S. N. DAR, B. A., LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

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1916

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Vakil High Court
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26	1916 "	136	177	" "	39	333	1916 "	919	463	1916 "	881	573	" "	482
55	1915 PC	99	183	1916 C	181	337	1915 PC	33	473	1917 "	555	578	1917 "	592
62	1917 C	721	190	" "	964	348	" "	121	477	1916 "	852	580	" "	666
79	1916 "	885	209	" "	909	358	" "	83	480	" "	958	583	1916 "	176
82	" "	938	215	" "	673	366	" "	37	482	1917 "	327	587	" "	170
105	" "	921	217	" "	824	372	1917 C	575	485	1918 "	950	592	1917 "	494
108	" "	883	220	" "	178	390	1916 "	451	489	1916 "	255	595	1916 "	464
111	" "	609	225	" "	428	392	" "	287	493	1917 "	888	596	1917 "	377
115	" "	927	231	" "	891	395	1915 PC	41	501	" "	432	598	1916 "	455
118	" "	686	235	" "	653	406	" "	115	506	1916 "	446	600	1917 "	573
122	" "	924	237	" "	329	411	" "	92	514	" "	877	603	1916 "	28
125	" "	954	241	" "	70	415	1916 C	239	547	1917 "	640	606	" "	126
130	1915 PC	79	256	1917 "	537	423	1917 "	466	553	1916 "	174	621	" PC	78
137	" "	48	281	1916 "	413	428	1916 "	175	555	" "	339	632	" "	118
145	1916 C	869	295	" "	859	429	" "	341	557	" "	887	635	1917 C	567
147	" "	66	297	" "	979	432	" "	840	559	1917 "	521	638	1916 "	118
148	" "	75	304	1917 "	50	436	" "	507	561	1916 "	392	641	1915 "	350
151	" "	956	310	1916 "	272	440	" "	515	563	" "	598	645	1916 "	488

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CLJ	AIR		CLJ	AIR		CLJ	AIR		CLJ	AIR		CLJ	AIR	
1	1916 PC	96	85	1917 C	280	187	1915 C	365	331	1917 C	308	453	1917 C	583
15	" "	1	88	1916 "	616	190	1917 "	428	335	" "	899	457	" "	201
21	1917 C	226	90	1917 "	283	198	1916 PC	102	348	" "	519	462	" "	422
26	1916 "	124	93	" "	71	207	" "	104	350	" "	497	467	" "	188
30	1917 "	219	103	" "	498	226	1917 C	65	355	" "	794	478	1916 PC	16
34	" "	286	113	1916 "	152	235	" "	320	358	" "	95	487	" "	110
38	1916 "	59	116	" PC	256	246	" "	445	363	1918 "	961	498	" "	123
40	1917 "	236	134	1917 C	593	272	1916 "	472	371	1917 "	829	504	" "	41
51	" "	818	137	" "	570	275	1917 "	313	373	" "	553	509	" "	148
54	" "	416	140	" "	716	279	1916 PC	9	375	" "	844	514	1917 C	248
57	" "	260	149	" "	264	291	" "	14	382	" "	161	517	" "	417
60	" "	326	158	" "	848	296	" "	126	400	" "	123	523	" "	728
62	" "	199	162	" "	659	303	" "	18	437	" "	256	533	1918 "	911
67	1916 PC	147	165	" "	345	309	" "	117	441	" "	665	539	1917 "	421
74	" "	2	175	" "	693	314	" "	115	444	" "	314	539	" "	435
79	1917 C	112	180	1916 "	519	320	" "	7	446	" "	518	541	" "	515
83	" "	312							448	1918 "	883			

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CWN	AIR		CWN	AIR		CWN	AIR		CWN	AIR		CWN	AIR	
1	1915 PC	70	142	1916 C	714	265	1915 PC	103	370	1916 C	136	520	1917 C	466
14	1916 C	821	147	" "	762	268	1916 C	428	391	1917 "	673	522	1916 PC	96
19	1915 "	214	149	" "	722	272	" "	451	393	1915 PC	115	537	1917 C	652
25	1916 "	500	156	" "	396	275	" "	735	404	1916 C	842	542	1916 "	250
28	" "	473	159	1915 "	194	278	" "	929	406	" "	672	544	" "	261
31	1917 "	689	163	1916 "	161	283	" "	411	408	" "	771	547	" "	283
35	1915 PC	99	166	" "	919	287	" "	979	412	" "	570	550	" "	730
39	" C	847	169	1915 PC	101	292	" "	912	418	1917 "	801	552	1917 "	550
40	" "	856	173	1916 C	181	297	1915 PC	89	420	1916 "	975	554	1916 "	331
43	1917 "	701	178	" "	783	304	1916 C	400	425	1915 PC	92	562	1917 "	537
48	1916 "	357	182	" "	664	310	" "	658	428	1916 C	413	576	1916 "	446
49	" "	337	185	1915 "	348	314	" "	312	437	1917 "	549	582	" "	503
51	1915 "	357	188	1916 "	241	319	1915 "	339	443	" "	555	584	" "	77
58	1916 "	661	192	" "	374	322	1916 "	827	446	1916 "	829	586	1917 "	520
62	1917 "	612	195	" "	934	326	" "	841	457	1915 PC	106	591	1916 "	543
68	1916 "	867	197	" "	883	329	1915 PC	121	463	1916 C	775	594	" "	361
66	" "	1	199	" "	921	335	1916 C	964	472	" "	290	601	" "	801
103	1917 "	655	201	1915 PC	33	347	" "	104	475	1917 "	841	605	" "	712
105	1915 PC	48	210	1915 C	843	350	" "	870	481	1916 "	751	608	" "	859
110	1916 C	542	231	" "	178	355	" "	930	485	" "	609	610	1917 "	828
111	" "	902	232	" "	869	356	" "	800	489	1917 "	575	613	" "	629
118	" "	894	234	1915 IC	37	358	" "	918	504	1916 "	797	615	1916 "	356
122	1915 "	341	240	1917 C	721	360	" "	322	508	1917 "	375	617	" PC	157
128	1917 "	687	254	1916 "	367	362	1915 PC	86	511	1916 "	421	627	1914 C	589
137	1915 PC	79	258	" "	861	365	1917 C	587	512	" "	352	634	1916 "	75
140	1917 C	626	262	1917 "	676	368	" "	557	518	1917 "	404			

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CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR		
636	1917	*C*	614	756	1916	*C*	734	923	1916	*P*	250	1065	1917	*C*	172	1209	1916	*P*	200
638	1916	"	120	758	"	"	472	925	"	*PC*	115	1067	"	"	185	1212	"	"	197
643	"	"	176	760	"	*P*	284	929	"	*C*	126	1069	"	"	609	1213	"	*PC*	186
645	"	"	840	770	"	*PC*	1	943	"	"	507	1071	"	"	705	1217	1917	*C*	487
648	1915	"	346	773	1917	*C*	469	946	"	"	917	1075	"	"	824	1224	"	"	815
650	1916	*PC*	166	787	"	"	811	948	1917	"	509	1080	1916	*P*	75	1231	1915	"	362
657	"	*C*	325	789	1916	"	824	950	1916	*P*	235	1082	"	"	374	1233	1917	"	253
659	"	"	905	790	1917	"	640	952	1917	"	486	1085	"	*PC*	104	1240	1916	*P*	110
661	"	"	395	796	1916	"	339	957	1916	*PC*	172	1097	1917	*C*	715	1243	"	"	49
663	"	"	369	797	"	*P*	275	967	1917	*C*	320	1099	"	"	716	1245	"	*PC*	126
665	1915	"	363	800	"	"	369	975	"	"	99	1110	1916	"	422	1252	1917	*C*	71
667	1916	"	710	802	"	*PC*	256	976	"	"	524	1112	1917	"	194	1258	"	"	345
669	1917	"	696	816	"	*C*	514	978	"	"	173	1113	1916	*P*	194	1265	"	"	593
672	1916	"	124	819	"	"	876	981	1916	"	69	1116	"	"	7	1267	"	"	807
673	"	*PC*	113	823	1917	"	104	983	"	*P*	54	1118	"	*PC*	132	1270	"	"	648
675	"	*C*	170	824	"	"	260	986	"	"	82	1125	1917	*C*	380	1274	1916	*P*	361
679	"	"	471	828	1916	*P*	35	989	"	*PC*	169	1128	"	"	261	1276	"	"	347
680	1917	"	734	829	"	"	216	995	1917	*C*	39	1133	"	"	878	1279	"	*PC*	18
685	"	"	790	833	"	*PC*	202	1000	1916	"	255	1135	1916	*P*	69	1284	1917	*C*	428
686	"	"	466	840	"	"	2	1002	1917	*C*	813	1149	"	*PC*	14	1294	"	"	426
689	"	"	630	845	1917	*C*	649	1005	1916	"	358	1155	1917	*C*	628	1296	"	"	235
691	"	"	838	849	"	"	204	1009	"	"	427	1157	1915	"	345	1300	"	"	416
696	"	"	103	852	"	"	745	1011	1917	"	197	1158	1917	"	681	1302	"	"	591
698	"	"	525	855	1916	"	263	1014	"	"	82	1165	1918	"	879	1303	1916	*P*	317
699	1916	*P*	210	857	1917	"	180	1015	"	"	206	1170	1917	"	849	1306	"	"	259
702	1915	*PC*	41	860	1916	*P*	268	1016	1916	*P*	391	1171	"	"	207	1311	"	*PC*	21
708	1917	*C*	252	862	"	"	152	1020	"	"	109	1174	1916	*P*	370	1323	"	"	117
725	1916	"	344	866	"	*PC*	147	1022	"	*PC*	73	1177	"	"	126	1327	1917	*C*	243
732	"	"	477	872	"	*C*	883	1028	"	*C*	85	1182	"	*PC*	7	1335	"	"	498
734	"	*P*	178	874	"	"	891	1044	1917	"	693	1192	1917	*C*	269	1340	"	"	515
738	"	*PC*	78	876	"	*P*	337	1048	1916	*P*	364	1203	1916	"	421	1345	"	"	269
744	1915	*PC*	83													1347	"	"	596
749	1917	*C*	286	889	"	*C*	488	1051	"	"	254	1206	1917	"	807	1352	1916	*P*	136
752	1916	"	80	901	1917	"	292	1054	"	*PC*	9	1207	"	*P*	504	1354	"	"	306

17 Cr. L. J. & 32 to 36 I. C.=All India Reporter.

Please refer to Comparative Table No. I in A. I. R. 1916 Lahore.

TABLE No. II

Showing Seriatim the pages of ALL INDIA REPORTER 1916 CALCUTTA with corresponding references of OTHER REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1916 CALCUTTA
Column No. 2 denotes corresponding references of OTHER REPORTS AND JOURNALS.

A. I. R. 1916 Calcutta=Other Journals

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	32	*I C*	53	23	19	*C W N*	914	51(1)	33	*I C*	85	61	19	*C W N*	611
FB	20	*C W N*	66	33	34	*I C*	115	51(2)	27	*I C*	459	63	36	*I C*	33
27	27	*I C*	442		43	*Cal*	1052		19	*C W N*	45		43	*Cal*	554
	19	*C W N*	33	41	27	*I C*	184	57	28	*I C*	469	64	27	*I C*	601
28	34	*I C*	111		19	*C W N*	181		42	*Cal*	109	66(1)	35	*I C*	44
	23	*C L J*	603		16	*Cr L J*	120	59	35	*I C*	26		23	*C L J*	145
30	29	*I C*	149		42	*Cal*	760		24	*C L J*	38	66(2)	32	*I C*	235
	19	*C W N*	961	43	33	*I C*	59	60	34	*I C*	152	67	29	*I C*	312
31	32	*I C*	232		19	*C W N*	1182		48	*Cal*	195				
32	28	*I C*	889	49	36	*I C*	29		25	*C L J*	857		19	*C W N*	1188
	21	*C L J*	475	50	27	*I C*	261	61	28	*I C*	705	69	36	*I C*	147

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
69	20	*C W N*	981	151	42	*Cal*	702	241	23	*C L J*	163	312	32	*I C*	823
	17	*Cr L J*	464		19	*C W N*	332		43	*Cal*	269		22	*C L J*	404
70	33	*I C*	102		16	*Cr L J*	415	244	28	*I C*	452		20	*C W N*	314
	23	*C L J*	241	152	36	*I C*	719	245	32	*I C*	781	315	33	*I C*	718
74	28	*I C*	713		24	*C L J*	113		43	*Cal*	878	318	27	*I C*	917
	42	*Cal*	286	154	27	*I C*	273	247	33	*I C*	644		42	*Cal*	926
	19	*C W N*	383	155	32	*I C*	355		17	*Cr L J*	164	319	30	*I C*	406
	21	*C L J*	642	156	28	*I C*	811	248	27	*I C*	822		43	*Cal*	124
75	35	*I C*	48		19	*C W N*	375	249	30	*I C*	321		19	*C W N*	817
	23	*C L J*	148	161(1)	34	*I C*	581		22	*C L J*	90	321	32	*I C*	614
	20	*C W N*	634	161(2)	33	*I C*	139	250	32	*I C*	494	322	34	*I C*	363
76	27	*I C*	605		20	*C W N*	163		22	*C L J*	394		43	*Cal*	239
	19	*C W N*	461	164	28	*I C*	818		20	*C W N*	542		20	*C W N*	360
77	32	*I C*	240		19	*C W N*	1193	252	34	*I C*	301	323	29	*I C*	673
	20	*C W N*	584	166	36	*I C*	721	253 (1)	29	*I C*	616	324	28	*I C*	972
79	29	*I C*	321		21	*C W N*	112	253 (2)	28	*I C*	477		42	*Cal*	953
	19	*C W N*	556	170	35	*I C*	294		21	*C L J*	480		19	*C W N*	513
	21	*C L J*	495		23	*C L J*	587	254	32	*I C*	784	325	33	*I C*	762
	16	*Cr L J*	481		20	*C W N*	675	255	33	*I C*	670		20	*C W N*	657
80(1)	33	*I C*	110	173	32	*I C*	358		44	*Cal*	367	327	27	*I C*	928
80(2)	34	*I C*	186	174	34	*I C*	777		23	*C L J*	489	328	30	*I C*	1
	20	*C W N*	752		23	*C L J*	553		20	*C W N*	1000		21	*C L J*	576
82	27	*I C*	614	175	28	*I C*	837	257	27	*I C*	825	329	32	*I C*	657
	19	*C W N*	514		19	*C W N*	1182		19	*C W N*	963		43	*Cal*	685
85	36	*I C*	184		23	*C L J*	428	259	30	*I C*	365		20	*C W N*	278
	20	*C W N*	1028	176	35	*I C*	298	261	32	*I C*	499		23	*C L J*	237
98	28	*I C*	795		20	*C W N*	643		22	*C L J*	397		17	*Cr L J*	65
	42	*Cal*	784		23	*C L J*	583		20	*C W N*	544	331	34	*I C*	435
	19	*C W N*	330	178(1)	27	*I C*	135	263	34	*I C*	309		20	*C W N*	554
	16	*Cr L J*	411		20	*C W N*	231		43	*Cal*	277		23	*C L J*	463
99	35	*I C*	72	178(2)	34	*I C*	792		20	*C W N*	855	337	29	*I C*	680
100	35	*I C*	91		23	*C L J*	220		17	*Cr L J*	197		22	*C L J*	279
101	29	*I C*	563		21	*C W N*	936	264	30	*I C*	49		20	*C W N*	49
102(1)	34	*I C*	203	181(1)	28	*I C*	838		21	*C L J*	624	339	33	*I C*	822
	43	*Cal*	225		19	*C W N*	64	266	29	*I C*	625		17	*Cr L J*	182
102(2)	33	*I C*	112	181(2)	34	*I C*	799		43	*Cal*	115		23	*C L J*	555
103	36	*I C*	472		23	*C L J*	183		21	*C L J*	537		20	*C W N*	796
	43	*Cal*	597		20	*C W N*	173		19	*C W N*	919	340	30	*I C*	4
	17	*Cr L J*	504		43	*Cal*	447	269	28	*I C*	675		21	*C L J*	578
104	32	*I C*	251	184	29	*I C*	350		43	*Cal*	28		42	*Cal*	1169
	20	*C W N*	347		19	*C W N*	782		19	*C W N*	580	341 (1)	32	*I C*	661
106	28	*I C*	799		43	*Cal*	46	271	32	*I C*	786		43	*Cal*	421
	42	*Cal*	608	188	29	*I C*	513	272	33	*I C*	685		20	*C W N*	326
	19	*C W N*	335		42	*Cal*	957		23	*C L J*	310		17	*Cr L J*	69
	16	*Cr L J*	415		21	*C L J*	331	274	27	*I C*	883	341 (2)	34	*I C*	444
107	34	*I C*	205		16	*Cr L J*	497		19	*C W N*	911		23	*C L J*	429
	43	*Cal*	211		19	*C W N*	676	276	30	*I C*	379	343	29	*I C*	686
108	29	*I C*	806	214	28	*I C*	173	277	32	*I C*	577		43	*Cal*	164
	19	*C W N*	872	221	33	*I C*	581	278	34	*I C*	534	344	33	*I C*	825
109	27	*I C*	431		20	*C W N*	1203	279	29	*I C*	629		43	*Cal*	1128
110	32	*I C*	267	223	32	*I C*	707	FB	42	*Cal*	1068		20	*C W N*	725
	21	*C W N*	280	224	27	*I C*	729		21	*C L J*	543		17	*Cr L J*	185
118	29	*I C*	834		19	*C W N*	751		19	*C W N*	849	347	30	*I C*	27
	23	*C L J*	638	225	30	*I C*	247	283	32	*I C*	791	348 (1)	17	*Cr L J*	91
120	35	*I C*	284	227	32	*I C*	86		43	*Cal*	938		32	*I C*	368
	20	*C W N*	638	228	34	*I C*	287		20	*C W N*	547	348 (2)	34	*I C*	556
124(1)	34	*I C*	336		43	*Cal*	285	285	28	*I C*	803	349	29	*I C*	690
	20	*C W N*	672	230	29	*I C*	566	286	30	*I C*	210		21	*C W N*	401
	17	*Cr L J*	224	231	28	*I C*	211	287	33	*I C*	689		23	*C L J*	570
124(2)	33	*I C*	129		19	*C W N*	473		23	*C L J*	392	352	33	*I C*	828
	43	*Cal*	1118		22	*C L J*	66	288	27	*I C*	890		20	*C W N*	512
	24	*C L J*	26	233	32	*I C*	766	290	30	*I C*	394		23	*C L J*	477
126	36	*I C*	655	234	33	*I C*	593		43	*Cal*	625		17	*Cr L J*	188
	20	*C W N*	929	236	27	*I C*	810		22	*C L J*	370	353	30	*I C*	29
	23	*C L J*	606	237 (1)	30	*I C*	277		20	*C W N*	472	355	32	*I C*	684
135	32	*I C*	276	237 (2)	32	*I C*	491	292	32	*I C*	587		17	*Cr L J*	92
136	35	*I C*	305		22	*C L J*	391	295	34	*I C*	657	356	34	*I C*	625
	43	*Cal*	790	239	34	*I C*	290		22	*C L J*	593		20	*C W N*	615
	23	*C L J*	26		23	*C L J*	415	310	29	*I C*	671				
	20	*C W N*	370	241	29	*I C*	580		16	*Cr L J*	543	357	29	*I C*	694
151	28	*I C*	799		20	*C W N*	188	311	28	*I C*	917		43	*Cal*	170

A. I. R. 1916 Calcutta=Other Journals—(*Contd.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
357	20	*C W N*	48	431	33	*I C*	289	507	23	*C L J*	436	564	31	*I C*	315
358	33	*I C*	899	SB	42	*Cal*	1094		20	*C W N*	943	SB	22	*C L J*	293
	44	*Cal*	403		19	*C W N*	1239	509	33	*I C*	211	566	30	*I C*	990
	20	*C W N*	1005		17	*Cr L J*	113	511	32	*I C*	744		42	*Cal*	819
359	30	*I C*	32	446 (1)	35	*I C*	239	513	36	*I C*	624		19	*C W N*	609
360	32	*I C*	687	446 (2)	32	*I C*	774	514	33	*I C*	253	568	29	*I C*	139
	17	*Cr L J*	95		43	*Cal*	973		20	*C W N*	816	570	28	*I C*	123
361	34	*I C*	634		20	*C W N*	576	515	34	*I C*	405		20	*C W N*	412
	43	*Cal*	857		23	*C L J*	506		23	*C L J*	440	574	31	*I C*	177
	20	*C W N*	594	451	34	*I C*	606	516	32	*I C*	749		19	*C W N*	1236
	23	*C L J*	443		43	*Cal*	207	519	36	*I C*	669		22	*C L J*	249
367	29	*I C*	696		20	*C W N*	272		24	*C L J*	180	576	30	*I C*	887
	20	*C W N*	254		23	*C L J*	390		21	*C W N*	829		22	*C L J*	78
369	33	*I C*	918	452	33	*I C*	434	521	29	*I C*	282	577	29	*I C*	181
	20	*C W N*	663		19	*C W N*	1307		42	*Cal*	830	580	31	*I C*	626
371	30	*I C*	38	454	33	*I C*	98		19	*C W N*	804		42	*Cal*	1043
	21	*C L J*	614	455	34	*I C*	985	524	30	*I C*	128		19	*C W N*	724
373	32	*I C*	695		23	*C L J*	598		21	*C L J*	396	581(1)	30	*I C*	894
374	34	*I C*	686		17	*Cr L J*	265		19	*C W N*	928		22	*C L J*	97
	20	*C W N*	192		21	*C W N*	470		16	*Cr L J*	576	581(2)	29	*I C*	437
376	29	*I C*	707	456	32	*I C*	788	529	28	*I C*	595	582	31	*I C*	965
377	33	*I C*	838	458	36	*I C*	243		21	*C L J*	621		22	*C L J*	525
FB	23	*C L J*	514	459	36	*I C*	286	530	29	*I C*	621	593	29	*I C*	905
391 (1)	30	*I C*	45		25	*C L J*	149		43	*Cal*	59	594	30	*I C*	61
	21	*C L J*	628		21	*C W N*	688		21	*C L J*	532		21	*C L J*	646
391 (2)	32	*I C*	697	462	32	*I C*	851		19	*C W N*	1332		19	*C W N*	1303
392	34	*I C*	702		22	*C L J*	306	531	31	*I C*	573	596	29	*I C*	216
	23	*C L J*	561	464 (1)	34	*I C*	986		19	*C W N*	1200		19	*C W N*	772
394	29	*I C*	716		23	*C L J*	595	532	29	*I C*	699	598	31	*I C*	789
395	33	*I C*	923		17	*Cr L J*	266		19	*C W N*	1151		23	*C L J*	563
	20	*C W N*	661	464 (2)	33	*I C*	133		22	*C L J*	197		21	*C W N*	93
396	30	*I C*	68	465	36	*I C*	292	538	30	*I C*	1007	600	30	*I C*	64
	43	*Cal*	263	471	32	*I C*	524		19	*C W N*	957		21	*C L J*	653
	21	*C L J*	659		20	*C W N*	679		16	*Cr L J*	719		19	*C W C*	1231
	20	*C W N*	156	472	34	*I C*	312	540	28	*I C*	505	603	29	*I C*	211
398	32	*I C*	699		20	*C W N*	758	541	29	*I C*	120	605(1)	31	*I C*	858
400	34	*I C*	707		17	*Cr L J*	200		19	*C W N*	470	605(2)	29	*I C*	355
	20	*C W N*	304		24	*C L J*	272		19	*C W N*	649	606	30	*I C*	578
	23	*C L J*	314	473	33	*I C*	143	542	31	*I C*	6	609	29	*I C*	797
404	29	*I C*	734		20	*C W N*	28		42	*Cal*	826		23	*C L J*	111
	21	*C L J*	441	475	33	*I C*	157		20	*C W N*	110		20	*C W N*	485
407	30	*I C*	83	477 (1)	34	*I C*	314	543	30	*I C*	958	612	31	*I C*	801
408	32	*I C*	703		20	*C W N*	732		22	*C L J*	160		43	*Cal*	779
410	34	*I C*	409		17	*Cr L J*	202		20	*C W N*	591	613	29	*I C*	395
	21	*C W N*	214	477 (2)	32	*I C*	545	545	29	*I C*	883		19	*C W N*	758
411	33	*I C*	831		21	*C W N*	238		21	*C L J*	485	614	30	*I C*	583
	20	*C W N*	283	479	36	*I C*	375	546	28	*I C*	267	616	29	*I C*	571
	17	*Cr L J*	191		21	*C W N*	366		19	*C W N*	1110		24	*C L J*	88
413	33	*I C*	148	482	33	*I C*	180	547	29	*I C*	468	617	31	*I C*	41
FB	43	*Cal*	603		23	*C L J*	573	548	31	*I C*	607		19	*C W N*	1038
	20	*C W N*	428	484 (1)	34	*I C*	337		42	*Cal*	1050	620	30	*I C*	587
	23	*C L J*	281	484 (2)	32	*I C*	553		19	*C W N*	623	621(1)	29	*I C*	838
421	33	*I C*	968	485	36	*I C*	530	551	29	*I C*	413	621(2)	31	*I C*	579
	20	*C W N*	511	487	32	*I C*	710	553	30	*I C*	444		19	*C W N*	1205
422	34	*I C*	527	488	36	*I C*	602		16	*Cr L J*	620	622	29	*I C*	402
	20	*C W N*	1110	FB	43	*Cal*	903	554	28	*I C*	245	623	30	*I C*	161
423	32	*I C*	580		23	*C L J*	645		22	*C L J*	212		21	*C L J*	557
	22	*C L J*	400		20	*C W N*	889		42	*Cal*	888		19	*C W N*	882
425 (1)	36	*I C*	155	496	32	*I C*	717		19	*C W N*	1034	628	29	*I C*	467
	43	*Cal*	542	497	34	*I C*	341	557	31	*I C*	581	629	31	*I C*	561
	17	*Cr L J*	475		21	*C W N*	394		42	*Cal*	942		19	*C W N*	1287
425 (2)	32	*I C*	701		25	*C L J*	325	558	30	*I C*	686	630(1)	30	*I C*	320
	19	*C W N*	967	500 (1)	33	*I C*	188		42	*Cal*	933		22	*C L J*	88
	43	*Cal*	158	500 (2)	33	*I C*	190		19	*C W N*	1061	630(2)	29	*I C*	743
427	36	*I C*	177		43	*Cal*	459	561	29	*I C*	935		19	*C W N*	1297
	43	*Cal*	986		20	*C W N*	25	FB	42	*Cal*	842	633	21	*I C*	164
	20	*C W N*	1009	503	34	*I C*	385		19	*C W N*	791		19	*C W N*	1043
428	34	*I C*	598		20	*C W N*	582		21	*C L J*	437		16	*Cr L J*	724
	43	*Cal*	511	504	32	*I C*	738	562	28	*I C*	570	642	30	*I C*	906
	20	*C W N*	268	506	36	*I C*	615		19	*C W N*	1170		22	*C L J*	113
	28	*C L J*	225	507	34	*I C*	394	563	29	*I C*	420				

A I R		Other Journals	
644	29	*I C*	251
645	31	*I C*	189
	22	*C L J*	259
	43	*Cal*	504
647	29	*I C*	260
	21	*C L J*	565
649	31	*I C*	807
650	30	*I C*	875
	22	*C L J*	70
651	29	*I C*	476
	19	*C W N*	970
	22	*C L J*	589
653	31	*I C*	812
	23	*C L J*	235
654	30	*I C*	868
	22	*C L J*	61
657	29	*I C*	480
658	31	*I C*	181
	22	*C L J*	254
	20	*C W N*	310
661	30	*I C*	824
	22	*C L J*	272
	20	*C W N*	58
664	29	*I C*	502
	20	*C W N*	182
665	31	*I C*	700
	19	*C W N*	1271
666	30	*I C*	855
	22	*C L J*	27
669	29	*I C*	453
	21	*C L J*	618
670	31	*I C*	705
	19	*C W N*	1113
672	30	*I C*	796
	22	*C L J*	92
	20	*C W N*	406
673	29	*I C*	464
	23	*C L J*	215
675	31	*I C*	662
	43	*Cal*	190
	19	*C W N*	880
676	30	*I C*	690
	19	*C W N*	1068
678	29	*I C*	466
679	31	*I C*	677
	19	*C W N*	1290
680	30	*I C*	697
	43	*Cal*	248
	19	*C W N*	1070
	22	*C L J*	552
685	29	*I C*	459
686	31	*I C*	691
	43	*Cal*	136
	19	*C W N*	998
	29	*C L J*	118
689	30	*I C*	681
	42	*Cal*	1140
	19	*C W N*	820
	21	*C L J*	584
690	29	*I C*	470
691	31	*I C*	695
	19	*C W N*	1015
693	30	*I C*	465
	19	*C W N*	972
	16	*Cr L J*	641
705	29	*I C*	472
707 (1)	31	*I C*	697
	19	*C W N*	1019
707 (2)	30	*I C*	442
	43	*Cal*	153
	19	*C W N*	1022
707 (2)	16	*Cr L J*	618
709	29	*I C*	399
710	31	*I C*	896
	22	*C L J*	412
	20	*C W N*	667
711	30	*I C*	441
	16	*Cr L J*	617
712	29	*I C*	423
	20	*C W N*	605
714	31	*I C*	983
	20	*C W N*	142
718	30	*I C*	955
	42	*Cal*	742
	19	*C W N*	1118
719	29	*I C*	308
	19	*C W N*	953
	22	*C L J*	244
722	31	*I C*	987
	20	*C W N*	149
727	30	*I C*	142
	19	*C W N*	959
	16	*Cr L J*	590
728	19	*I C*	337
	43	*Cal*	34
	19	*C W N*	1082
730	31	*I C*	16
	22	*C L J*	219
	20	*C W N*	550
733 (1)	30	*I C*	159
	19	*C W N*	990
	16	*Cr L J*	607
733 (2)	29	*I C*	385
	21	*C L J*	640
734	31	*I C*	26
	26	*C L J*	232
	20	*C W N*	756
735	30	*I C*	953
	43	*Cal*	547
	22	*C L J*	155
	20	*C W N*	275
738	29	*I C*	122
	19	*C W N*	638
740	31	*I C*	29
	22	*C L J*	235
741	30	*I C*	898
	43	*Cal*	178
	22	*C L J*	99
	19	*C W N*	1077
745	29	*I C*	841
	22	*C L J*	574
747	31	*I C*	30
	19	*C W N*	860
750	30	*I C*	412
	21	*C L J*	590
	19	*C W N*	825
751	31	*I C*	242
	22	*C L J*	283
	20	*C W N*	481
754	29	*I C*	833
755	31	*I C*	444
756	29	*I C*	790
	43	*Cal*	1
	19	*C W N*	1181
757	31	*I C*	672
	19	*C W N*	1172
760	29	*I C*	802
761	31	*I C*	562
	19	*C W N*	1226
762	29	*I C*	787
	43	*Cal*	20
	20	*C W N*	147
764	31	*I C*	554
	43	*Cal*	558
	19	*C W N*	1217
	22	*C L J*	356
771 (1)	29	*I C*	742
771 (2)	31	*I C*	394
	22	*C L J*	311
	20	*C W N*	408
774	29	*I C*	989
	19	*C W N*	933
776	31	*I C*	405
	22	*C L J*	316
	20	*C W N*	463
782	29	*I C*	855
	21	*C L J*	469
783	31	*I C*	426
	22	*C L J*	333
	20	*C W N*	178
787	29	*I C*	865
	19	*C W N*	864
788	31	*I C*	430
	43	*Cal*	733
	22	*C L J*	339
	21	*C W N*	632
791	29	*I C*	902
792	31	*I C*	433
	43	*Cal*	574
	22	*C L J*	345
795	29	*I C*	840
	43	*Cal*	100
796	29	*I C*	925
797	31	*I C*	460
	43	*Cal*	230
	22	*C L J*	375
	20	*C W N*	504
800	29	*I C*	848
	21	*C L J*	462
	20	*C W N*	356
801	31	*I C*	22
	43	*Cal*	69
	22	*C L J*	227
	20	*C W N*	601
804	29	*I C*	682
806	31	*I C*	33
	22	*C L J*	237
808 (1)	29	*I C*	875
	19	*C W N*	947
808 (2)	31	*I C*	249
810	29	*I C*	880
	21	*C L J*	483
811	31	*I C*	319
	22	*C L J*	298
812	29	*I C*	877
	19	*C W N*	814
	21	*C L J*	650
814	31	*I C*	321
	22	*C L J*	304
815	29	*I C*	871
	19	*C W N*	897
816	31	*I C*	13
	43	*Cal*	217
	19	*C W N*	1228
817	29	*I C*	862
	19	*C W N*	864
818	31	*I C*	35
	43	*Cal*	441
	22	*C L J*	241
820	29	*I C*	896
	21	*C L J*	487
	19	*C W N*	823
821	33	*I C*	978
821	20	*C W N*	14
824	34	*I C*	789
	23	*C L J*	217
	20	*C W N*	769
825	35	*I C*	788
827	33	*I C*	565
	20	*C W N*	322
829	32	*I C*	437
FB	43	*Cal*	743
	22	*C L J*	419
	20	*C W N*	446
838	33	*I C*	247
	22	*C L J*	22
840	35	*I C*	673
	23	*C L J*	432
	20	*C W N*	645
842	33	*I C*	553
	43	*Cal*	227
	20	*C W N*	404
843	32	*I C*	468
FB	22	*C L J*	462
	20	*C W N*	210
859 (1)	33	*I C*	797
	23	*C L J*	295
859 (2)	34	*I C*	632
	20	*C W N*	608
861	33	*I C*	54
	20	*C W N*	258
864	32	*I C*	167
	19	*C W N*	1322
867	33	*I C*	626
	20	*C W N*	63
	43	*Cal*	173
	17	*Cr L J*	146
869	34	*I C*	959
	20	*C W N*	232
	23	*C L J*	145
870	32	*I C*	195
	20	*C W N*	350
874	33	*I C*	938
	43	*Cal*	77
876	35	*I C*	339
	20	*C W N*	819
880 (1)	32	*I C*	856
	22	*C L J*	308
880 (2)	35	*I C*	665
	17	*Cr L J*	361
882	34	*I C*	693
	23	*C L J*	567
883 (1)	35	*I C*	365
	20	*C W N*	872
883 (2)	34	*I C*	961
	43	*Cal*	671
	20	*C W N*	197
	23	*C L J*	108
	17	*Cr L J*	241
884	32	*I C*	170
	19	*C W N*	1309
885	33	*I C*	14
	23	*C L J*	79
887	34	*I C*	697
	23	*C L J*	557
888	33	*I C*	250
	22	*C L J*	209
	19	*C W N*	1326
890	32	*I C*	193
891 (1)	35	*I C*	343
	20	*C W N*	874
891 (2)	33	*I C*	17
	23	*C L J*	231

A. I. R. 1916 Calcutta=Other Journals.—(*Concld.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
894	32	*I C*	21	912	17	*Cr L J*	439	927	23	*C L J*	115	953	23	*C L J*	480
	43	*Cal*	467	917	32	*I C*	227		21	*C W N*	152	954	32	*I C*	200
	20	*C W N*	113		20	*C W N*	946	928	33	*I C*	810		23	*C L J*	125
	22	*C L J*	577	918	34	*I C*	253		43	*Cal*	64	956	34	*I C*	946
901	33	*I C*	847		43	*Cal*	586	929	32	*I C*	164		23	*C L J*	151
	22	*C L J*	566		20	*C W N*	358		19	*C W N*	1328	962	33	*I C*	349
902	34	*I C*	22	919	32	*I C*	132	930	34	*I C*	251		22	*C L J*	569
	20	*C W N*	111		20	*C W N*	166		20	*C W N*	355	964	34	*I C*	807
903	38	*I C*	595		17	*Cr L J*	4	931	33	*I C*	331		43	*Cal*	833
	25	*C L J*	128		23	*C L J*	333		22	*C L J*	546		23	*C L J*	190
	21	*C W N*	534	921	34	*I C*	974	934	34	*I C*	692		20	*C W N*	335
905	33	*I C*	767		43	*Cal*	591		20	*C W N*	195	973	33	*I C*	745
	20	*C W N*	659		20	*C W N*	199	935	32	*I C*	801		43	*Cal*	90
906	34	*I C*	56		23	*C L J*	105		42	*Cal*	1135	974	32	*I C*	205
907	33	*I C*	346		17	*Cr L J*	254	936	33	*I C*	352	975	33	*I C*	548
	22	*C L J*	564	923	33	*I C*	344		22	*C L J*	571		43	*Cal*	640
908	32	*I C*	833		22	*C L J*	561	937	34	*I C*,	157		20	*C W N*	420
	17	*Cr L J*	97	924	34	*I C*	956		43	*Cal*	201	979	32	*I C*	395
909	34	*I C*	783		23	*C L J*	122	938	33	*I C*	273		43	*Cal*	884
	23	*C L J*	209	926	33	*I C*	342		23	*C L J*	82		20	*C W N*	287
912	35	*I C*	999		22	*C L J*	551	953	34	*I C*	227		23	*C L J*	297
	20	*C W N*	292	927	34	*I C*	953		43	*Cal*	300				

THE ALL INDIA REPORTER 1916.

CALCUTTA HIGH COURT.

A. I. R. 1916 Calcutta (1)
Full Bench.

JENKINS, C. J., WOODROFFE AND MOOKERJEE, JJ.

J. I. J. Hyam—Defendant—Appellant.

v.

M. E. Gubbay—Plaintiff—Respondent.

Appeal No. 29 of 1914, decided on 25th May, 1915, from Original Civil Suit of Chitty, J., dated 11th February, 1914.

(a) Contract—Construction—Written contract, essential term of bargain—There is no enforceable contract in absence of written agreement.

Where it is the essential term of a bargain between the parties that there should be a written contract, there is no enforceable contract in the absence of a written agreement. *Ridgway* v. *Wharton*, (1854) 6 H. L. C. 238, ref. to. [P. 7, C. 1 & 2.]

(b) Contract—Construction—Written agreement contemplated by parties—Determination of question whether there was concluded contract in absence of writing—Provision requiring written agreement should be taken into consideration.

Per *Jenkins, C. J.*—Where parties to a contract contemplated an agreement in writing, the provision for a written agreement is not negligible in determining the question whether there was a concluded contract between the parties in the absence of writing. [P. 7, C. 1 & 2.]

(c) Contract—Construction—Sale—Substantial agreement upon main features of transaction does not necessarily create concluded contract.

In a contract for the sale of land, the substantial agreement of the parties upon the main features of the transaction, *i. e.*, the sale, the identity of the property, the price, the imposition of restrictions in some form or another, does not necessarily create a concluded contract between the parties. [P. 8, C. 2.]

(d) Specific performance—Suit for—Contract for sale—Earnest money paid—Defendant (purchaser) can yet plead that there was no concluded contract.

In a suit for the specific performance of a contract for the sale of land, the defendant (purchaser) is not precluded from pleading that there was no concluded contract, merely because he paid earnest money. [P. 8, C. 2.]

(e) Specific performance—Suit for—Terms of contract uncertain—Court will not enforce it.

Per *Woodroffe, J.*—A Court will not enforce specific performance of a contract the terms of which are uncertain. [P. 8, C. 2.]

(f) Civil P. C. (5 of 1908), S. 100—Question whether contract is uncertain is one of fact.

The question whether a contract is uncertain in the sense that the Court cannot know what the contract is which the parties entered into, is a question of fact. [P. 8, C. 2 & P. 9, C. 1.]

(g) Contract—Construction—Sale—Immovable property—Exclusive written record is not necessary.

In a contract for the sale of immovable property, an exclusively written record is not required by the law of the country. [P. 9, C. 1.]

(h) Civil P.C. (5 of 1908), O. 41, Rr. 1 and 2—Appellant must satisfy Appellate Court that judgment appealed against, is erroneous.

An Appellate Court is not bound to accept the first Court's appreciation of the facts. But the appellant has to satisfy the Appellate Court that the judgment appealed against is erroneous. [P. 9, C. 2.]

(i) Contract—Construction—Parties referring to preparation of agreement by which terms to be put into more formal state—Binding contract may still exist unless parties did not intend to be bound until formal contract was signed.

The fact that the parties to a contract refer to the preparation of an agreement by which the terms agreed upon are to be put into a more formal state, does not prevent the existence of a binding contract, unless the reference to a future formal contract is made in such terms as to show that the parties did not intend to be bound until a formal contract was signed. [P. 9, C. 2.]

(j) Contract—Construction—Parties intending to embody terms in formal written agreement—Fact is strong evidence that negotiations prior to drawing up of writing were merely preliminary.

Per *Mookerjee, J.*—The fact that the parties intended to embody the terms of their contract in a formal written agreement, is strong evidence that the negotiations prior to the drawing up of such writing were merely preliminary and not understood or intended to be binding.

[P. 20, C. 1.]

(k) Contract—Construction—Oral agreement or written memorandum complete—Binding obligation is fixed on parties in absence of intention that contract would not be binding until reduced into writing.

If an oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing a binding obligation is fixed upon the parties, unless it is understood and intended that such contract shall not become operative until reduced to writing. *Chinnock* v. *Marchioness of Ely*, (1865) 4 De G. J. & S. 638; *Rossiter* v. *Miller*, (1877) 5 Ch. D. 648; *Bonnewell* v. *Jenkins*, (1878) 8 Ch. D. 70 and *Rossiter* v. *Miller*, (1878) 3 A. C. 1124, ref. to. [P. 20, C. 2.]

(l) Vendor and purchaser—Sale of land—Purchaser is not bound to take land subject to leases.

A purchaser of land is not bound to take it subject to leases, but is entitled to vacant possession unless there is an agreement to the contrary. *Collier* v. *Jenkins*, 34 R. R. 268; Younge, 295; *Lineham* v. *Cotter*, (1844) 7 Ir. Eq. Rep. 176. [P. 26, C. 1.]

Hyam—for Appellant.

Zorab—for Respondent.

Jenkins, C. J.—This appeal arises out of a suit for specific performance brought by the plaintiff, who claims to have entered into a concluded contract for the sale to the defendant of immovable property in Calcutta. Negotiation is not denied, nor is there any dispute as to the identity of the property or as to the price, but it is contended by the defendant that there is no concluded contract and certainly not one that should be specifically enforced. The defence failed before Mr. Justice Chitty, and he passed the decree for specific performance from which this appeal is preferred.

The property in dispute belongs to the plaintiff, Mr. Gubbay, who lives in London. Mr. R. C. Cohen, acting on his behalf, instructed Mr. Owen, a house-broker, to find a purchaser. The price ultimately asked was Rs. 1,33,000. Mr. Owen found a person ready to purchase at that price in the defendant, Mr. Hyam, who is in the habit of buying property with a view to subsequent building operations. Mr. Hyam was told by Mr. Owen that there were certain conditions on which Mr. Cohen insisted. As the precise limit of those conditions is a matter in dispute between the parties, I will describe them generally as designed (1) to prevent the building of a temple or mosque on the land, and (2) to secure to the Jewish School, which occupied a part of the premises, a continuance of their possession for a year. To these terms Mr. Hyam expressed his assent in the sense in which he understood them. On the 13th November Mr. Owen wrote to Mr. Gregory, the plaintiff's attorney, as follows:—

"*Calcutta, 13th November*, 1912,
7/1 and 8, Pollock Street and
1, Mansook Lane.

Gal. Gregory, Esq.
DEAR SIR,

With reference to our conversation of date in regard to the above premises, my principal accepts your client's offer made by you to me for rupees one lack and thirty-three thousand only. My principal agrees to have no temple or mosque built on these premises or to cause any nuisance to the Jewish Synagogue. He further agrees that he will not ask the Jewish school to vacate for 12 months from the date of execution of the conveyance. The time to execute and complete the conveyance shall be six weeks from the date of the contract, subject to approval of titles by my principal's solicitor. Please ask your client to confirm this to-day, if possible.

Yours faithfully,
OWEN OWEN."

On the 14th Mr. Cohen confirmed the arrangement orally to his attorney, Mr. Gregory, subject to the purchaser paying Rs. 5,000 as deposit money. Up to this time Mr. Hyam had not orally discussed matters with Mr. Cohen or Mr. Gregory, nor was he known by them to be the intending purchaser.

On the 15th, however, there were several interviews at which Mr. Cohen, Mr. Gregory, Mr. Hyam and Mr. Owen or some of them were present.

According to the plaintiff there were four such interviews, *first*, one at Mr. Gregory's office at which Mr. Gregory, Mr. Owen and Mr. Hyam were present, *then* one at Mr. Cohen's office where

Mr. Cohen, Mr. Hyam, Mr. Owen and Mr. Gareh met, a *third* at Mr. Gregory's office attended by Mr. Gregory, Mr. Hyam Mr. Owen and Mr. Gareh and *fourth* and last an interview at Mr. Gregory's office between Mr. Gregory and Mr. Gareh.

Mr. Hyam and Mr. Owen have no recollection of the first of these interviews, but there purports to be a record of it in Mr. Gregory's day-book which was written up by a clerk at the close of the day. But whether Mr. Hyam was present or not, nothing of importance happened at this interview, and neither Mr. Hyam nor Mr. Owen can have had any reason for falsely denying Mr. Hyam's presence.

The second interview is one of importance, for, according to the plaintiff's case as developed at the hearing, it was then that the defendant accepted the plaintiff's view of the scope of the conditions.

The third admittedly took place and to a considerable extent the defendant admits that its purport is correctly recorded in the day-book.

The defendant knows nothing of the fourth, and it is not suggested he was present.

Mr. Gregory prepared a draft agreement on the 15th and sent it for approval to Mr. Cohen, who returned it approved on the 20th. On this last date it was forwarded for Mr. Hyam's approval.

On the 28th December, a power-of-attorney was received from the plaintiff, and Mr. Hyam was informed of this and asked to return the draft agreement approved. On the 15th January, Mr. Gregory wrote to Mr. Hyam offering to send the title-deeds for approval. On the same date the defendant wrote to Mr. Gregory as follows :—

"4, Middleton Row.
Calcutta; the 15th January, 1913.

G. Gregory, Esq.,
Solicitor,
Re Pollock Street,
Premises Nos. 7/1 and 8.

DEAR SIR,

I am returning the draft agreement *re* above. Will you be so good as to redraft the same in regard to the following particulars, *viz* :—

1. As to the covenant not to build a mosque or temple, I agree to make this a personal covenant, but not to make it a covenant that will run with the land. But I do not bind myself as to the use of the premises for any other purpose.

2. As to the school remaining for a year, I agree to this, but the purchase is not to be completed before a year also.

3. As to the payment of interest on the purchase-money, the interest shall be at the normal rate of 6 per cent. and not 9 per cent.

I did not write to you earlier because I was willing to let the Jewish School purchase the property, but as I now understand Mr. Gubbay is not willing to sell to the school on the terms offered by them, I am returning the draft agreement as stated above.

Yours faithfully,
J. I. J. HYAM."

It seems probable that these two letters of the 15th crossed.

On the 17th Mr. Gregory replied to Mr. Hyam in the following terms.—

"J. I. J. Hyam, Esq.

17th January, 1913,
Re 7/1 and 8, Pollock Street.

DEAR SIR,

I have communicated with my client's agent with reference to your letter of the 15th instant. They are not a little surprised at the objection you now raise, which they certainly decline to entertain.

The draft agreement submitted to you for approval is merely formal agreement, setting out the terms of the concluded contract entered into by you with my client through Mr. Owen Owen, the broker, and there can be no doubt that the objections you now put forward are an afterthought on your part simply with a view of delaying the completion of your purchase.

As regards your first objection, my clients cannot understand your stating that you agree to make the covenant restricting the erection of the mosque or temple a personal covenant. This point was discussed and you made no qualification restricting the covenant. The covenant must, therefore, be a covenant running with the land and be binding on you and your assigns, otherwise there would be no necessity for making it one of the conditions of the sale. There is nothing in the draft agreement restricting the use of the premises except what was agreed, namely, that you are to cause no nuisance to the Jewish Synagogue.

Your second objection is most inconsistent with your agreement to allow the Jewish School to remain in occupation of the premises for 12 months from the date of the execution of the conveyance, which was fixed for the 6th January instant. If, as you say, the purchase is not to be completed before a year, there would have been no occasion to make such a stipulation. This objection also my client most emphatically declines to entertain.

As regards the third objection, I admit there was no rate of interest fixed at the time, and under my advice my client will have no objection to reduce the rate of interest from 9 per cent. to 6 per cent., provided you complete your purchase without any further delay.

The proposal on behalf of the Jewish School to purchase the property has nothing whatever to do with your contract to purchase, and you were fully aware at the time that the terms offered on behalf of the Jewish School had been rejected by my client long before your contract, otherwise he would not have entered into the contract with you and received the earnest money from you.

I again send you the draft agreement for your approval, and unless you return the same approved within 24 hours from this date or agree to complete your purchase on or before the first proximo (in which case the execution of the formal agreement may be dispensed with), my instructions are most peremptory to file a suit against you for the specific performance of your contract.

Yours faithfully,
G. GREGORY."

On the 22nd, Mr. Hyam wrote to Mr. Gregory as follows :—

" 4, Middleton, Row,
Calcutta, the 22nd January, 1913.

G. Gregory, Esq.,

Re 7/1 and 8, Pollock St. and 1, Mansook's Lane.

DEAR SIR,

Yours of the 17th instant on the subject of the above matters to hand.

I must repudiate your suggestion that my objections to certain terms in the draft agreement you sent me are an afterthought, or that they were put forward simply with the view of delaying the completion of the purchase of the premises in question.

With regard to the question of the covenant not to erect a mosque or temple being made a personal one in the conveyance, or one running with the land, with reference to which you say that the point was discussed and that I made no qualification restricting the covenant, I entirely did not discuss the point with your client or any one on his behalf, nor did I authorize any one to do so on mine. When Mr. Owen Owen reported to me that Mr. Cohen wanted to be assured that I would not pull down the existing building and erect in its place a mosque or temple, I told Mr. Owen that I certainly would not build either a mosque or a temple and told him to assure Mr. Cohen of that. Beyond this there never was any other discussion on the point, nor did any occasion arise for me to make any such qualification as you advert to in your letter regarding the covenant before you sent me the draft agreement, when for the first time I saw that the covenant was sought to be made to run with the land, and I at once objected to the same, and I deny your allegation that there was any agreement to cause no nuisance to the Synagogue which you have introduced in your draft agreement, and to which you refer at the end of the 3rd paragraph of your letter under reply.

With regard to the question of the occupation by the Jewish School of the premises for another year, the suggestion made to me was that although the school had no lease of the premises, nevertheless, in order not to work hardship on an institution which was charitable and Jewish, I was agreed to let the school remain on for a year to enable it in the meantime to find another habitation, and I agreed to this suggestion which I considered reasonable and agreed to defer the completion of the purchase for one year, until your client could give me vacant possession of the premises. The school was to remain on for a year, not from the date of the conveyance but from the date of the agreement for sale and purchase which was to be executed in writing, and this was so because I wanted and did insist on vacant possession, for I would have none of the trouble, worry and expense, not to mention the odium, of having to turn out a charitable and communal institution from the premises which, I am informed, it has

made its home for the last 40 years. Mr. Cohen, as one of the elders of the community and at one time the Honorary Secretary of the very school in question, I believe, would be in a position better than any one else to get the school vacated without unpleasantness, and I consented to the reasonable request of Mr. Cohen to let the school remain on for a year, provided the conveyance was similarly delayed and vacant possession given to me as above stated.

I deny that the 6th January instant or any particular date was fixed for the execution of the conveyance as you allege, or that I was aware at all that the school offered to purchase the premises, or that the said offer was rejected by your client.

In the circumstances it is open to your client, as he pleases, either to accede to my terms which were agreed upon but which your client now wishes to vary, or to file his action which under instructions you threaten me with, but on my part, I shall insist on your client performing his part of the contract upon the terms agreed as hereinbefore stated.

Yours faithfully,

J. I. J. HYAM."

On the 22nd, Mr. Gregory wrote to Mr. Hyam demanding a return of the draft agreement, and on the 23rd, he wrote to him as follows :—

"*23rd January, 1913.*

J. I. J. Hyam, Esq.

Re Pollock St. and
1, Mansook's Lane.

DEAR SIR,

In continuation of my letter to you of yesterday's date, I am instructed to state that as you have declined to complete your purchase upon the terms agreed upon there is no necessity to prolong this matter by further correspondence. My client denies that there has been any variation on his part or that he is attempting to vary the terms of the contract, and as you decline to complete your purchase in terms thereof, my client has no other alternative left but to institute proceedings against you for the specific performance of your contract, etc., and which I am instructed to do without any further reference to you.

I have again to request you to return the fair draft agreement which was submitted to you for approval."

Mr. Hyam has explained that his delay was due to the pendency of negotiations for the purchase of the property on behalf of the Jewish School.

On the 8th February, 1913 the plaint in the present suit was filed, and, among other matters, it is thereby alleged as follows :—

"3. On or about the 13th November, 1912 an agreement was made in Calcutta between the plaintiff through his representative and the defendant through his broker, whereby the defendant agreed to purchase from the plaintiff the said several premises free from incumbrances subject to approval of title at the price of Rs. 1,33,000 on special conditions following, namely : (1) that the said premises and the site thereof should not be used for the purposes of a mosque or a temple, or for carrying on any noisy or offensive trade or business, or for any purpose which might cause nuisance or annoyance to the Jewish Synagogue in Pollock Street, Calcutta, situate opposite the said premises; (2) that the said Calcutta Jewish School should be allowed to continue in occupation of the said premises No. 8, Pollock Street for one year, from the date of execution of the conveyance of the said property, on the same terms and conditions under which they were then occupying the same; (3) that the defendant shall accept a conveyance of the said several premises executed under a special power-of-attorney on behalf of the plaintiff.

4. On or about the 15th November, 1912, the defendant personally called and saw the plaintiff's solicitors and confirmed the said agreement and paid Rs. 1,001 as earnest money therefor, and it was agreed that the plaintiff's said solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase, including the special conditions agreed upon as aforesaid and submit the same to the defendant for approval, it being further agreed that the said sale should be completed within six weeks from the date on which the title-deeds of the said premises should be delivered to the defendant or his solicitors, and that in the event of the title not being approved, the plaintiff would pay no costs.

5. A draft agreement, embodying the said terms and conditions, was duly

prepared by the plaintiff's solicitors and sent to the defendant for approval on the 20th November, 1912, with a letter requesting the defendant to name his solicitors to whom the title-deeds of the said premises should be sent for approval on his behalf, but the defendant never replied to the said letter. The said draft agreement is now in the possession of the defendant and copy thereof is hereto annexed and marked 'A' to which the plaintiff refers as part of this his plaint."

Counsel for the plaintiff experienced great difficulty in stating when the contract on which his client sues was made. Nor is this to be wondered at for the evidence discloses no clean-cut agreement It has to be spelt out, if at all, from the conflicting versions given in the witness-box of what passed at several interviews; and the confusion is increased by the fact that the several interviews were not all between the same persons.

At one time the case made was that the letter of the 13th November was preceded by an oral agreement of which it was but an imperfect record, and that the imperfection was cured by what passed between the parties at the interviews of the 15th.

Ultimately the case selected by the plaintiff for our acceptance was that the parties came to a concluded agreement on the 13th of November; but Mr. Zorab at the same time expressed his wish not to abandon such advantage as he might be able to derive from the interviews of the 15th November, and in particular the interview between Mr. Cohen and Mr. Hyam on that day. The case made in the plaint appears from the paragraphs I have already read. They allege an agreement between the plaintiff through his representative and the defendant through his broker on or about the 13th November, and a confirmation by the defendant to the plaintiff's attorney on the 15th.

It is noticeable that the agreement of the 13th as alleged in the plaint does not correspond with the letter of that date, but this Mr. Zorab explains by the suggestion that the letter was an imperfect record of the contract, and that the fuller exposition of the plaint is merely a statement of that which was inherent in the letter and might properly be read into it, if regard were had to all the circumstances. Has then the plaintiff made out that there was a concluded agreement on the 13th November?

The ultimate conclusion of Mr. Justice Chitty is expressed in these words: "I hold that there was a definite, complete and binding agreement arrived at between the parties on 15th November, 1912, by which the defendant agreed to buy the property in question for Rs. 1,33,000 subject to the three conditions set out in paragraph 3 of the plaint."

This certainly does not affirm a concluded contract on the 13th November, and if it was the intention of the learned Judge to negative a concluded contract on the 13th, I agree with him.

This appears to me to be the meaning of the entry in Mr. Gregory's day-book of the 15th November, which contemplates that even on that date it still remained for terms to be settled. This too is borne out by the evidence both of Mr. Gregory and Mr. Cohen, from which it is clear that matters had not taken definite and final shape on the 13th; in fact so far were terms from being fixed that Mr. Cohen on the 15th informed the defendant that he might "leave or take" his conditions. In support of this view that there was no concluded agreement, the defendant points to such matters as the dispute regarding the scope of the special restrictive conditions, the amount of the earnest money and the date for completion, the uncertainty involved in the stipulation that the written agreement should contain the "usual terms and conditions of sale and purchase," the agreement that there should be an agreement in writing, and the conflict of view as to whether the contract was for a sale with vacant possession or not.

All this and also the subsequent negotiations and conduct of the parties, in my opinion, afford clear indication that there was no concluded contract on the 13th.

The next question is whether there was a concluded contract on the 15th. This is regarded by Mr. Justice Chitty as "the important date in the case," and he seems to have thought that a final agreement was concluded between Mr. Cohen and the defendant on that day. This is not the case made in the plaint. It is, however, alleged in paragraph 4 that on the 15th "It was agreed that the plaintiff's said solicitors should prepare a formal agreement in writing embodying the usual terms and conditions

of sale and purchase including the special conditions agreed upon as aforesaid and submit the same to the defendant for approval."

If then, as I hold, there was no concluded contract before the 15th, it is manifest on the face of the plaint that the preparation of a formal agreement in writing embodying the usual terms and conditions or purchase was an integral part of the negotiations of that day and was actually a matter of agreement between the parties. That it was an essential term of the bargain between the parties that there should be a written contract is, I think, clear even apart from the definite allegation in the plaint. Thus Mr. Owen's letter refers to the time for completion as a matter to be determined by the "date of the contract," and on his evidence he explains that the time for completion was fixed at "six weeks after the execution of the agreement." The day-book, too, shows that a written agreement was to be prepared, and the evidence on the point is to the same effect. And in fact a draft agreement in writing was actually prepared and submitted by the plaintiff's attorney.

Can it then be said that in the absence of such formal contract in writing—for none has been executed—there is a concluded contract between the parties?

In *Von Hatzfeldt Wildenbury* v. *Alexander* (1), it was said by Lord Parker as he now is, "it appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Here it is expressly pleaded in the plaint that it was a matter of actual agreement, not merely the expression of a desire, that the terms should be embodied in a written agreement. And there is the further fact that this written agreement was to take the place not of a previous writing, but of previous conversations of the uncertain character disclosed by the evidence.

I am aware of no case where a provision for a written agreement in place of oral conversations has been treated as negligible: none has been cited to us. Though there may be no presumption of law negativing legal obligation in the absence of writing where there is a stipulation for a written agreement, still, from the nature of things, the inclination of decision must be stronger in that direction where the supersession is of an oral by a written agreement, and not merely of one writing by another.

In *Ridgway* v. *Wharton* (2), Lord Cranworth expressed the view that the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement, and he there was dealing with the supersession of written negotiation by formal writing. While Lord Wensleydale in the same case said: "These cases often occur in Courts of Law, and the question then always is, whether the parties mean to embody the contract, made by parol, in writing? If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agreement, nothing will bind them but that written agreement." In the absence of a written agreement, therefore, I hold there was no enforceable contract, and in the view I take, this is sufficient to dispose of the appeal.

But, in my opinion, apart from this, there are fatal objections to the success of this suit, for I think it is not established that the parties were at one. Thus the scope of what have been termed the special conditions was not definitely settled, nor were the parties agreed as to whether vacant possession was to be given on completion. I would here digress for a moment to point out that the parties might well not be in exact accord as to the precise mode in which effect should be given to the special conditions, though they were agreed as to their general character. Thus Mr. Hyam

(1) (1912) 1 Ch. 284.

(2) (1854) 6 H. L. C. 238.

might be wanting to postpone completion for a year so as to accommodate the Jewish School and yet be unwilling to pay the purchase-price, borrowed for the purpose at interest, until he get possession, for to him the transaction was a matter of business.

Similarly the defendant may have been willing to bind himself personally as to the building on the land and have been unwilling to impose a restriction that might be a blot on the title. And as he intended himself forthwith to build, he might have supposed that would be accepted as sufficient. But to return to the difficulties in the plaintiff's way, I would next point to the allegation in the plaint, that it was agreed that the plaintiff's solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase (paragraph 4).

A draft agreement has been submitted after approval by Mr. Cohen, and its terms presumably represent what was regarded as usual.

A perusal of the document demonstrates the uncertainty of the expression "usual terms," and by way of illustration I may point to the provision in the draft that the sale is subject to tenancies, that interest at 9 per cent. is charged on the balance of the purchase-money, that a right to rescind is reserved to the vendor if he is advised not to remove or comply with any objection or requisition, that the property is sold subject to all outgoings and easements though none are particularized, and that time is to be deemed in all respects to be of the essence of the contract.

If this draft represents the plaintiff's idea of what are "usual terms" that can be introduced into an agreement for sale without discussion, it cannot be a matter of surprise if the defendant is not at one with him as to that.

Indeed the circumstances of this case illustrate forcibly the mischief against which the decision in *Rummens* v. *Robins* (3) was directed. There in reference to a similar provision Lord Justice Knight Bruce asked "what are the usual clauses in a contract for the sale of land? They differ almost incessantly; they differ according to the state of the title, the conveniences, the fancies, and the wishes of mankind, and the particular situation, convenience and inconvenience belonging to the estate." And in view of the uncertainty of the provision it was held that there was not a contract capable of being specifically enforced.

The plaintiff asserts, as is obligatory, that he was ready and willing to perform and carry out the agreement. Presumably the draft agreement embodied his conception of his obligation and indicates what he was ready and willing to perform. But if that be so, his readiness and willingness did not correspond with his obligations under the alleged agreement, either of the 13th or 15th November. Nor does it mend matters that the plaintiff may have been willing at the trial to waive any of the stipulations of the draft.

No doubt as to the main features of the transaction, *i.e.*, the sale, the identity of the property, the price, and even the imposition of restrictions in some form or another, the parties were substantially agreed, and to that extent the defendant may well have considered that as between man and man there was a contract, and have used language appropriate to that position. But that is not enough to create a concluded contract between the parties.

Nor is the defendant precluded from pleading that there was no concluded contract merely because he paid earnest money, more especially as the mode in which the plaintiff's agent dealt with the money shows that even he did not treat the matter as governed by a concluded agreement at the time of payment.

The conclusion then to which I come is that the learned Judge should not have decreed specific performance.

I would, therefore, allow the appeal, reverse the judgment of the first Court and dismiss the suit with costs throughout, including the costs of the appeal.

Woodroffe, J.—This appeal, in my opinion, raises a question of fact, the principles of law applicable to such facts admitting of no doubt. The Court will doubtless not enforce specific performance of a contract, the terms of which are uncertain. If the Court does not clearly know what the contract is which the parties entered into, it cannot obviously enforce it. But the question

(3) (1865) 3 De G. J. & S. 88.

whether a contract is in this sense uncertain, is a question of fact which arises upon the documents and oral evidence tendered in support of it. In the present case the alleged contract was for the sale of the premises mentioned in the first and second paragraphs of the plaint free from encumbrances, subject to approval of title at the price of Rs. 1,33,000 on the special conditions mentioned in the third paragraph of the plaint. Those terms appear to me to be free from uncertainty in themselves, and the defendant's agreement to them has been established by evidence which the learned Judge has accepted and which, for reasons which I later give, I also accept. This evidence is partly documentary and partly oral. There is no law in this country which in this case requires an exclusively written record, and if we were to insist upon it as a condition for the grant of specific performance, we should be requiring from the parties more than the law demands. Moreover, there is in this case a document, *viz.*, the broker's acceptance of the contract. The broker was admittedly agent for both parties. Necessarily in this case as in other cases the oral evidence for the plaintiff and the defendant is in conflict. But we have to sift that evidence and to see which is to be believed. If upon such examination the nature of the agreement is left in doubt, the plaintiff must fail, but if the evidence is believed to be true, we must, I think, give effect to it. If the evidence given for the plaintiff is accepted, it, in my opinion, leaves no doubt as to what the facts are. Moreover this is an appeal and we are asked to reverse the judgment of the learned Judge on a question of fact. The defendant in his evidence insinuates that the letter of the broker, Mr. Owen, was due to something more than misunderstanding. He contests both the truth and accuracy of the evidence of the latter and other witnesses, charges that the evidence of Mr. Cohen is "absolutely false" and says that he returned the draft agreement which had been sent to him by Mr. Gregory, the plaintiff's solicitor, as he "suspected that the latter had drawn up an agreement, the terms of which were not the same as the broker's letter, which he knew was the basis of it. His grievance on the facts is that the learned Judge has not accepted these charges or the evidence on which they are made. I have never held that the Appeal Court is bound to accept the first Court's appreciation of the facts. In my opinion, both the law and facts are open to us. Still this being an appeal on the facts, the appellant has to satisfy us that the judgment appealed against is erroneous, and this he has failed to do. On the contrary, for reasons I later state, it seems to me that the learned Judge has arrived at a correct finding on the evidence before him. He points out that the defendant's evidence stands alone, and as against it there is the evidence of the four witnesses Owen, Cohen, Gareh and Gregory, the letter of the 13th November, 1912, and other documentary evidence. It would, in my opinion, require a strong case which would justify us in accepting the defendant's evidence alone as against all the other evidence which has been accepted by the Judge of first instance.

It is then alleged in the plaint as it stands that on the confirmation of the agreement and payment of the earnest money, it was agreed that the plaintiff's solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase including the special conditions above mentioned, and should submit the same to the defendant for approval. On the strength of this allegation and certain answers given by the plaintiff's witnesses, it is contended that there has been no completed contract between the parties and that the suit is premature. Here again the law applicable seems to me to admit of no doubt. It is well established that the mere reference to a future formal contract will not prevent a binding bargain. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put into a more formal shape, does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. "If", said Lord Cairns in *Rossiter* v. *Miller* (4), "you find not an unqualified acceptance...subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is

(4) (1878) 3 A. C. 1124.

fulfilled no contract is to arise, then... you cannot...find a concluded contract." In other words, the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. The question in this suit is whether the case falls within one or other of these alternatives. As James, L. J., said in *Bonnewell* v. *Jenkins* (5), each case depends on its own special circumstances.

What then are the circumstances here? I will deal with this point at once, as it is one which, if disposed of in favour of the appellant, establishes his case. This contention of the appellant appears to me to be an afterthought. It first appears in the written statement filed in March 1913, the contract for sale having been, it is said, entered into in November 1912. It has been argued that the defendant is a layman and could not appreciate the advantages which, it is contended, the law gives him. We are not asked to say that the defendant is incapable of understanding or looking after his own interests, and the point here is a simple one for the party himself, whatever may be the difficulties which the Court has in some cases in ascertaining what was passing in the minds of others. The defendant, has, however, only to ask himself whether it was agreed that he was in no wise to be bound until he had approved and signed a contract. If this had been the fact, it seems to me incredible that it should not at once have occurred to the defendant, and when he was pressed by the plaintiff we should have expected the reply:—"There is no contract. I have not signed and refused to sign any agreement."

What then are the facts? On the 15th November, 1912 the defendant admittedly paid earnest money of Rs. 1,001. This payment was in itself evidence of a concluded contract. It is suggested that it is not but that payment of earnest money is merely a sort of guarantee that the buyer will seriously negotiate. This, I think, is not the case. If this earnest money was not concluding a contract, why do we find no provision for its disposal and refund? Reliance is placed on the fact that it was not cashed directly by Mr. Cohen, but made over to his solicitor and cashed later. This, however, may well be due to the fact that Mr. E. M. D. Cohen intervened, when he found that the property on which the Jewish School was placed was going to be sold away. From the letter of the 5th December, 1912, it appears that Messrs. Sassoon and Co. informed Mr. Gubbay that Mr. E. M. D. Cohen was writing to him about it. Mr. Gregory's day-book shows that Mr. Cohen accepted the Rs. 1,001 as earnest money, the amount of which was admittedly the previous subject of discussion, and that it was after that arranged that an agreement should be prepared and submitted to Mr. Hyam for his approval, the purchase to be completed within six weeks. That Mr. Hyam considered the acceptance of the earnest money closed the transactions, appears on his evidence. That Mr. Cohen and Mr. Gregory considered the matter concluded is shown by their action in at once taking steps to get a power-of-attorney executed. On the 20th November, 1912, a draft was sent to the defendant for approval. After this the parties appear to have been waiting for the receipt of instructions from Mr. Gubbay as to whether he was prepared to cancel the sale, seeing that Mr. E.M.D. Cohen of the Jewish School, which was thereby likely to be displaced, was objecting to it. Mr. Gubbay, however, refused to cancel, and on the 28th December Mr. Gregory informed Mr. Hyam of the fact "that he will not cancel the contract for sale" and asked for the return of the draft approved, without delay. The defendant was also informed of the arrival of the power-of-attorney authorising Mr. Cohen to act for Mr. Gubbay. To this the defendant gave no reply. According to his case all that he had to do was to write back and say, "there is no sale to cancel until I have approved the draft contract." He did nothing and was again written to on the 2nd January asking for return of the draft. He did nothing, and having given no reply he was again written to to the same effect on the 7th. He did nothing, and on the 13th January, Mr. Gregory wrote insisting on the sale and asking for return of the draft. This letter was not more successful than the rest and on the 15th January Mr. Gregory wrote again referring expressly to the agreement and saying that "Mr. Gubbay will not cancel the

(5) (1878) 8 Ch. D. 70.

contract as you requested him to do." Legal proceedings were then threatened. With reference to this letter I may observe that Mr. Hyam spoke to him about cancelling the contract. The defendant who appreciates the inference which may be drawn from the use of the word "cancel", denies that he ever used that term to Mr. Gregory. It is noteworthy, however, that if this be so he did not deny what Mr. Gregory stated in the reply which he at length sent on the 15th January, 1913. I will refer to this letter later. Its only importance here is the explanation which it gives of the delay to which I have referred. According to Mr. Hyam he did not read the draft until about this date. He then states "I did not write to you earlier because I was willing to let the Jewish School purchase the property, but, as I now understand, Mr. Gubbay is not on terms offered by them willing to sell, I am returning the draft." As the learned Judge has pointed out, Mr. Hyam has not called Mr. E. M. D. Cohen to support his story and I am unable to understand how he could have thought that there was a possibility of sale to the Jewish School, seeing that he had been definitely informed on the 28th December that Mr. Gubbay refused to cancel the sale. This is followed by an important letter of the 17th January, in which Mr. Gregory alleges that the draft sent was merely the formal expression of a "concluded contract" and asking for its approval. To this the defendant replied on the 22nd January in which letter he also assents to the position that there was a concluded contract though he disputed its terms; for he says "In the circumstances it is open to your client, as he pleases, either to accede to my terms which were agreed upon but which your client now wishes to vary or to file his action, but on my part I shall insist on your client performing his part of the contract upon the terms agreed." In the face of these express words it does not seem to me to be possible to say that there was then no contract between the parties. In fact, as the learned Judge points out, it is the case of both parties that a definite agreement to sell was arrived at, the difference between them being as to its terms. Mr. Cohen also evidently thought that the contract was concluded for, as above stated, he at once set about to get the power-of-attorney under which the conveyance was to be executed. It was, however, both his wish and that of the defendant that what is called in the evidence "the usual earnest agreement" should be drawn up, and on Mr. Cohen's answers on this point reliance is placed. Mr. Cohen says that this agreement was to embody the special conditions as contained in Mr. Cohen's letter and stated by the defendant himself on the 15th and the usual terms as written by solicitors. He says that the sale was concluded with Mr. Hyam personally on the 15th and that all that was to be done was to insert the usual conditions. Mr. Hyam says in answer to the question "you contemplated a written contract"?—"Yes." It may be admitted that this was the intention of both parties. The question is, whether there was to be no concluded contract until the formal agreement was signed. That the parties did not then, whatever the defendant may now do, trouble about the other conditions is shown by Mr. Hyam's letter of the 15th January in which no attention is paid to these matters, and the statement in his evidence that these were no part of his business but of his attorney. Mr. Gregory says that the defendant told him on the 15th November that terms had been finally arranged with Mr. Cohen who had accepted the earnest money and that the remaining clauses were the usual clauses in an earnest agreement. He denies the suggestion that he understood "that this matter was subject to the preparation and approval of a formal contract," and says that the formal contract was only to include and did in fact include the ordinary conditions of sale and purchase. If this be not the fact, the defendant could have called evidence to show that the terms proposed to be inserted were not, as he for the first time in the written statement alleges, usual conditions of sale in Calcutta. The written statement (S. 2) admits that the defendant agreed to purchase "upon the usual terms of such purchases and sales." Here I may observe, upon the defendant's allegation that the draft contains terms which are not usual, that if it were necessary to decide this question it would be sufficient to point out that the evidence is all one way, there being nothing to controvert Mr. Gregory's statement on this point. It does not, however, seem necessary to

decide this point, for the plaintiff does not insist upon specific performance of the draft, conceding that if it be the fact, which is not admitted, that there are any terms therein which are not usual, the same could not be enforced against the defendant. It is obvious that specific performance could not be enforced except as to terms agreed upon, namely, those in the third paragraph of the plaint. The draft was not signed and accepted. It is noteworthy in this connection that though the defendant does now object to some of such terms, he did not do so in his letter of the 15th January. Like the objection that the execution of a formal agreement was a condition of the contract, this objection appears for the first time in the written statement. I should here mention that Counsel for the respondent stated that the terms of paragraph 4 of the plaint should run as follows.—"Should prepare a formal agreement in writing embodying the said terms and conditions and submit the same to the defendant for approval," instead of "should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase including the special conditions agreed upon as aforesaid and submit the same to the defendant for approval," and he asked that three documents should be admitted in evidence, *viz*, the instructions for the plaint, original draft plaint in Counsel's handwriting and a fair copy plaint. I thought that this application which was made after the close of the reply, came too late and moreover that the point was immaterial to the decision. The agreement of which specific performance is sought is that stated in paragraph 3 of the plaint and stated to have been confirmed in the first three lines of paragraph 4. The plaintiff, as stated, does not seek specific performance of the draft agreement with all its terms and the subsequent allegations as to the preparation of a formal agreement in whatever terms they are stated, have only a bearing on the question which I have already discussed, namely, whether there was a contract at all until the formal agreement was drawn up. In a still more belated fashion, though the written statement does not allege uncertainty, but on the contrary willingness to complete upon the terms the "defendant had agreed to," it was urged in argument that the contract is uncertain because the phrase "usual terms and conditions" is uncertain [*Rummens* v. *Robins* (3)]. It would be sufficient to reply to this that there is unrebutted evidence what such conditions are, and, therefore, no uncertainty if we accept Mr. Gregory's evidence. But apart from this, what the plaintiff alleges is that the agreement sought to be enforced is that stated in paragraph 3 of the plaint, and the arrangement arrived at subsequent to and after the concluded contract there mentioned did not form part of it. This is a sufficient answer to the reply that the vendor cannot waive such stipulation, for which the case of *Lloyd* v. *Nowell* (6) is cited. That case, moreover, is distinguishable, for there the contract was to sell "subject to the preparation by the vendor's solicitors and completion of a formal contract." This was, therefore, a term of the contract itself in that case where it was held not to be for the benefit of the vendor only and, therefore, could not be waived by him alone.

A new point has been raised on appeal, that the sale was free from encumbrances whereas there were some leases on the property. It appears from Mr. Cohen's evidence that the property sold was subject to lease. The Jewish School were monthly tenants and the other leases expired in October 1913, that is, before the expiration of the year when the defendant was to get possession from the Jewish School and before the hearing of the suit. The first answer to this which is given by the respondent appears to me conclusive, *viz*., the point was not raised in the pleadings, nor was an issue directed to the point, nor does Mr. Hyam anywhere say that he did not know of the existence of the leases and if he had known he would not have purchased. The Court is not called upon to raise an objection of this kind which the party himself has not raised. But it was submitted that Mr. Hyam could not raise the point as he was, it is suggested, unaware of the leases. I do not believe that he was unaware, nor has he sworn that he was ignorant of them. Counsel for the appellant stated that Mr. Owen was the common agent for both parties. Mr. Cohen swears that the possession was subject to the

(6) (1895) 2 Ch. 744.

lease and that he told the broker, the common agent, of the tenancies affecting the properties. His evidence on this point is supported by Mr. Owen, who swears that he told Mr. Hyam "exactly the terms which Mr. Cohen had proposed and he accepted them." Mr. Cohen says that the term that property should be taken subject to lease was one of his expressed conditions. Mr. Hyam says that nothing was said about encumbrances without, however, mentioning the leases. That Mr. Cohen's terms were as he states, is borne out by the draft agreement which he handed to Mr. Gregory on the 20th November. The draft was sent on to Mr. Hyam on the same date. Paragraph 1 of the draft expressly mentions that the property was sold free from the encumbrances but "subject also to the existing tenancies affecting the same." Incidentally I may remark that Mr. Gregory was here distinguishing between encumbrances and leases the two terms not being always synonymous. This agreement must have put Mr. Hyam on notice even if he had not had actual information before. That Mr. Hyam read this agreement before suit I believe, for when he returned it on the 15th January, 1913, he took specific exception to two terms of the draft, namely, the second touching interest and the last making the covenant not to build a mosque or temple to run with the land. It is noted further that the property which is the subject-matter of the suit adjoins a property of Mr. Hyam who was, therefore, likely to know what was the state of it. Nor is it in the least degree likely that Mr. Hyam, who is represented to be a person who speculates in land, did not make full enquiries as to the state of the property which he proposed to purchase. Again Mr. Hyam must have known from the draft agreement that the sale was subject to existing tenancies. If this had been for him the vital "defect in title" now alleged, one would have expected him to have said at once: "There are leases on the property. I was not told of them. The negotiations are off," and this he would, one should have thought, have done the more readily seeing that on other grounds he had sought to get the sale cancelled. That he did not, points to the inference that he was aware of the leases from the beginning. Notwithstanding all this no objection on this point was taken in the written statement nor issue raised thereon. Even if we were to make the improbable assumption that Mr. Hyam was unaware of the leases until the point was mentioned in the evidence, Mr. Hyam gave his deposition after the witnesses of the plaintiff and he does not even then say that he was unaware of the leases and that if he had known of them, he would not have purchased. It is true that a somewhat similar statement was made by his Counsel here but what Counsel says is not evidence, and is not accepted as such. Nor was the point sought to be made by amended defence, nor was it according to the respondent's Counsel argued in the lower Court. That this statement is likely to be correct is shown by the fact that there is no mention of a point which has been made so much of in appeal in the judgment of the learned Judge, nor is the point specifically taken in the grounds of appeal. The point first arose in the last hearing before two Judges as a result of certain observations made by the Court, which were subsequently adopted as his argument by Counsel for the appellant. The point, therefore, in my opinion, cannot be taken now. Had it been taken in the first Court it might have been possible to lead evidence to show that it had no substance, as the facts to which I have referred themselves suggest. But even if the point were open there does not appear to me to be any substance in it. If there had been it would have been taken. In answer to the Chief Justice, Counsel for the respondent whilst submitting that the question did not arise said that if required to answer the question, he would say that the property was sold free from encumbrances but subject to the existing tenancies as the draft says, but submitted that there was no contradiction having regard to the nature of the tenancies, the return on the money which they give, *viz.*, 5½ per cent. and the fact that the tenancies had expired before the hearing of the suit. Further, that even if the leases were encumbrances, that was no defence if the Plaintiff discharged them and offered them free of encumbrances. As stated, these tenancies have long ceased to exist and cannot be any real defence. The real objection, as I point out later, is that Mr. Hyam is unwilling to incur the

odium of turning out the Jewish Poor School now in possession of portion of the premises. Doubtless the point might have had a legal bearing on the question, what was the contract between the parties, if it had been raised. But it was not and as I have said there is no evidence by Mr. Hyam that when he entered into negotiations he believed he was negotiating for purchase of a property free of existing leases. Had this been the case and there was any substance in the objection, it would have undoubtedly been properly raised. The defendant can have possession now, but he will not take it because he does not wish to incur the displeasure of his community by turning the Poor School out as he would be entitled to do if he accepted the property.

As regards the evidence that the parties were not *ad idem*, it is sufficient generally to say that this must depend on the view the Court takes of the facts. If the evidence given for the plaintiff is accepted the parties were *ad idem*, for that evidence shows that the defendant understood what the terms were and gave his assent to them.

In my opinion these various objections fail and were an afterthought put forward to relieve the defendant of the obligation into which he had entered, should he fail on the substantial part of his case, to which I now turn. That question, is, assuming as I hold that there was a concluded contract, what were its terms?

But before doing so, I will deal with a point advanced in the argument, namely, when and where the offer was accepted and whether Mr. Owen had authority to accept on the defendant's behalf.

Mr. Owen's acceptance is contained in the letter of the 13th November, 1912. Mr. Hyam swears that he "never gave him authority to write any such letter and that the first time he saw it was on the 24th January, 1913; but that he never wrote repudiating his authority as he did not think it necessary." He denied Mr. Gregory's explicit statement that he showed him Mr. Owen's letter at the interview of the 15th. No doubt Mr. Gregory's veracity was impugned in cross-examination, it being suggested and denied that his day-books (in which this particular incident was not described) had been characterised as false entries in another case. It is also a circumstance in Mr. Hyam's favour that Mr. Owen does not recollect this incident. But it is easier in the case of an incident of this kind to forget it than to honestly suppose that it took place when it did not. It is hard to imagine any alternative to the acceptance of Mr. Gregory's positive statement than that he was telling an untruth. I am unable to hold this, nor has the learned Judge done so. The incident seems to be quite a probable one. Is it likely that a conversation should be had between Mr. Cohen, Mr. Gregory and the defendant without any reference to the broker's letter which was the basis of the contract? I think not. It appears also to be the fact that Mr. Hyam's ignorance of the contents of the letter till the 25th January was not put in cross-examination to any of the plaintiff's witnesses. Mr. Owen admits that after writing the letter he did not show it to the defendant before sending it to Mr. Gregory, but he swears that he wrote it on Mr. Hyam's authority, who suggested to him its terms in the form and to the effect in which it now stands. It is said that Mr. Hyam did not previously take exception to Mr. Owen's authority. But I think there is nothing in this. For I think a fair reading of Mr. Hyam's evidence is that Mr. Owen had authority to negotiate and settle but only on the terms which Mr. Hyam alleges. With this I deal later. For reasons which I give later also I hold that Mr. Owen had authority to bind the defendant as he purported to do by his letter: and that (on Mr. Gregory's evidence) Mr. Hyam must be taken to have been aware of its terms. The question whether Mr. Owen was authorised to write the letter of acceptance is of secondary importance in this case, for if the evidence of the plaintiff be accepted the defendant personally later on gave his assent to the conditions sought to be enforced against him.

This being so, the facts stand as follows:—

Mr. Owen was informed by Mr. Gregory of the plaintiff's terms on the 13th November. Mr. Cohen was then informed by Mr. Gregory of the result of this interview. Mr. Owen accepted by his letter of the 13th November of which Mr. Cohen was informed. The latter confirmed the arrangement to Mr. Gregory on the 14th November. Mr. Owen called at Mr. Gregory's office on the 15th

with Mr. Hyam, when they said that they would call on Mr. Cohen to settle the terms with him and would see him again later. They are then alleged to have seen Mr. Cohen in the presence of Mr. Gareh and the contract was confirmed. After this both Mr. Cohen and Mr. Hyam called at Mr. Gregory's Office when Mr. Hyam told Mr. Gregory that he was agreeable to Mr. Cohen's terms. On the same day it is said that the 6th January, was fixed for completion. On the 2nd Mr. Cohen handed the draft agreement approved to Mr. Gregory who, as stated, forwarded it to the defendant on the 20th November. Now, if this evidence be true the result is that Mr. Owen on the 13th January accepted the plaintiff's offer explicitly as regards all terms but two, and as to these implicitly. As regards these latter there was, it is said, an acceptance though an imperfectly expressed acceptance. These two terms were, *firstly*, (the defendant having agreed that he would not ask the Jewish School to vacate for 12 months from the date of execution of the conveyance) that the school was to remain on the same terms as heretofore. This was not expressly stated but implicitly accepted, because without it the condition would be nugatory since it would be open to the defendant to nullify the condition by changing and enhancing the rent to a point at which the school could not pay and remain. This term was in any case, according to the evidence, later expressly accepted. Nor does the defendant deny that the school were to have possession on the same terms; what he says is that he had no objection to that provided that the contract was not to be completed until after the expiration of 12 months. The *second* term imperfectly recorded was that there was to be a special power-of-attorney under which the conveyance was to be executed. This is indicated though not expressed by the reference to "six weeks." This arose out of the conversation with Mr. Gregory, in which it was explained that as Mr. Gubbay was in England the contract could not, as he proposed, be executed in a month.

The matter is one of no importance and it is not contended that it is of any concern to Mr. Hyam whether there was such a special power or not. The same remarks apply to the fixing of a definite date, the 6th of January, which was done on the 15th. These terms were further, it is alleged, confirmed by the defendant personally on the 15th with the evidence I deal later. It comes then to this, either there was an acceptance of the contract by Mr. Owen's letter expressly and implicitly as to the terms mentioned (other than the actual date for execution) and an acceptance of this last term by the defendant personally on the 15th January and an express confirmation by him of the other terms on the same date; or if, as the defendant alleges, Mr. Owen had no authority or his letter does not mean what the plaintiff says he does, or if he says there was no implicit acceptance of the terms imperfectly recorded, then there was an acceptance by the defendant personally on the 15th in terms which have no ambiguity about them. I think the plaintiff is entitled to rely, as he does, not only on Mr. Owen's letter which is regarded as the acceptance but on the subsequent oral conversations which, if true, more fully and clearly state and confirm that to which the letter refers. As first put before us there was some inaccuracy in the statement of the case by Counsel for the respondent which he subsequently corrected. As it now stands it is, in my opinion, in conformity with that pleaded. The appellant has submitted that there is a variance between pleading and proof in two particulars. The plaint alleges an agreement on the 13th November, 1912, between Mr. Cohen and Mr. Owen and a confirmation to the plaintiff's solicitors on the 15th. It is suggested that the case now made is an agreement with Mr. Cohen on the 15th. This argument is, in my opinion, without foundation. The plaintiff relies on the agreement of the 13th, namely, the broker's letter. What he says is that two minor terms which were implied but not expressly stated in this letter, were clearly stated and confirmed on the 15th. Confirmation was given to the plaintiff's solicitors on the return of the defendant and the broker from Mr. Cohen. The plaint omits, it is true, to state any reference to the interview with Mr. Cohen but this is an omission to plead evidence only. The confirmation to the solicitor alleged in the plaint is proved. Some reliance was placed on the fact that the learned

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Judge finds that an agreement was arrived at between the parties on the 15th. But this does not seem open to objection, for the learned Judge had previously also held that the conditions had been previously agreed to when Mr. Owen wrote and gave Mr. Gregory the letter of acceptance on the 13th and when, as the learned Judge holds, both the solicitor and Mr. Cohen regarded the matter as concluded. The agreement evidenced by this letter was as to the terms expressed in the letter and with the two particulars so implicitly therein contained became, as the learned Judge holds, a definite, complete and binding agreement on the 15th November.

We are here led to a consideration of the question, what, if any, were the terms agreed upon by the parties? I will take them in the order in which they are stated in the broker's letter. The acceptance of the general offer for the sale of the premises in suit for Rs. 1,33,000 is not disputed. The first of the disputed special conditions is stated in the letter as follows:—" My principal agrees to have no temple or mosque built on these premises." As these words are not in any way qualified they mean, in my opinion, what they in effect say and that is that a temple or mosque is not to be built by any one, whether the purchaser or others taking, through him. This construction is strengthened by the wording of the next sentence "he will not ask the Jewish School to vacate, etc.," where the purely personal obligation is expressed as such. It is also supported by a consideration of the following facts. It cannot be matter of doubt upon the oral evidence and the day-book of Mr. Gregory that the vendor who is a Jew was insisting that the premises shold not be used as a mosque or temple and that no noisy or offensive business should be carried on there, because the premises were near to the Jewish Synagogue. This is a permanent institution and it is, therefore reasonable to suppose that the vendor at least intended that it should be permanently protected. If he had it in his mind to bind the immediate purchaser only, the latter could have made the protection nugatory by selling the property the following day to some one else who might have built a mosque or temple or created a nuisance on the property. I think also that Mr. Hyam must have understood this. Whether he accepted the condition in this sense is another question to which I next refer. He must be taken to have done so for the following reasons. In the first place that is the construction which I put on the letter of Mr. Owen who, in my opinion, had authority from his principal. That the words of the letter as they stand mean this, is to some extent indicated by Mr. Hyam's evidence. For he takes exception to the statement in the letter, which would be unnecessary if it merely meant what he says he agreed to. But the matter does not rest there for the oral evidence for the plaintiff, if true, shows both the meaning of the words in Mr. Owen's letter and that Mr. Hyam expressly agreed to the plaintiff's conditions. Mr. Cohen expressly swears that the defendant in his presence agreed to a clause being inserted in the conveyance binding the land, that is, the purchaser's assigns. This and other evidence of Mr. Cohen is charged by the defendant as being false and unless it is displaced is conclusive of the matter. Before us it has been argued that as the plaint pleads a confirmation between Mr Gregory and the defendant, the confirmation spoken of in the evidence between Mr. Cohen and the defendant must be an invention. According to the plaintiff's evidence it is a fact that the defendant did confirm to Mr. Gregory the plaintiff's special conditions. I may here refer to Mr. Gregory's evidence and his day-book. So far then the plaint is not at variance with the evidence. We are, however, asked to say that because the plaint did not plead confirmation to Mr. Cohen, therefore, such a confirmation did not take place. In the first place, it is in a high degree unlikely that no confirmation was given to Mr. Cohen. This latter was not some stranger but the person acting for the vendor in England who knew the vendor's mind and intentions and had full authority to give effect to them. Mr. Gregory on the other hand was merely the solicitor of the vendor who in all matters would have to refer to the latter's agent, Mr. Cohen. It is, therefore, in a high degree probable that the defendant saw and spoke to Mr. Cohen and if he did it does not seem to me to be likely that at such interview, the

latter would omit to discuss the special terms on which alone the sale was to take place. Mr. Cohen's evidence is further supported by that of Mr. Gregory and his day-book. The latter states that on the 15th November Mr. Owen and Mr. Hyam called on him and they said they would call on Mr. Cohen, settle the terms with him and see Mr. Gregory again. It is true that Mr. Owen does not seem to recollect having seen Mr. Gregory twice with the defendant. But as against what is possibly a lapse of memory on his part we have a reliable contemporaneous record in the day-book. That they did see Mr. Cohen is sought to be proved by the latter evidence and that of Mr. Gareh. As regards the latter's evidence it might have been a question had we been sitting as a Court of first instance, whether it is sufficiently proved that Mr. Gareh was there. Mr. Gareh is a young assistant who would not ordinarily be present unless sent for. He himself says that he cannot remember whether he was present when the defendant arrived or went in afterwards or whether he was sent for. Mr. Owen says Mr. Gareh was not there (that is, during the interview) and that he was sent for at the conclusion to accompany them to Mr. Gregory. That he did this there is no doubt. Mr. Cohen on the other hand supports Mr. Gregory when he says Mr. Gareh was present. The learned Judge has accepted both Mr. Cohen and Mr. Gareh's evidence and I see no sufficient reason for differing from him, the more particularly that I disbelieve the defendant's case as put in the cross-examination of Mr. Gareh "that no terms whatsoever (other than the amount of earnest money) were discussed between Mr. Hyam and Mr. Cohen." Mr. Gregory also says, though this evidence is not of much account, that Mr. Gareh told him that the matter had been discussed before Mr. Cohen. Mr. Owen also says the terms were verbally agreed to between the defendant and Mr. Cohen. Mr. Gregory next deposes that the defendant came to him saying that they had arranged the terms finally with Mr. Cohen and that they were agreeable to his special conditions, which to the best of his belief were mentioned in detail. Mr. Gregory says that on that day he had shown the defendant Mr. Owen's letter and that the defendant did not repudiate Mr. Owen's authority, but said he would have no objection to give a personal covenant. He then naturally said that the defendant must speak to Mr. Cohen direct on the subject as his own instructions on the point were peremptory. He says, however, that when they came back (and in this he agrees with Mr. Cohen) the defendant agreed that the covenant should run with the land. As against this evidence there are two circumstances which are relied upon for the defendant. Mr. Gregory's day-book runs: "and that he would not convert the premises into a mosque or temple" and next in his letter of the 17th January 1913 he writes: "This point (personal covenant) was discussed and you made no qualification restricting the covenant", no mention being made of the express agreement referred to in the evidence. Mr. Gregory's explanation is that in the day-book matters are not completely stated and that there was an omission in the letter. So far as they go it must be conceded that these two points favour the defendant. The question is, however, whether in this appeal they are sufficient to displace the other facts to which I have in part referred, including the positive direct testimony for the plaintiff which is such that it must be either true or false. I cannot believe that all of it which the defendant traverses was due to mis-recollection or mistake. Further, Mr. Hyam says that he agreed to and understood there was to be a personal covenant and according to his evidence he expressed himself in these terms.. It was then that Mr. Gregory said "no, no I must put it in the agreement." This appears to me to indicate what Mr. Gregory says about the question of the personal covenant. It was to go in the agreement because as Mr. Cohen says "it was to go with the title-deeds binding him for ever." That it was at least so understood, is shown by the fact that the draft was drawn up in this way on the 15th and was not repudiated by the defendant to whom it was sent on the 20th November until the 15th January following. According to Mr. Hyam's evidence on the other hand when asked, "do you say Mr. Cohen, when asked, did not say a single word as regards the conditions?" he answers "absolutely nothing—not one word." As I have

said, that and the story that Mr. Gregory only said "what about the mosque and temple" does not seem to me a likely tale. I may here point out that whilst the defendant asserts that what Mr. Cohen has said on this point is "absolutely false", such a case was not put in cross-examination to the latter. On the contrary Mr. Sircar's question at page 37, line 4, assumes that there was in fact a conversation between Mr. Hyam and Mr. Cohen on the subject of the mosque and temple though the parties were at variance as to the terms of it. If, as Mr. Hyam says, the question of building a mosque or temple was dropped directly it was ascertained that he, a Jew, was the purchaser, how is it that according to his evidence Mr. Gregory insisted upon the condition appearing in the draft and its appearance there? Mr. Hyam's suggestion that there were to be two agreements, seems a new case.

Some of the considerations above mentioned apply also to the second and other terms of Mr. Owen's letter. The second runs "or to cause any nuisance to the Jewish Synagogue." If these words stood alone they would, in my opinion, cover the condition as stated in the plaint. But they do not stand alone. Mr. Hyam's case is that the "question of nuisance was never discussed, never put to me." As against this we have the following facts. Mr. Gregory's day-book of the 13th November shows that Mr. Cohen was insisting that the purchaser would not "carry on any noisy or offensive business." This is, however, not repeated in the note made as regards the broker's visit which followed. Mr. Cohen spoke on the subject to Mr. Owen. The latter embodied it in his letter of the 13th November. He swears also that he told Mr. Hyam that the premises should not be made a source of nuisance to the Synagogue; that he told the latter all the terms Mr. Cohen proposed and that the defendant accepted them. Mr. Cohen says the defendant agreed to these conditions. Mr. Gregory enters in his day-book of the 15th November "that the defendant agreed not to do any act which would be a nuisance to the Jewish Synagogue," and deposes to the same effect saying that the defendant told him that "he would not cause any tin shop or anything of that kind or other things to make a noise there which would be a nuisance" He embodies a provision in the draft regarding a subject which Mr. Hyam says was never discussed and subsequently asserts the agreement in his letter of the 17th January. It seems to be impossible on these facts to hold that all this evidence is either untrue or mistaken and that, as Mr. Hyam says, the subject was never discussed at all. The letter of Mr. Owen affords strong corroborative evidence that it was discussed and that the letter in this and other respects states the plaintiff's case, is shown by the defendant's exception to it as disagreeing not only in form but in substance from what he gave Mr. Owen authority to accept.

The next term was "that he will not ask the Jewish School to vacate for 12 months from the date of execution of the conveyance." Learned Counsel for the respondent does not, having regard to the circumstances and time which has elapsed, insist upon this term but says it was agreed upon. The letter is imperfect in that it does not expressly state "on the same terms and conditions under which they (the school) were then occupying the same." I should myself, as I have said, have thought this was implied. For the obvious desire was to benefit and give time to the school and unless it was allowed to remain on the same terms, the provision might have been rendered nugatory by asking a rent or imposing other conditions which would oblige the school to vacate. That, however, the defendant agreed to this is shown by the evidence of Mr. Gregory and his day-book and of Mr. Cohen. Mr. Owen says he has no recollection whether the terms were discussed. He, however, speaks to the term 'from the date of execution of the conveyance" and Mr. Gregory's evidence is that Mr. Owen's letter was shown to the defendant and that the only term which the latter attempted to get conceded was the question of personal covenant not to build, with which I have already dealt. The plaintiff's case is also stated in Mr. Gregory's letter of the 17th January. The defendent's contention is set out in his reply of the 22nd January where he says he agreed to defer completion of purchase for a year. But if so, what had the defendant to do with the school? He could not interfere with the tenants until his purchase was completed and he became owner of the property. And if

so, any stipulation on the point was unnecessary. Mr. Hyam's statement that "not a word" was said at the interview with Mr. Gregory about the school is contradicted by Mr. Gregory's evidence, his day-book and the letter he wrote on the 17th January. The last term was as to the date for completion of conveyance which was fixed in the broker's letter as six weeks from the date of execution and was subsequently fixed on the 15th November for the 6th January following. This the defendant denies but the plaintiff's case is made out as to the letter by Mr. Owen, and as to the 6th January by Mr. Gregory, his day-book, Mr Gareh and Mr. Owen. According to the latter his letter was written under the defendant's instructions. Six weeks from the date of the contract would expire by the beginning of January and so, Mr. Gregory says, the 6th January was fixed as the exact date. The last point which was somewhat faintly referred to is the term under which a conveyance was to be accepted under a special power-of-attorney, the vendor being in England. This is referred to in Mr. Gregory's day-book and his evidence.

In short the question presents itself to me as a question of fact and the credibility of the plaintiff's witnesses. Mr. Owen, the broker, swears that he wrote the letter of acceptance under instructions from Mr. Hyam who "suggested to me the terms to write to Mr. Gregory." The first question is, therefore, whether Mr. Owen is to be believed on this and other points of the case. Nextly Mr. Cohen, who so far as I can see has no personal interest in the matter, swears that the defendant personally agreed to the terms and Mr. Gregory, the solicitor, swears that Mr. Hyam confirmed the acceptance of these terms to him and that he (Mr. Gregory) further showed the defendant the broker's letter. Again, the question is whether these witnesses are speaking the truth or not. It is quite impossible that all these witnesses should be mistaken as to all the matters on which reliance is laid on behalf of the plaintiff. Nor does Mr. Hyam suggest that, for he expressly in his evidence charges Mr. Cohen's evidence to be "absolutely false" and seems to make the same suggestion against the latter's solicitor and his day-books, which in cross-examination were alleged to have been characterised as false in another case. We are asked to disbelieve all this evidence on the strength of Mr. Hyam's denial. The learned Judge who heard the evidence has not done so, nor am I able to hold that he is in so holding wrong. The reasons which have led to that denial have, in my opinion, been correctly surmised by Mr. Justice Chitty.

Mr. Hyam, though himself a Hebrew, does not at first appear to have thought of or troubled himself about the consequences of his purchase of the Jewish Poor School and as regards the covenant against building a mosque and temple he speaks of it as "personal to him," and Mr. Cohen who was "prejudiced." Later on, as is stated in Exhibit E, Mr. E. M. D. Cohen, the manager of the Poor School, learning of the proposed sale, went to Mr. Hyam "and had a big row with him" and so much so that the latter wished to cancel the contract. As appears from Mr. Gregory's day-book of the 29th November, Mr. Hyam called on the former and said that Mr. E. M D. Cohen had raised obstacles in the way of his purchasing the property, "that he was quite disgusted with the whole affair", and that he would be prepared to cancel the contract. This is admitted. Correspondence then took place with Mr. Gubbay, the plaintiff, who, however, refused to cancel. On the 8th January, 1913 the Solicitor's day-book shows that Mr. Hyam again called and stated that he would rather not complete his purchase "as the whole of the Jewish community were against his doing so." Mr. Hyam in his evidence refers Mr. E. M. D. Cohen speaking of the "curses of the Jews being heaped on his head." Then on the 22nd January Mr. Hyam wrote to Mr. Gregory that he insisted on vacant possession for "I would have none of the trouble, worry and expense, not to mention the odium, for having to turn out a charitable and communal institution from premises in which it had made its home for 40 years." It appears to be this, and not the numerous objections taken later, why the defendant attempted to back out of his contract. It is true that he had previously taken an objection to the covenant running with the land but according to the evidence this objection was not persisted in. If it was, why did the negotiations hang on from

November 13th, 1912, till towards the close of January 1913? It is quite clear that the plaintiff's agent was insisting on the covenant and if, as is suggested now, the point was vital to the defendant and not given up by him, the negotiations would have come to a close. That they did not, supports the plaintiff's case that the objection though taken was given up. Nor is there any evidence in support of the suggestion now made, that Mr. Hyam would not have agreed to conclude the contract before he got possession of the school premises as his money would be lying idle. Mr. Hyam in his evidence does not take this objection. The real objection which he had was that stated to Mr. Gregory and the rest is an afterthought, with a view to avoid an agreement which I hold is binding on him.

In my opinion, the appellant has established no sufficient ground for reversing the decision of Mr. Justice Chitty that the plaintiff had proved and was entitled to have specific performance of the contract pleaded.

The appellant has not, in my opinion, established grounds for the reversal of the judgment and decree against him and I would, therefore, dismiss this appeal with costs.

Mookerjee, J.—This appeal is directed against a decree made by Mr. Justice Chitty for specific performance of a contract for sale of land in Calcutta. The substantial question in controversy between the litigants is, whether there was a concluded contract in respect whereof specific performance may be directed by the Court. The trial Court has pronounced in favour of the plaintiff. That decision has been assailed by the defendant, and we have been invited to hold that there was no completed contract between the parties as they contemplated a formal agreement which was never executed, and as they were not even of one mind with regard to material terms of the proposed agreement while the negotiations were in progress.

It is well settled that the fact that the parties intended to embody the terms of their contract in a formal written agreement, is strong evidence that the negotiations prior to the drawing up of such writing are merely preliminary and not understood or intended to be binding. If it is definitely expressed and understood that there is to be no contract until the formal writing is executed, there is plainly no binding agreement formed until this provision is complied with. It is also true that if all the terms of the agreement have not been settled and it is understood that these unsettled terms are to be determined by the formal contract, there is no binding obligation until the writing is executed. But if the oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing, a binding obligation is fixed on the parties, unless it is understood and intended that such contract shall not become operative until reduced to writing. These principles, which in their application give rise to questions of considerable nicety, are illustrated by decisions of the highest authority, to some of which reference may usefully be made here. In *Chinnock* v. *Marchioness of Ely* (7), the defendant's solicitors wrote to the plaintiff, naming the price for an estate about which they had been negotiating, the plaintiff wrote a letter in which he agreed to give the price named, and then added, "I shall be obliged if you will forward me the usual contract." In reply, the defendant's solicitors wrote, "we have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared and will be forwarded to you for approval in a few days." Lord Westbury, L. C., held that so far the parties were in treaty merely, and that without the execution of the draft mentioned, there was no contract concluded. In *Bonnewell* v. *Jenkins* (5), the defendant's agents offered certain premises for sale. The plaintiff wrote to the agents, making an offer of £800 for the estate. The agents wrote in reply as follows:—"We are instructed to accept your offer of £800 for these premises and have asked Mr. Jenkins' solicitor to prepare contract." The Lord Justices of Appeal held that there was a concluded contract. Thesiger, L. J., said:—"The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape, does not prevent the existence of a binding contract." In *Rossiter* v. *Miller* (8), there was much correspondence

(7) (1865) 4 De. G. J. & S. 638.
(8) (1877) 5 Ch. D. 648.

about a sale of certain lots of land, and the question arose whether the correspondence showed a completed contract without the formal draft which had been referred to in some of the letters. James, L. J., said:—"The reasonable view of the case is that the parties intended the signing of the formal contract to be a condition precedent." Coleridge, C. J., said:—"If a set of terms are agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here, a set of terms never was finally agreed to." Baggallay, L. J., said:—"The letters left the defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement." When the case of *Rossiter* v. *Miller* (4) was taken on appeal to the House of Lords, Lord Hatherley said:—"Although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement...between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties merely because that letter may say, we will have this agreement put into due form by a solicitor." Lord O'Hagan said:—"The correspondence gives no colour to the suggestion that the contract was not final, and was not considered to be final by all the parties to it, because the formal agreement embodying its already settled terms had not been furnished." Lord Blackburn said:—"The mere fact that the parties have expressly stipulated that there shall be afterwards a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." In the course of the same speech, Lord Blackburn further said:—"Parties often do enter into negotiation, meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if, on seeing the result in that shape, they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think the parties ought not to be held bound, till they have executed the formal agreement." In *Ridgway* v. *Wharton* (2), Lord Cranworth, L. C., said:—"If parties have entered into an agreement, they are not the less bound by that agreement because they say, we sent it to a solicitor to have it reduced into form; but when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form, affords to my mind generally cogent evidence that they do not intend to bind themselves till it is reduced into form. The circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." Lord Wensleydale said in the same case:—"These cases often occur in Courts of Law, and the question then always is, whether the parties mean to embody the contract, made by parol, in writing? If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agreement, nothing will bind them but that written agreement, and that quite independently of the Statute of Frauds applying to all agreements....If the parties agree finally to be bound by any terms and then, for the sake of preserving a memorial, having agreed to be bound by the original terms, they get a document drawn up, there is no doubt that they are bound by the original terms. An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say

that a man enters into an agreement till the terms of that agreement are settled, until those terms are settled, he is perfectly at liberty to retire from the bargain." In *Rummens* v. *Robins* (3), where an offer to sell a piece of land at a certain price was accepted, it was ruled that there was no completed contract as the letter by which the offer was made stated that there would be the usual clauses in a contract and some limitations as to the length of the title and other minor details. Knight Bruce, L. J., said :— "What are the usual clauses in a contract for the sale of land? They differ almost incessantly; they differ according to the state of the title, the conveniences, the fancies and the wishes of mankind, and the particular situation, conveniences and inconvenience belonging to the estate." To the same effect are the decisions in *Von Hatzfeldt Weldenburg* v. *Alexander* (1), *Lloyd* v. *Nowell* (6), *Jones* v. *Daniel* (9), *Winn* v. *Bull* (10), *Oxford* v. *Provand* (11), *Brien* v. *Swainson* (12), *Page* v. *Norfolk* (13), *Watson* v. *McAllum* (14) and *Clark* v. *Robinson* (15). It is needless to multiply authorities, but reference may be made to the following obervation of Lord Selborne in *Hussey* v. *Horne-Payne* (16) : —"A contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement." Lord Cairns, L. C., in the same case affirmed the important principle that where a Court has to find a contract in a correspondence, the whole of that which has passed between the parties must be taken into consideration ; a line cannot be drawn at one point of the negotiations, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations which may plainly show that terms of the intended agreement of great practical importance and regarded on both sides as such, then remained unsettled and were still the subject of negotiation between them.

From these expressions of judicial opinion, it is clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signature, then he will not be bound until the signatures are affixed. As was said in *Lyman* v. *Robinson* (17), the question in such cases always is, did the parties mean to contract by their correspondence or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound? The expression of this idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract ; if however it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed. To determine which view is entertained in any particular case, several circumstances may be helpful, as for example, whether the contract is of that class which are usually found to be in writing, whether it is of such a nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as a final

(9) (1894) 2 Ch. 332=63 L. J. Ch. 562.
(10) (1877) 7 Ch. 29=47 L. J. Ch. 139.
(11) (1868) 2 P. C. 135=16 E. R. 472.
(12) 1 L. R. Ir. 135.
(13) (1894) 70 L. T. 23.
(14) (1902) 87 L. T. 547.
(15) (1903) 51 W. R. 443.
(16) (1879) 4 A. C. 311.

(17) 14 Allen 242.

conclusion of the negotiations. If a written draft is proposed, suggested or referred to to during the negotiations, it is some evidence that the parties intended it to be final closing of the contract. Still, with the aid of all rules and expositions of principles, the solution of the question in concrete cases is often difficult, doubtful and sometimes unsatisfactory. A good illustration of the uncertainty inherent in the subject is afforded by the case of *Rossiter* v. *Miller* (4), where Coleridge, C. J., James, L. J., and Baggallay, L. J., were clear that there was no contract for want of a formal draft, while Cairns, L. C., Lord Hatherly, Lord Blackburn and Lord Gordon, no less able and eminent jurists, were confident in the contrary opinion. We come now to the consideration of the circumstances and correspondence in this case in the light of the principles explained.

The plaintiff Gubbay is the owner of premises, 8 and 7/1, Pollock Street and 1 Mansook Lane in Calcutta. The first of these is in the occupation of the Calcutta Jewish School as tenants at a monthly rent of Rs. 300 ; the others consist of a godown and a lower-roomed house. The plaintiff resides in London, and employed R. M. Cohen to sell these premises for Rs. 1,33,000. R. M. Cohen instructed a house-broker Owen to find a purchaser. Owen negotiated with the defendant Hyam, who was speculating in the purchase of landed property in Calcutta for the purpose of building operations. Owen appears to have intimated to Hyam that the sale would be subject to two conditions, *first*, that no temple or mosque would be built on the site, and *secondly*, that the possession of the Jewish School would not be disturbed for a year. Hyam agreed to these conditions as he interpreted them. On the 13th November, 1912, Owen wrote to Gregory, the solicitor of the plaintiff, and intimated to him that he had found a purchaser of the property who was willing to pay the price demanded and had agreed not to have a temple or mosque on the site, nor to cause any nuisance to the Jewish Synagogue Bethel and also not to ask the Jewish School to vacate for 12 months from the date of execution of the conveyance. The broker added that the time to execute and complete the conveyance would be six weeks from the date of the contract, subject to approval of titles, and requested that confirmation by the vendor might be obtained in the course of the day, if possible. It is not quite clear on the evidence whether, before the institution of this suit, defendant was aware that a letter in the terms mentioned had been written by the broker to the solicitor. Gregory asserts that he read it out to Hyam in the presence of Owen, but the latter has no recollection of the incident; Owen, at any rate, did not show the letter to Hyam, who denies all knowledge of it before suit. Gregory wrote for instructions to Cohen, who, on the day following, verbally confirmed the arrangement, subject to the payment of Rs. 5,000 by the purchaser as deposit money. This appears from the entries in the day-book of the solicitor under dates 13th and 14th November; entries in this day-book, it may be added, were made by a clerk in the office of the solicitor at the end of each day. Up to this stage, Owen does not appear to have disclosed the name of the intending purchaser, and Hyam had not met either Cohen or Gregory. On the 15th November, there were, according to the plaintiff, four interviews between various persons in connection with the proposed transaction: three of these are said to have taken place in the office of the solicitor and one in the office of Cohen. The first interview in point of time took place in the office of Gregory, where Owen, Hyam and Gregory are alleged to have been present, but Hyam cannot recollect that this interview did in fact take place. At the second interview, which took place in the office of Cohen, there are said to have been present Owen, Hyam, Cohen and Gareh, an assistant of Cohen employed to look after the properties of Gubbay. Owen and Hyam both deny that Gareh was present when the conversation took place; according to them, Gareh was sent for by Cohen, and merely asked to accompany Owen and Hyam to the office of Gregory ; this version seems probable. The third interview was in the office of Gregory, when Owen, Hyam, Gregory and Gareh were present. The fourth interview was in the office of Gregory, between the defendant, Gregory and Gareh, and the defendant, as may be expected, denies all knowledge thereof. What is alleged by the different witnesses to have taken place at these interviews appears from their depositions and the version of

Gregory may also be gathered from the entry in his day-book. There is a wide divergence between the witnesses in the accounts they profess to give of what was said by the different persons at these interviews; this is not surprising, as the witnesses were endeavouring to narrate conversations which had taken place nearly fifteen months before they deposed in Court. But this much is clear that Hyam paid a cheque for Rs. 1,001 as earnest money, which Cohen and Gareh had agreed to accept, and it was arranged that Gregory should prepare an agreement to be submitted to Hyam for approval. Gregory appears to have prepared the draft agreement on that very day and sent it to Cohen for approval. Cohen returned the draft approved on the 20th November and Gregory sent it on to Hyam at once for his approval. The evidence does not show that there was any communication between the parties between that date and the 28th December when the power-of-attorney of Gubbay was received from England. Gregory informed Hyam of the receipt of the power-of-attorney and requested the return of the draft agreement with his approval. Hyam does not appear to have replied to this letter till the 15th January, 1913, and in explanation of his silence, he now states that he was waiting to see whether the Jewish School would acquire the property, as the elders of the Jewish community had heard with evident concern that the property was about to change hands. On the 15th January, 1913, Hyam wrote to Gregory and stated his willingness to complete the purchase subject to three conditions, *first*, that the covenant not to build a temple or mosque would be personal to him and not a covenant running with the land; *secondly*, that the purchase would not be completed for the year during which the Jewish School were to be left in possession; and *thirdly*, that interest on the balance of purchase-money would be charged at six instead of nine per cent. as stated in the draft agreement. On the same day, before this letter was received by Gregory, he wrote to Hyam offering to send title-deeds for inspection and approval. On the 17th January, Gregory replied to the letter of Hyam dated the 15th January, accepted the proposal about the interest on the balance of purchase-money, but repudiated the suggestions about the personal covenant and the time for completion of purchase. On the 22nd January, Hyam wrote to Gregory, explained that he had understood the proposed covenant not to build and not to disturb the Jewish School in the sense indicated in his letter dated the 15th January, and stated that he must insist on vacant possession. On the same day, Gregory demanded return of the draft agreement. On the next day, Gregory wrote to Hyam again, and stated that as Hyam had declined to complete the purchase on the terms which, he alleged, had been agreed upon between the parties, there was no necessity to prolong the matter by further correspondence. The present suit for specific performance was thereafter instituted on the 8th February, 1913. In these circumstances, the question arises whether there was a completed agreement between the parties as alleged by the plaintiff.

In the third paragraph of the plaint, it is stated that the agreement was made on or about the 13th November, 1912 between the plaintiff through his representative and the defendant through his broker for the sale of the premises, subject to approval of title and on three special conditions. In the fourth paragraph, it is stated that on or about the 15th November, the defendant personally called, saw the solicitor for the plaintiff, confirmed the sale agreement, paid Rs. 1,001 as earnest money, and agreed that the solicitor should prepare a formal agreement in writing embodying the usual terms and conditions for sale and purchase, including the special conditions aforesaid. The case for the plaintiff, therefore, plainly is that there was a concluded agreement on the 13th November, which was confirmed two days later. A bold endeavour was made in this Court, after the conclusion of the arguments on both sides in this appeal, to obtain practically an amendment of the plaint, when the Counsel for plaintiff sought to introduce additional evidence to explain how the plaint had been originally drafted and how it had been transformed before it was filed in Court. The course attempted by the Counsel for plaintiff was so contrary to well recognised rules of procedure that his endeavour was wholly unsuccessful and the merits of the controversy must be adjudged on the plaint as it stands, which has been accepted throughout as the basis of the investigation by the trial Court and the discussions before

the Court of Appeal. When, then, was the agreement between the parties made? The Counsel for the plaintiff found this a very embarrassing question to answer. Four alternative hypotheses are possible; *first*, that the complete contract is embodied in the letter of the 13th November from Owen to Gregory; *secondly*, that the contract was verbally made on that date and that the letter embodies an imperfect narration thereof; *thirdly*, that the contract was made verbally in the course of the interviews on the 15th November; and *fourthly*, that there was never, in any stage, a completed agreement, as the parties intended that the agreement should be embodied in a written instrument which was drafted by the solicitor for the plaintiff but disapproved by the purchaser. The Counsel for the plaintiff found it difficult to make his choice among the first three alternatives, although the plaint is founded upon the first hypothesis or possibly a combination of the first and second. The Counsel for the defendant has pressed the Court to accept the fourth alternative. Mr. Justice Chitty, if I appreciate his judgment correctly, has held that there was no concluded agreement on the 13th November. In that view I concur without hesitation. The day-book of the solicitor, his evidence in Court, as also the deposition of Cohen, make it perfectly plain that there was no concluded agreement on the 13th November. Nothing had been settled at the time as to the amount of the earnest money and the date for completion; even the scope of restrictive covenants had not been settled, nor had the question of interest on the balance of purchase-money been even mooted. In these circumstances, one can well understand why, even on the 15th November, Gregory should state in his day-book that Owen and Hyam had called to confer with him and had stated that they would call on Cohen "to settle the terms with him." This is consistent with the statement of Cohen that when on the 15th November Hyam offered to give a personal covenant not to build a mosque or temple on the site, he told him, "these are my conditions, leave or take." There is, in my opinion, no escape from the position that no agreement was concluded between the parties on the 13th November and that they were on that date still in the stage of negotiation. The specific case made in the plaint, consequently, fails; indeed, the case as sought to be developed by the plaintiff in the course of the evidence is that the concluded agreement was made on the 15th November. It may be observed, in passing, that there is thus some force in the contention of the Counsel for defendant that the plaintiff should not be allowed to succeed on a case different from that set out in the plaint, and that the Court should refuse specific performance when there is substantial variance between pleading and proof: *Hawkins* v. *Maltby* (18), *Lindsay* v. *Lynch* (19) and *Mortimer* v. *Orchard* (20). But, assuming that the plaintiff is entitled to a decree for specific performance in the suit as framed, if he proves that the agreement was concluded on the 15th November, the question arises whether the plaintiff has established the third hypothesis previously mentioned? The answer depends principally upon an examination of the oral testimony as to what passed at the four interviews said to have taken place on that date. Nothing material happened at the first interview, of which the plaintiff has no recollection. As regards the other interviews, the witnesses are hopelessly in conflict with each other, specially as to what was said about the covenant not to build a temple or mosque on the site, and there is that absence of certainty which is fatal to a claim for specific performance: *Reynolds* v. *Waring* (21). Upon this point, the evidence of Gareh is not reliable, and it seems improbable that he should have been present throughout the interview between Cohen and Hyam: if he had been he could not have failed to notice that Hyam at the time wrote out and tendered a cheque for the earnest money. There is then a conflict between Cohen and Hyam. Cohen seeks to make out that Hyam at first pressed to make the covenant personal, but yielded ultimately, and agreed to make the covenant run with the land. Hyam denies this, and his version appears to me more probable in all the circumstances of the case. In any event, the parties agreed that Gregory would draw up a draft agreement for their approval. Hyam and Cohen both allege that each of them wanted this draft agreement to be drawn up. What then was their intention? Did they intend that the written instrument should be merely a memorial of an agreement already completed, or was it their intention that

(18) (1867) 3 Ch. App. 188.
(19) (1804) 2 Sch. & Lef. 1=9 R. R. 54.
(20) (1793) 2 Ves. 243=30 E. R. 615.
(21) (1831) Younge 346=34 R. R. 284.

the draft should bring out clearly the points which still required consideration and must be settled before the agreement could be deemed completed? To determine the true view of the situation, we must bear in mind that important points had not been settled up to that stage. For instance it had not been determined whether the purchaser should have vacant possession. There were leases yet to run in respect of the premises not occupied by the Jewish School. There is nothing to show that Hyam was aware of the fact of these leases, their terms and conditions, though it has been asserted that he must have made enquiries into the matter and made up his mind to accept the property subject to the leases. It is well settled that the purchaser is not bound to take subject to leases and is entitled to actual possession, unless there is an agreement to the contrary: *Coollier* v. *Jenkins* (22) and *Lineham* v. *Cotter* (23). Hyam would, therefore, be *prima facie* entitled to vacant possession, and this would also be essential for the building operations he had in view. The question of vacant possession, then, was obviously one of the points which would require to be settled by the written agreement. There was also the question of completion of the transaction. According to the letter of Owen to Gregory, dated the 13th November, the time to execute and complete the conveyance was six weeks from the date of the contract; this would make the written agreement essential for the conclusion of the bargain. But it is now sought to be proved by oral evidence that in the course of the interviews on the 15th November, the date for completion was fixed at the 6th January, 1913. The reason for this alleged variance is not satisfactorily made out, and the story is not convincing. There were evidently also other terms which might lead to differences between the parties, though they were compendiously described under the somewhat misleading category of "usual terms and conditions of the sale and purchase." What the conception of Cohen and his solicitor was about usual terms and conditions is amply made out by the draft agreement prepared later. These terms included provisions to the effect that the purchaser would take the property subject to existing tenancies, that the balance of purchase-money would be paid and the sale completed on a date different from that contained in the letter of Owen, that interest on the balance of the purchase-money would run at 9 per cent. per annum, that the sale would be effected on the authority of a special power-of-attorney from the vendor, that the costs incidental to the completion would he paid by the purchaser, that the properties would be sold subject to unspecified outgoings and easements, that there would be a right of rescission in the vendor, that there would be a covenant running with the land not to use the site for the purposes of a mosque or a temple and not to carry on any noisome or obnoxious trade or business calculated to cause nuisance or annoyance to the Jewish Synagogue, and finally, that time would be deemed of the essence of the contract. It is obvious that many, if not all, of these conditions could in no sense be regarded as usual terms and conditions for the sale of lands. In the words of Knight Bruce, L. J., they were dependant on the state of the title, the conveniences, the fancies and the wishes of the agent of the vendor. The inference seems to me to be legitimate that the parties intended the written draft to be the consummation of their negotiations which were to be treated aa concluded only upon the final execution of the written instrument. It is immaterial that the purchaser was prepared to modify the condition as to payment of interest before the negotiations were broken off or that he was prepared to waive one or other of the conditions named in the draft, during the trial of the suit. The vital point is that the fact that so many terms still remained undetermined, is a sure index that the contract had not yet been concluded. This view fits in with the mode in which Cohen dealt with the earnest deposit; Cohen admits that he did not cash the cheque, but returned it to Gregory to keep it with him until he heard further from Gubbay; this is consistent only with the hypothesis that Cohen at that stage believed that there was no completed agreement and that it was still open to Gubbay to transfer the property to the Jewish School if he so desired. The inference that there was no concluded agreement is strengthened when we remember that the parties were really not of one mind with reference to material elements of the transaction. Cohen thought that the property would be transferred subject to existing leases; Hyam

(22) (1831) Younge 295=34 R. R. 268.
(23) (1844) 7 Ir. Eq. Rep. 176.

was under the impression that he would have vacant possession. Cohen thought that there should be a covenant binding the land for all time to come to the effect that no temple or mosque would be built on the site nor any business carried on there which might prove a nuisance to the Jewish Synagogue. Hyam was under the impression that as he would build on the site at once, a personal covenant from him was all that was required. There was ample room for misunderstanding, as is clear from the looseness of the language used by the parties, and if there was ambiguity in any of the conditions of sale in restriction of the rights of the purchaser, the condition would be construed most strongly against the vendor: *Seaton* v. *Mapp* (24). Thus, even in the day-book of the solicitor, in the entry of the 13th November, we find the proposed covenant described in one place as "that the purchaser would not use the premises as a temple or mosque" (language appropriate to a personal covenant by the purchaser) and in another place as "that the premises must not be used as a mosque or temple" (words appropriate to indicate a covenant running with the land). After anxious consideration of all the circumstances of the case, I do not see any escape from the conclusion that there was no concluded contract either on the 13th or the 15th November, and that as the parties intended the execution of the draft to be the final step in their negotiations, there was no concluded agreement capable of specific performance. In my opinion, this appeal should be allowed, the decree for specific performance discharged and the suit dismissed with costs throughout.

V.B./R.K.

Appeal allowed.

(24) (1846) 2 Collyer 556=70 R. R. 324.

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IMAM, J.

Ram Churn Law—Plaintiff.

v.

Fatima Begum and *others*—Defendants.

Original Suit No. 422 of 1911, decided on 15th June, 1914.

(a) Mahomedan Law—*Waqf*—*Waqf* deed in favour of grandson and grand-daughter for some religious purpose—Held, it was valid and trustees have no power to alienate the property.

Where a Sunni Muhammadan conveyed certain properties of his to his grand-daughter and grandson under a deed of *waqf* for the "service of Imam Hossain and Hassan and for religious purposes":

Held, that the deed was valid and operative as a deed of *waqf* and that the trustee under the deed could not alienate the property by sale or mortgage. [P. 27, C. 2 & P. 28, C. 2.]

(b) Mahomedan Law—*Waqf*—Dedication for purpose of Muharram is valid.

A dedication of property for the observance of the Muharram constitutes the service of man and the good of humanity, though to a limited section, as it entails the feeding of the poor and distribution of alms to the needy. [P. 28, C. 1.]

B. Chakravarti, *J. E. Bagram* and *Ghatak*—for Plaintiff.

Rasul, *Zahir Ali* and *Ashraf Ali*—for Defendants.

Judgment.—In this suit the plaintiff seeks declaration of his title to and possession over a half share in premises No. 63, Dhurrumtola Street, in the town of Calcutta and a consequent partition of the said premises. The facts material to this case are shortly these: One Prince Syeduddin, a Muhammadan of the Sunni sect, owned and possessed several valuable properties in Calcutta, one amongst them being the premises of which a half share is in suit. He conveyed the said premises to his grand-daughter, Sahibzadi Fatima Begum, and his grandson, Faizuddin, under a deed of *waqf*, dated the 15th of July, 1864, the purpose of the dedication being stated in the deed to be "service of Imam Hossain and Hassan and for religious purposes" in the manner mentioned in the deed. The direction to Fatima Begum and Faizuddin and to their successors in the trust under the endowment is to apply the rents and profits of the premises, after defraying the cost of collection and repairs, "to the due and proper observance of the annual Muhammadan festival of the Mohurrum."

On the 20th September, 1907, Fatima Begum mortgaged a half share of the premises to the plaintiff for the consideration of Rs. 16,000 advanced to her by the latter. The debt not having been repaid, the plaintiff sued Fatima Begum on the mortgage and obtaining a mortgage-decree, purchased the half share of the premises at the execution sale. Before the sale Nural Huq, a son of Fatima Begum, addressed a letter through his Attorney to the Registrar of this Court requesting him to notify to the intending purchasers at the sale Nural Huq's protest that the property was a *waqf* and

that Fatima Begum had not a saleable interest. The plaintiff, having failed to secure possession of the half share purchased by him, has instituted this suit against Fatima Begum, Nurul Huq, her son, and the other defendants who are the descendants of Faizuddin. The suit, however, has been contested by the defendants other than Fatim Begum and Nurul Huq. The plaintiff's contention is that the deed of the 15th August, 1864, though on its face purporting to dedicate the property as *waqf* to religious uses, was in effect a deed of gift, the donor having adopted the device of a *waqf* in order to preserve the property for the benefit of the donees. The contesting defendants assert the validity of the alleged *waqf* and deny the plaintiff's title to a moiety of the premises. There is only one issue that is material to the decision of this case, namely, whether the deed of the 15th July, 1864 is valid and operative as a deed of *waqf*. For the plaintiff, two objections are taken to the deed: (1) that the object of the *waqf* is not valid under the Mahomedan Law, (2) that the conveyance was in reality a gift, dedicating the property "in the way of God" not being the intention of the donor. It is contended for the plaintiff that in the deed there is no indication that a general benefit was intended to be conferred on the Mahomedan public, and a reference has been made to the case of *Delroos Banoo Begum* v. *Ashgur Ally Khan* (1) in support of the proposition that the observance of the Mohurrum by a Mahomedan is a matter essentially of a private character. I cannot accede to the proposition in the general way it has been put. If the observance of the Mohurrum entails the feeding of the poor and distribution of alms to the needy, as it undoubtedly does, the dedication of the property to such use constitutes the service of man and the good of humanity, though to a limited section. Apart from the help to the poor and the needy, the commemoration of the historic events of Karbala, keeping alive, as it does, some of the best traditions of Islam, is to my mind as good a purpose as the followers of a faith can have. I see in it the visualization of the grandest examples of courage and endurance and all that is heroic in man from the pages of Islamic history, and I think it would be wrong to exclude it from objects valid for *waqf*. In the case of *Delroos Banoo Begum* v. *Ashgur Ally Khan* (1), the decision rested on considerations that do not affect the present case. The Imambara in that case was a part of the private dwelling house of the Begum; in the present instance there is not the maintenance of a Imambara attached to a private house that is the purpose of the *waqf*, but it is the keeping up of the Mohurrum as an institution with all its moral effect on the general Mahomedan public. The contention that Prince Syeduddin adopted the device of a *waqf* and in effect made a gift is not borne out by any of the circumstances of the case. The value of the premises, half of which is in suit, was admitted to be Rs. 1,43,000 only in 1864. The prince about that time made certain dispositions of his other properties of the value of more than Rs. 58,000 in favour of Fatima Begum and Faizuddin, and the deeds relating to these properties do not show that he adopted any device to preserve them for his grandchildren for all time. Had it been his intention to tie up the properties for their benefit by a device, we should have had a *waqf* of all the properties and not merely of the premises in suit. I hold that the deed of the 15th July, 1864 is valid and operative as a deed of *waqf*. In this view Fatima Begum had not a saleable interest in the property and the plaintiff by his purchase obtained no title to it. The suit is, therefore, dismissed with costs on scale No. 2, including reserved costs, if any.

V.B./R.K.

Suit dismissed.

(1) (1875) 15 B. L. R. 167 = 23 W. R. 453.

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CHITTY AND WALMSLEY, JJ.

Radhica Mohan Roy—Plaintiff—Appellant.

v.

Manmotha Nath Mitter and *others*—Defendants – Respondents.

Appeal No. 1566 of 1915, decided on 6th April, 1916, from the Original Decree of Addl. Dist. Judge, 24 Parganas, dated 1st April, 1915.

(a) Bengal Cess Act (9 of 1880), S. 47—Levy of cess—Procedure.

S. 47 of Bengal Cess Act lays down that the procedure for levy of cess shall follow that prescribed for realization of arrears of rent.

[P. 29, C. 2.]

(b) Bengal Cess Act (9 of 1880), S. 47—Landlord and tenant—Interest on arrears of rent—Contract between parties—Waiver of claim for

interest on arrears of rent does not absolve liability for interest on rent.

The provisions of S. 47 are not restricted or controlled by any special contract existing between landlord and tenant as to payment of interest on arrears of rent. Hence, the waiver of a claim by the landlord to demand interest on arrears of rent for a term in virtue of a contract with the tenant will not absolve liability for interest on the cess for that particular period at the rate mentioned in S. 47. [P. 29, C. 2.]

(c) Bengal Cess Act (9 of 1880), S. 47—"In the same manner and under the same penalties etc."—Meaning of.

The expression 'in the same manner and under the same penalties as if the same were arrears of rent due to him' in S. 47 of the Act has reference only to the procedure to be adopted and the consequences to follow in the recovery of rent, that is to say, the remedy would be by suit and the penalties would possibly be the sale of the holding or damages at 25 per cent. under S. 68 of the Bengal Tenancy Act.

[P. 29, C. 2.]

B. Chakravarti and *Jogendra Narain Mozumdar*—for Appellant.

S. R. Das and *Tarakeswar Pal Choudhury* for *Surendra Madhab Mullick* and *Jatindra Nath Sen*—for Respondents.

Judgment.—This is an appeal by the plaintiff and relates to a sum of Rs. 2-3-6 interest on the cess payable for the *Assin kist.* 1320. Defendants are tenure-holders under the plaintiff and their rent is payable in three *kists* under their *kabuliyat*, which is dated 1879 before the passing of the Bengal Tenancy Act or the Cess Act. In that *kabuliyat* they undertook to pay any cesses which might be imposed by Government. The cess for the *Assin kist* admittedly amounts to Rs. 424-7-6. It became due on 1st *Kartic* 1320 (18th October, 1913). On that day the Courts were closed. There had been correspondence between the parties, and there had also been previous trouble in the matter of the acceptance of the rent. Defendants accordingly informed the plaintiff that they would pay the amount into Court on the day the Court re-opened, which was 1st November, 1913 (15th *Kartic*, 1320). On that day the defendants made the deposit now in question, and later on the same day the plaintiff filed his suit for rent and cesses. The question is whether the deposit should have been made with interest at 12½ per cent. per annum for the few days which transpired between the cess becoming due and the deposit being made.

The *kabuliyat* provided in the case of rent that no interest should be chargeable on arrears of rent until the end of the Bengali year, the close of the month of *Cheyt*. It was argued for the defendants and has been found by the learned District Judge, that the same would apply to the cess and that no interest would be payable until the end of *Cheyt*, that is to say, the defendants might be in arrears with their payment of cesses without penalty until the end of the Bengali year. We do not think that this is the right reading of the provisions of the Bengal Cess Act. S. 42 (3) provides: "Every holder of a rent-paying tenure and every cultivating *raiyat* shall pay the amount of road cess and public works cess due by him in instalments in the proportion of the instalments of rent payable in respect of the tenure or holding of such tenure-holder or *raiyat*." That means that in this case, the cess would be paid in the same three instalments as the rent under the *kabuliyat*. S. 47 says: "Every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and a half per cent. per annum in the same manner and under the same penalties as if the same were arrears of rent due to him." For the defendants it is argued that this means that cesses are not to carry interest until the end of the year and that the provisions of S. 47 must be subject to the special contract between the parties made in the *kabuliyat*. That is not how we read the section. We think that "in the same manner and under the same penalties as if the same were arrears of rent due to him" has reference only to the procedure to be adopted and the consequences to follow in the recovery of rent; that is to say, the remedy would be by suit, and the penalties would be possibly the sale of the holding or damages at 25 per cent. under S. 68 of the Bengal Tenancy Act. The provisions of S. 47 of the Cess Act cannot be restricted in this way by reason of the contract between the parties in the matter of rent. We are of opinion that in this case the cesses became due at the dates of the three *kists* in which the rent was payable under the *kabuliyat* and that interest upon such cesses would be recoverable under S. 47 from the dates on which they fell due.

At the same time in this particular case it was found that there had been for several years past trouble between the parties in the matter of granting receipts

for the rent; and the Courts have held that the defendants were justified in making the deposit in Court. If this were so, they admittedly made the deposit on the first day possible after the cess had become due. They should not, therefore, in equity, be saddled with the further payment of interest because the Court was closed and so they were unable to make the deposit earlier.

We accordingly disagree with the opinion expressed by the learned District Judge with regard to the liability to pay interest under S. 47 but, in the circumstances of this case, we consider that, the deposit having been made as it was on the first possible day, no interest was payable. We accordingly dismiss the appeal but without costs.

V.B./R.K.

Appeal dismissed.

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FLETCHER AND TEUNON, JJ.

Brojendra Lall Dass—Decree-holder—Appellant.

v.

Lakshmi Narain Khanna and *another*—Judgment-debtors—Respondents.

Appeal No. 241 of 1913, decided on 9th March, 1915, from the Original Decree of Dist. Judge, Burdwan, dated 31st March, 1913.

Civil P. C. (5 of 1908), S. 145—Scope of S. 145—Surety's personal liability—Liability is enforceable to the extent to which he is personally liable.

S. 145 of the Code of Civil Procedure applies only where the surety has rendered himself personally liable for the decretal amount, and such liability can only be enforced against him to the extent to which he has become personally iable. [P. 30, C. 2.]

Ram Chandra Mazumdar and *Chandra Sekhar Banerjee*—for Appellant.

Baidya Nath Dutt and *Tarkeshwar Pal Chowdhury*—for Respondents.

Fletcher, J.—This is an appeal from a Judgment of the learned District Judge of Burdwan, dated the 31st March 1913, rejecting an application. The application that was before the learned Judge was an application under S. 145, Code of Civil Procedure, for the execution of a decree against an alleged surety, Lakshmi Narain Khanna, by the sale of two Government promissory notes which, it is said, he had deposited as security for the decretal amount. The judgment-debtor is the son-in-law of the said Lakshmi Narain Khanna and a warrant for his arrest having been issued, Lakshmi Narain Khanna appeared before the first Munsif of Burdwan and threw on the table before him, according to the evidence, two Government promissory notes for Rs. 1,000 each, which he wished the Court to take as security for the decretal amount which had been found due against his son-in-law and to stay further proceedings in execution pending an application to set aside the *ex parte* decree. The learned Munsif refused to take the two Government promissory notes which had been so thrown upon the table of his Court, on the ground that no formal application had been made. Then what happened seems to be somewhat in dispute. It is said that Babu Sailendra Nath Mukerjee, who was the Pleader engaged by the decree-holder, took the Government promissory notes and put them into his pocket. The story told by Babu Sailendra Nath Mukerjee is that there was an arrangement between him and Lakshmi Narain Khanna that he should hold the two Government promissory notes as security for the due fulfilment of the decree. The decretal amount not having been paid, the present application was lodged. The litigation seems to have occupied a considerable time. The point, however, may be dealt with very shortly. S. 145, Code of Civil Procedure, applies only where the surety has rendered himself personally liable for the decretal amount. That is obvious because the section states so. *Secondly*, it would not be convenient to sell property in a suit that was not brought for that purpose. It is quite clear, therefore, that S. 145 only applies where the surety has rendered himself personally liable for the decretal amount and such liability can only be enforced against him to the extent to which he has become personally liable. Accepting the story told by Babu Sailendra Nath Mukerjee, how does the case come under S. 145, Code of Civil Procedure? According to the story told by Babu Sailendra Nath the agreement was that "we", that is the decree-holders, would execute the decree and realize the decretal amount by sale of the promissory note. 'Note' is obviously a mistake for 'notes'. Therefore, first of all it is to be seen whether Lakshmi Narain Khanna was a surety for the purpose of this decree. Clearly he did not acknowledge his personal liability. There was no

contract of guarantee within the meaning of S. 126 of the Indian Contract Act. All that he had done was that he deposited by way of security, or collateral security; if we accept Sailendra Babu's evidence, those two promissory notes were to remain as security for the amount due under the decree. That does not come within S. 145. If the story is true, then Lakshmi Narain has only created an equitable charge upon the two Government promissory notes in favour of the decree-holder by depositing them in that manner to secure the amount due under the decree and, if that is the true arrangement, as Sailendra Babu says it is, then that liability can only be enforced in a regular suit for the purpose of enforcing the charge that has been created by the deposit of the two Government promissory notes. The persent proceedings have altogether been misconceived and I think the learned Judge of the Court below was quite right when he came to the conclusion that no contract, as provided by S. 145 of the Code of Civil Procedure, had been established and that no personal liability having been undertaken by Lakshmi Narain Khanna his liability as mortgagor of these two Government promissory notes could not be enforced in an application under S. 145, Code of Civil Procedure. I think the conclusion arrived at by the learned Judge of the Court below is right and the present appeal fails and must be dismissed with costs, two gold *mohurs*.

Teunon, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 31

CHATTERJEA AND NEWBOULD, JJ.

Abdul Karim Mean – Plaintiff—Appellant.

v.

Miajan Mianji and *another* — Defendants – Respondents.

Appeal No. 1229 of 1914, decided on 24th November 1915, from the Appellate Decree of Dist. Judge, Noakhali, dated 10th February, 1914.

(a) Bengal Tenancy Act (1885), S. 86—Surrender of interest by one of joint tenants—Deed stamped as conveyance and registered—Surrender may operate as valid transfer if not valid surrender.

Surrender by one of the joint tenants of his interest in a holding may operate as a valid transfer, if not as a valid surrender, to the landlord of his interest subsisting at the date of the surrender, when the deed of surrender is stamped as a conveyance and is registered.

[P. 31, C. 2.]

(b) Landlord and tenant—Surrender—Surrender of portion of joint holding—Whether valid.

Quære.—Whether surrender of a portion of joint holding by one of the tenants is valid.

[P. 31, C. 2.]

Dhirendra Lal Kastgir—for Appellant.

Ramdayal Dey—for Respondents.

Judgment.—The plaintiff-appellant sued to recover possession of the land in dispute, on the ground that it had been surrendered to him by defendant No. 4, who was one of the tenants who held the tenure which comprised the land in suit. The Court of first instance gave the plaintiff a decree, but on appeal that decree has been reversed, and the main ground upon which the lower Appellate Court has dismissed the suit is that the tenancy of Ahmed Ali and his co-sharers being a joint one there could not be a valid surrender of a portion of the holding by one of the tenants. It appears, however, that there was division of the land of the holding as between themselves and that division was binding upon them, although not binding upon the landlord. Ahmad Ali used to pay his share of the rent to the landlord and being unable to pay the arrears of rent, he executed a registered document in favour of the landlord transfering his interest in the holding. Even if there could be no valid surrender, we think the deed operated to pass his interest in the holding in favour of the landlord. It was stamped as a conveyance and registered and in substance it was a conveyance of the interest of Ahmad Ali. We think, therefore, that if Ahmad Ali had any subsisting interest in the holding at the date of the deed, it was transferred to the plaintiff landlord. It is contended, however on behalf of the respondents that the lower Appellate Court has not come to any finding as to whether Ahmad Ali had any subsisting interest at the date of the deed. The case will, therefore, go back to that Court in order that it may find on the evidence whether Ahmad Ali had any subsisting right to the land in suit at the date when he executed the document. If the question is decided in the affirmative the decree of the Munsif will be confirmed, if in the negative the suit will be dismissed.

The costs of this appeal will abide the result.

V.B./R.K.

Case remanded.

A. I. R. 1916 Calcutta 32

CHATTERJEA AND GREAVES, JJ.

Krishna Kanta Ghose — Plaintiff — Appellant.

v.

Jadu Kasya and *others* — Defendants — Respondents.

Second Appeal No. 3718 of 1913, decided on 5th February, 1915, against the decision of Sub-Judge, Dinajpur, dated 3rd July, 1913.

Bengal Tenancy Act (8 of 1885), S. 182—Lessee of homestead land from *raiyat* holding other lands as *raiyat* from another landlord—Held S. 182 applied to tenancy of homestead land though defendant was under-*raiyat* of that land.

The plaintiff was a *raiyat* and his holding consisted partly of agricultural and partly of homestead land. He let out the homestead portion to the defendants who held certain lands as *raiyats* not under the same landlord but under a different landlord and in a different village contiguous to the homestead land :

Held, that S. 182 of the Bengal Tenancy Act applied, and that the provisions of the Act applicable to a *raiyat* would regulate the incidents of the tenancy of the homestead, though the defendants had only the interest of an under *raiyat* with respect to it.

Mohini Mohan Chakravarti and *Abinash Chandra Chakravarti*—for Appellant.

Bimal Chandra Das Gupta—for Respondents.

Judgment.—This appeal arises out of a suit for ejectment of the defendants, who are the respondents in this appeal, from a piece of homestead land, under S. 49, clause (*b*), of the Bengal Tenancy Act. The plaintiff-appellant is a *raiyat* and his holding consists partly of agricultural and partly of homestead land. He let out the homestead portion to the defendants. Although that portion is not agricultural, the incidents of the sub-lease held by the defendants would be governed by the provisions of the Bengal Tenancy Act having regard to the nature of the original tenancy of the plaintiff, and not by the Transfer of Property Act [see *Babu Ram Roy* v. *Mohendra Nath Samanta*, (1) and *Abdul Karim* v. *Abdul Rahman* (2)]. The defendants are, therefore, under-*raiyats* and are *prima facie* liable to be ejected under S. 49, clause (*b*) of the Bengal Tenancy Act. The defendants, however, hold lands as a *raiyat*, not under the same landlord, but under a different landlord and in a different village contiguous to his homstead land. The Courts below have held that as the defendants are settled *raiyats* of the adjoining village, they have acquired a right of occupancy in the homestead under the provisions of Ss. 20 and 182 of the Bengal Tenancy Act. The plaintiff has appealed to this Court.

Now S. 182 of the Bengal Tenancy Act lays down that "when a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage and subject to such local custom or usage, by the provisions of this Act applicable to land held by a *raiyat*."

The meaning of the section is not clear. It is not easy to see why the rights of persons who have nothing to do with the holding held by the *raiyat* should be affected in the manner mentioned in the section when a *raiyat* takes from such a person a settlement of his homestead, the incidents of which would, but for the section, be governed by the provisions of the Transfer of Property Act, subject to custom or local usage. The Bengal Tenancy Act regulates the incidents of the holding of a *raiyat*, and does not appear to concern itself with relations which the *raiyat* may enter into with regard to properties other than the holding with other persons who have nothing to do with the holding. The words used in the section, however, are "a *raiyat*," without any qualification, and it has been held in several cases that the provisions of the section are applicable to the homestead of a person who is a *raiyat*, although he does not hold his homestead under the same landlord under whom he holds his holding, and although his holding may be in a village different from that in which his homestead is situate, see *Kripa Nath Chakrabutty* v. *Sheikh Anu* (3) and *Harihar Chattopadhyaya* v. *Dinu Bera* (4), and we are bound by these decisions. See also *Protab Chandra Das* v. *Biseswar Pramanick* (5) (judgment of Geidt, J.) and *Golam Mowla* v. *Abdool Sowar Mondul* (6).

The learned Vakil for the respondent sought to distinguish the above cases on the ground that in those cases the incidents of the tenancy of the homestead would,

(1) (1904) 8 C. W. N. 454.
(2) (1912) 13 I. C. 364.
(3) (1906) 10 C. W. N. 944.
(4) (1911) 10 I. C. 139.
(5) (1905) 9 C. W. N. 416.
(6) (1911) 9 I. C. 922.

but for S. 182, have been regulated by the provisions of the Transfer of Property Act, and as the intention of the Legislature is that the incidents of the homestead as well as that of the holding should be regulated by the Bengal Tenancy Act, S. 182 is applicable to those cases, but that in the present case, as the defendant holds his homestead as an under-*raiyat*, the provisions of the Bengal Tenancy Act are applicable to the homestead, apart from S. 182. And as the Bengal Tenancy Act provides for ejectment of an under-*raiyat*, those provisions should be made applicable, and that great anomalies would arise if the under-*raiyati* of the homestead were to be governed by the provisions of the Act applicable to land held by a *raiyat*.

S. 182, however, provides not merely that the provisions of the Bengal Tenancy Act would apply, but that the provisions of the Act applicable to land held by a *raiyat* shall regulate the incidents of the tenancy of the homestead. If S. 182 applies, as we must hold that it does, having regard to the decisions cited above, the provisions of the Bengal Tenancy Act applicable to a *raiyat* would regulate the incidents of the tenancy of the homestead, though the defendant has only the interest of an under-*raiyat* with respect to it. It may lead to some anomalous results, but so would the application of S. 182 to the cases cited above, and the present case cannot be distinguished on principle from the said cases.

It is unnecessary to consider in the present case whether the defendants have acquired a right of occupancy in the homestead, because if the incidents of the homestead are to be regulated by the provisions of the Act applicable to land held even by a non-occupancy *raiyat*, the defendants cannot be ejected under the provisions of S. 49.

The appeal is dismissed, but we make no order as to costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 33

HOLMWOOD AND IMAM, JJ.

Nanda Lal Roy and *others*—Plaintiffs—Appellants.

v.

Abdul Aziz and *another*—Defendants—Respondents.

1916 Cal.—5 & 6

Appeal No. 29 of 1914, decided on 28th February, 1916, from Original Decree of Sub-Judge, 1st Court, 24 Parganas, dated 17th September, 1913.

(a) Transfer of Property Act (4 of 1882), S. 78—Scope of—Fraud — Misrepresentation—Gross-negligence.

S. 78 of the Transfer of Property Act makes 'fraud,' 'misrepresentation' and 'gross negligence' quite disjunctive. One cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. It is not necessary that there should be fraud or something indicating fraud to bring a case within S. 78 of the Transfer of Property Act. 2 C. W. N. 750, expl. *Oliver* v. *Hinton*, (1899) 2 Ch. 264, ref. to.

[P. 36, C. 2 & P. 39, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 78—Neglect to secure title-deed by mortgagee from mortgagor not gross-negligence.

A mere omission on the part of a mortgagee to take and keep the title-deeds is not of itself 'gross negligence' which will secure a postponement of his mortgage to that of another subsequent mortgagee who secures them. The existence of gross negligence must be determined according to the circumstances of each case. Case-law discussed. [P. 40, C. 1.]

(c) Registration—Registration not notice in Bengal.

Registration by itself does not amount to notice in Bengal. [P. 40, C. 1.]

(d) Transfer of Property Act (4 of 1882), S. 3—Unsuccessful search at registration office—Presumption.

The making of a search at the registration office for a document does not amount to, nor raise an irrebuttable presumption of notice in every case under S. 3 of the Transfer of Property Act. It is open to a party making the search to show why he should not be saddled with notice. 16 I. C. 618, expl.

[P. 36, C. 2 & P. 41, C. 2.]

(e) Transfer of Property Act (4 of 1882), S. 78—Vendor neglecting to recover title-deeds from vendee—Gross and culpable negligence—Illustrated.

Neglect to recover the title-deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster, and whereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title-deeds is gross and culpable negligence, and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale-deed and a suggestion that the purchase-money was required in cash and paid accordingly.

[P. 41, C. 1 & 2.]

Rash Behary Ghose, *Dwarka Nath Chakravarty*, *Sarat Chandra Basak* and *Heramba Chandra Guha*—for Appellants.

Pugh, *A. K. Fazlul Haq* and *Haradhan Chatterjee*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff to recover

Rs. 15,000 odd on a mortgage from defendant No. 1 by postponing an alleged mortgage executed by defendant No. 1 in favour of defendant No. 2, on the ground that the defendant No. 2, the original owner of the property, had, by surrendering the title-deeds into the hands of defendant No. 1 and suppressing the mortgage to himself and making it appear that the sale to defendant No. 1 was for a cash consideration of Rs. 32,000, afforded defendant No. 1 opportunity to raise money on the property by second mortgage as unencumbered.

The defence was that the defendant No. 1 had not really borrowed Rs. 13,000 from the plaintiff and the plaintiff was fully aware of the circumstances under which defendant No. 1 purchased and mortgaged the property in suit. Search having been made in the Registration Office the plaintiff was saddled with notice of defendant No. 2's mortgage and the possession of defendant No. 2 was also notice to the plaintiff. The defendant No. 1 did not appear, but the Court below passed an *ex parte* decree against him and dismissed the plaintiff's suit as against defendant No. 2, on the ground that the plaintiff was not deceived by any of the recitals in the deed of sale, that he had constructive notice of the mortgage to defendant No. 2, and that there was no gross negligence on the part of defendant No. 2.

Against this decision the plaintiff has appealed and the points raised for our consideration are

1. Whether the defendant's mortgage is a real or fictitious one?

2. Whether the defendant is not estopped against the plaintiff by reason of certain recitals in the conveyance under which defendant No. 2 sold the property to defendant No. 1.

3. Whether defendant No. 2 has not forfeited his priority by reason of his having parted with the title-deeds and having been otherwise guilty of gross negligence so as to enable the defendant No. 1 to raise money on mortgage from the plaintiff on the footing that the property was unencumbered. It appears that the defendant No. 2, one Abdul Aziz, an old man of 70, purchased the property which consists of 12 *cottahs*, 8 *chittaks*, 10 square feet of land with an old masonry dwelling house upon it, known as 81, Karrya Road, Ballygunge, in the suburbs of Calcutta, but included within the Calcutta Corporation but not in the original jurisdiction of the High Court, for Rs. 22,000, in the year 1909.

The property not letting at its proper value the defendant No. 2 and his son, who is a *mohurrir* in the office of the Superintendent of Political Pensions and was formerly Assistant Record Keeper in the Alipore Magistrate's Office, determined to sell it and, according to the sale-deed, to invest the cash proceeds in other property. The defendant No. 1 made an offer of Rs. 32,000 which was evidently accepted by the defendant No. 2 on the footing that the whole was going to be paid in cash, though the evidence on defendant No. 2's side is so conflicting as to what actually happened that it is difficult to assert anything in connection with it except that the defendant No. 2, his son and the Pleaders and other witnesses cannot all be speaking the truth.

The evidence of the Pleader Jiban Hari Mukerjee, who seems to have impressed the learned Subordinate Judge very much by his ingenuous ignorance of law and his far too frank admissions of careless neglect of his client's interests, is of extreme importance in elucidating the very extraordinary transaction whereby the property passed under a registered *kabala* with full consideration to the defendant No. 1 and yet is said to have remained in the possession of defendant No. 2 under a mortgage, which purported to be a simple mortgage, for the major portion of the consideration to be paid in instalments.

This mortgage is sought to be varied by evidence of an oral agreement changing it into a mortgage with possession. The arrangement alleged by defendant No. 2's son is that the defendant No. 1 agreed to pay Rs. 2,500 in cash but being unable to do so he paid Rs. 500 only in cash, and gave a hand-note for Rs. 2,000. This hand-note is not forthcoming and the evidence regarding it is conflicting, some saying it was in favour of the defendant No. 2's son, others saying it was in favour of the father.

For the balance Rs. 29,500 the defendant No. 1 executed a mortgage on the house to be paid in instalments without interest. Both the sale-deed and the mortgage were registered on the same day, *viz*, 26th July, 1911, and they purport both to have been executed on the 25th July, but it is a curious and wholly unexplained fact that the sale-deed was executed in the Pleader Jiban Hari's office while the mortgage-deed was executed in the office which the

defendant No. 2's son calls his office but is really a part of the Magistrate's office at Alipur, where the assembling of the parties for such a transaction must have been wholly unauthorised, and carried out in secret without the knowledge of Golam Mohiuddin's superiors.

The Pleader Jiban Hari now wants to make out that he drafted the passage about the consideration for the sale with full knowledge of the intended mortgage and that he did not mention the mortgage because the mortgagee was to remain in possession.

The passage in the sale-deed is marked (L) and purports to be the statement of Abdul Aziz. It runs as follows :—

"I, being in need of money for purchasing other property, notified to sell the said property, and you having agreed to purchase the same for a consideration of Rs. 32,000 (thirty-two thousand rupees), I sell the said property for the said consideration to-day and by executing this deed in your favour, I do hereby agree and promise that all rights, ownership and interest and title which I had in the property sold, do hereby devolve upon you from to-day.

This he says was drafted on the vendor's son's instructions. As regards the other curious recital contrary to the facts marked (B) in the mortgage-deed, he says that it does not represent the arrangement come to between the parties immediately before the execution of the conveyance and the mortgage-deed. In the mortgage-bond the defendant No. 1 mortgagor says: "The property is retained in my possession and I shall pay the Collectorate rent and the Municipal taxes, etc., from my own pocket. I deliver to you the documents mentioned in the schedule (*ga*) below as your title-deeds." Yet the Pleader says the arrangement immediately before the execution of the mortgage and the conveyance was totally different and that the deeds, as they stand were drafted "2 or 3 or 4 or 5 days before the execution of the deeds." Nevertheless he did not think it necessary to make any alteration in the drafts which, whatever their legal effect may be, are certainly calculated to deceive a subsequent mortgagee or purchaser, and were fraud pleaded in a case like this, the recitals would certainly be evidence for what they were worth of possible fraud and would, therefore, perhaps come within the purview of the judgment of Jenkins. J. in *Mohindra Chandra Nandy* v. *Troylockho Nath Burat* (1), which we shall refer to more at length later on when we come to consider the question of "gross negligence." Now turning to the evidence of the old man Abdul Aziz it appears that he executed the sale-deed in Jiban Hari Pleader's office, which is near his dwelling-house in Kidderpur. He was not present when the mortgage-deed was executed and he says the hand-note for Rs. 2,000 was in favour of his son. All he got himself was Rs. 500 in cash and the registration receipt for the sale-deed to protect his mortgage. This, he would have us believe, he handed over to defendant No. 1 because he wanted to make a copy of the sale-deed.

The loan was for 5 or 7 days, yet the defendant No. 1 was allowed to retain it for two months and eventually use it to raise money from the plaintiff, though a copy could easily have been obtained from the Registration Office at very small expense.

But still more curious is the making over of a large number of documents, most of them in no sense documents of title, to the defendant No. 1 by the vendor's son independently of his father on the same flimsy excuse. One may well ask what could he want with promissory on-demand notes and plans of proposed privies and other works never executed, when he was not to have a day's possession of the premises. The learned Counsel for the respondent suggests that the defendant No. 2 and his son are endeavouring to place their case too high when they say defendant No. 1 never had possession and that what probably happened was that they resumed possession when defendant No. 1 ran away in Septembar 1911 leaving the mortgage instalments unpaid.

But if that is so, not only is the evidence of the defendant No. 2 and his son but that of the candid Pleaders on whom the Subordinate Judge relies rooted and grounded in falsehood.

The absence of defendant No. 2 at the execution of the mortgage, its secret preparation as an after-thought in a Government office, where such a transaction had no business to be carried out, the hand-note of Rs. 2,000 to the son, though the documents recite that it was in favour of the father, convince us that the father, having accepted Rs. 3,500 as earnest money and agreed to the remainder being paid in instalments on

(1) (1898) 2 C. W. N. 750.

simple mortgage-bond without interest, was put off with a present payment of Rs. 500 and left the rest of the negotiation to the son. The whole transaction is full of suspicion and supported and excused by evidence much of which is deliberately false.

Not only is the mortgage with possession incapable of proof in face of the registered document, but the evidence which is given in respect of it by the four most important witnesses in the case, the defendant No. 2, his son and his two Pleaders, is, as we have seen, false and has almost to be admitted to be false by learned Counsel in order to get over the legal difficulty of the passing of the property by sale on full consideration.

He at first endeavoured to defend the retention of possession on the ground that the non-payment of Rs. 2,500 in cash justified it.

But the acceptance of a hand-note and a mortgage as full consideration negatives this and there was no attempt to support the Pleader—witness's absurd contention that possession could be retained until the instalments of the mortgage were paid.

This is one point on which we find the defendant No. 2's case is damaged by false evidence, and another portion of the evidence which we cannot believe is the story of the receipt and documents being made over *bona fide* to the defendant No. 1 for taking copies. It is perfectly clear that the title-deeds were handed over to him on execution of deed of sale and that in the subsequent mortgage-deed executed in another place he undertook to return them.

By the most extraordinary carelessness the old man Abdul Aziz and his incompetent Pleader, Jiban Hari Mukerjee, left the receipt for the deed of sale in defendant No. 1's hands with all its false and misleading recitals and the question before us is, whether the plaintiff cannot plead an equity to postpone the mortgage to defendant No. 2 which appears to contain perfectly true recitals, though the defendant No. 2 and his witnesses have taken so much trouble to prove that they are false.

Now we have to ask ourselves what is the meaning of all this apparently foolish misrepresentation and false statement. Ordinarily speaking such conduct would be evidence of fraud, but it is difficult to see what object was sought to be attained by this chicanery and the plaintiff is of course unable to assign any fraud because he knows nothing of the secret dealings of the parties. But if there was no fraud, it is difficult to avoid the inference that there was gross and culpable negligence in fact, and the sorry figure cut by the Pleader who is responsible for the documents in the witness-box lends colour to that inference.

On the facts proved by the evidence for the plaintiff we have no hesitation in holding with the learned Subordinate Judge that the plaintiff was induced to advance Rs. 13,000 to defendant No. 1, on the strength of the clear title in his hand and that the evidence, which is amply sufficient, is not recalled nor even impugned in cross-examination. The learned Counsel for respondent urges that both plaintiff and defendant No. 2 have been defrauded by defendant No. 1 and that defendant No. 2 stands to suffer a very heavy loss compared with plaintiff, who took a speculative mortgage with the usual risks. The defendant No. 2's mortgage on the other hand was consideration for a valuable property belonging to the defendant No. 2 and he should not be the loser by postponement. This is on the merits. But on the law he strenuously argues that there is no defect in form in the conveyance and that although the recitals in it might be a very good answer to a claim for an unpaid vendor's lien it is no answer to a valid registered mortgage. It is argued upon the authority of *Mohindra Chandra Nandy* v. *Troylockho Nath Burat* (1), to which we have already referred, that there must be fraud or something indicating fraud to bring the case within S. 78 of the Transfer of Property Act, and that although the rule in this Court, contrary to the view held by the Bombay Court, is that registration is not *per se* notice, yet where there has been a search there is an irrebuttable presumption that the searcher had notice of the registered encumbrance, and for this the case of *Akhoy Kumari Debi* v. *Kanai Lal Kundu* (2) is relied on and the reasons given by Dart in his work on Conveyancing. A mere case of carelessness, such as it is argued occurred here, would not have such serious consequences particularly in a country where transfers of property are registered. Moreover the plaintiff, it is alleged, has been guilty of neglect of the plainest duties of a mortgagee in not demanding requisitions of title though he acted through a Calcutta Solicitor, in not searching the Municipal Registers and not seeking for an explanation

(2) (1912) 16 I. C. 618.

of the absence of any express words showing payment of the consideration-money in cash. It was also argued, as we have seen, that possession is notice.

To deal with the last point first. It is now conceded that the right to possession passed absolutely to the vendee defendant No. 1 by the sale-deed and the plaintiff has, in our opinion, clearly established that when he went to see the property with a view to advancing money on it, the defendant No. 1 had the key, opened the door and showed the premises. From enquiries on the spot he came to know that defendant No. 1 was in possession. The Subordinate Judge is in error in saying that the plaintiff's deposition shows that he merely paid a flying visit for a few minutes and asked a casual neighbour who the owner was and came away. The whole incident of the broker and the key which is unrebutted is ignored by the learned Subordinate Judge. The defendant No. 2 has to admit through his learned Counsel that he must have given possession to defendant No. 1, otherwise he would be guilty of defrauding the defendant No. 1 by taking money and a hand-note from him and a mortgage wholly without consideration. That being so, the gravest suspicion falls on the whole transaction, the recitals in the documents being false, the evidence being false and the transaction being carried out in a most irregular manner at a most irregular place. The Pleader, who is the first witness to the mortgage-deed, admits that he was not present at its execution but signed it later on the admission of the executant. Whether the son of defendant No. 2 wanted to defraud defendant No. 1 and get Rs. 2,500 for an inoperative sale is not now before us inasmuch as defendant No. 1 does not appear, but it is quite clear that at that time defendant No. 1 had no fraudulent intention. His fraud, if any, had its first inception when his pecuniary difficulties pressed hard upon him and the negligence of the defendant No. 2 and his son gave him the opportunity of deceiving the plaintiff. Upon this it has been argued for the respondent that you cannot get damages for an innocent misrepresentation of Common Law.

Derry v. *Peek* (3) and in Appeal Cases (1902) in the House of Lords, Lord Halsbury is referred to as saying that it is not your duty to guard against criminal offences. It cannot be negligence to trust a person who can only take advantage of you by means of a crime. Now the answer to the first part of this contention is that no one is seeking damages for misrepresentation or negligence in this case. A purely equitable relief is sought for here and we have nothing to do with any question of damages or compensation at Common Law. In the same way the criminal act of fraud, if any, was oommitted by defendant No. 1 against the plaintiff and not against defendant No. 2. Defendant No. 2 was never deceived. He accepted full consideration for his sale and thought he had made a very good bargain. The agreement, if it had any force at all, would tell in the plaintiff's favour, but there is nothing to show that defendant No. 1 is amenable to the criminal law.

He did not seek out the plaintiff or make any representation to him. The plaintiff saw the property, satisfied himself as to the possession, placed the verification of title in the hands of his Solicitor and there is nothing on the record to show that the defendant No. 1 ever brought himself within the clutches of the Indian Penal Code. Indeed the respondent had to admit that it would be very difficult on the facts to get a verdict of cheating against the defendant No. 1. The defendant No. 2 had secured what he considered a very good bargain for his rather unprofitable property.

The Pleader Jiban Hari Mookerjee says both parties were his clients and the whole transaction was open and above board.

The son of defendant No. 2 says he had known the defendant No. 1 two years before the sale. He had a new *arat* of jute business at Munshigunj in Decca District and a press and tailoring business in Calcutta. Nothing was then known of his being unable to meet his liabilities. Defendant No. 2 does not seem to have any very good case for sympathy on the merits. That being so, let us examine the legal contentions which arise on the Subordinate Judge's judgment.

We are not called upon to hold that the prior mortgage of defendant No. 2 was not a *bona fide* and valid document, though the circumstances under which it was created and the conduct of the defendant No. 2's son in respect of it are suspicious. The

(3) (1889) 14 App. Cas. 337=58 L. J. Ch. 864.

first important question of law is as to notice.

S. 3 of the Transfer of Property Act says: "A person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it." Now it is perfectly certain that plaintiff did not actually know that the property was mortgaged to within a few rupees of its nominal and greatly enhanced value. If he had, he would have been mad to have advanced Rs. 13,000 on it, and being a money-lender, it is not likely that he was blind to his own interest. The only way in which this substantial finding of ignorance in fact could be met would be by arguing, as it was argued, that defendant No. 1 was colluding with the plaintiff to rob defendant No. 2. There is no evidence of this and the Subordinate Judge has rightly held that there is strong evidence to the contrary, though he is wrong in saying that there are "a host of independent witnesses" on the point. If in fact, therefore, he did not know, how is he to be saddled with constructive notice? In two ways, it is argued: (1), because he had a search made in the Registration Office and (2) on the authority of *Akhoy Kumari Debi* v. *Kanai Lal Kundu* (2) that resulted in a presumption of notice of the contents of the book and it could not be rebutted by the mere statement that though a search was made it was unsuccessful.

We may accede to this narrow proposition, although it is based upon a fresh decision by which, as the learned Judges point out, we are not bound. But it was sought by learned Counsel to erect this very simple presumption by way of caution against fraud into an irrebuttable presumption that the person who had a search made had notice in every case and if we held otherwise, we were strongly pressed to refer the decision cited to the Full Bench. In support of this contention we are referred to Dart on Vendors and Purchasers, page 901, where he says: "The duty of the solicitor being to inform the client of the defect in the title, the presumption that he has done so is *sui juris et de jure*, the danger of perjury being too great to admit of the presumption being rebutted by evidence." The passage in Dart has, of course, no reference to this question of registration and search. That is, as the Judges in *Akhoy Kumari Debi* v. *Kanai Lal Kundu* (2) point out, a simple presumption of fact depending on the circumstances of the particular case.

We cannot put it better than in the words of the learned Judges themselves as to what was then before them. They say: "all that is said here is that a search was made but without success. There is no attempt made to explain this want of success, no suggestion of any special or qualifying circumstance which would justify the treatment of the case as exceptional."

Here very much the reverse is the case.

All the title-deeds were before the attorney and he approved the title. He was then instructed to search for encumbrances and he employed the managing clerk of the defendant No. 1's attorney to make the search. To excuse his conduct he states that this Haripado Chatterji is joint clerk of himself and Romesh Babu, the attorney of the common adversary defendant No. 1. He admits that the plaintiffs ordinarily search through their own man, Upendra Talukdar. He being away the attorney was asked to make the search and he admits that the responsibility for the search is theoretically his. When he employs the principal clerk of the attorney of defendant No. 1 who was strongly interested to see that the encumbrance was not discovered, we can easily see how easily this Haripado, who identified defendant No. 1 at the Registration Office on the 21st September, 1911 and then described himself as managing clerk of Romesh Chandra Bose solicitor and nothing else, could be induced by defendant No. 1 to suppress the encumbrances. No man of the plaintiff was allowed to go with him though plaintiff has numerous men looking after his legal business.

The evidence in regard to this search is so suspicious that we are inclined to agree with the Subordinate Judge that it is extremely doubtful whether there was any search at all. At any rate no presumption can be raised against the plaintiff on a search made by the managing clerk of the enemy's attorney.

Secondly, it is said S. 3 does not apply on account of gross negligence. Now this is alleged to be the non-inspection of the Municipal papers, not obtaining requisitions of title, and not requiring

an explanation of the absence of express words as to the passing of consideration.

The Municipal papers have been printed by the respondent in a separate book and they show nothing except that Abdul Aziz was registered in 1909, and that he paid the taxes for the quarter before the sale and for the quarter after, the house being admittedly unoccupied by a tenant. The sale was in the middle of the quarter and so was the disappearance of defendant No. 1. So that nothing would appear from the Corporation papers and the plaintiff was entitled to assume from the recent transfer from Abdul Aziz to defendant No. 1 in July that the name of Abdul Aziz would still appear during the quarter July to September, and the registers could show him nothing.

Requisitions of title are a matter for the solicitor. He was instructed to get them but informed the plaintiff on the title-deeds that the title was good.

The sale-deed was registered at a *mofussil* office and there is no practice outside Calcutta, and certainly no such presumption as that laid down by Dart for England, that the solicitor has made requisitions of title. In this case the fact remains that he had not, though he appears to have made the plaintiff believe that he had and appears to have been acting hand in glove with defendant No. 1's attorney to the detriment of the plaintiff. Neither the Attorneys for the plaintiff nor the Pleaders for the defendant No. 2 come very well out of the witness-box. As regards the recitals in the sale-deed, whatever may be the strict legal effect of such statements in England we are unable to hold that the plaintiff, was put upon any enquiry as to the consideration by reason of the absence of a memorandum of consideration. It may have been the duty of the Attorney Sailendra to look into the matter, but his evidence shows he clearly neglected his duty and makes light of his responsibility. We are of opinion that the words used were deliberately inserted to give the impression that the consideration had passed in cash, and we derive from Jiban Hari Pleader's evidence that that was the original suggestion made to satisfy the old man, defendant No. 2.

It does not, therefore, matter whether the words according to strict English rules of conveyancing can bear that interpretation in law. The question is that the parties on the one side intended to be believed and the parties on the other side were induced to believe by the words used. On the whole, therefore, we are able to find as a fact that plaintiff had no notice of the defendant No. 2's prior encumbrance, that steps were taken throughout the transaction to keep that knowledge from the plaintiff and that he cannot be saddled with constructive notice by reason of any search improperly made by a man from the enemy's camp, or any omission to make enquiries which were infructuous in the one case, and on the face of the documents superfluous in the other.

The other main point of law on which the Subordinate Judge has held against the plaintiff is with regard to the application of S. 78 of the Transfer of Property Act.

That section says: "Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

Now there is no allegation or proof of any actual fraud on the part of the prior mortgagee in this case, though his conduct is such as it is difficult to explain without assuming that he had the intention to deceive some one to his own or his son's advantage; nor is there any misrepresentation as defined in S. 18 of the Contract Act, though there is a great deal of misrepresentation in the ordinary sense of the word. The question remains, is there any "gross negligence"?

Now whatever definition we take of the three ingredients in the section, fraud, misrepresentation or gross negligence, it is clear that the section makes them disjunctive and that one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. The ruling, therefore, in *Monindra Chandra Nandy* v. *Troylockho Nath Burat* (1), which was the decision of a single Judge sitting on the original side of this Court and governed more directly by English practice and precedents than we are, cannot be taken to mean as was argued by learned Counsel that there is no postponement apart from fraud. The learned Judge, who after holding the

offices of Chief Justice of Bombay and of this Court has now been elevated to the Judicial Committee of the Privy Council, cannot be for one moment suspected of ignoring the clear distinction drawn by S. 78 of the Transfer of Property Act between the three different kinds of conduct which raise an equity against the prior mortgagee.

It is true that the English cases which he cites not as authorities but guides do seem to import the idea of fraud, if only by implication, although the distinction drawn by S. 78 is clearly made by Lord Justice Turner in *Hunt* v. *Elmes* (4), but all that is derived from those cases is that the mere omission on the part of the mortgagee to take and keep the title-deeds is not of itself gross negligence and the existence of gross negligence must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration here is the fact that in this country a universal system of registration exists. Some remarks follow which might be construed to imply that the learned Judge was re-importing the Bombay view that registration is notice, into this Court which has always held to the contrary, but a careful consideration of the facts of that case precludes us from ascribing any such intention to the learned Judge.

The Maharani in that case was not the owner of the property. She took a mortgage after every proper enquiry and perfected her title by registration, and the only fact against her was that her agent followed the *mofussil* practice and returned the title-deeds to the mortgagor. Here the owner while transferring his property by sale took particular pains to conceal what the real consideration was, and though he registered the mortgage, deliberately suppressed all reference to it in any statement of consideration and for some unknown reason made it appear on the face of the title-deeds that there was no such mortgage. His handing over the sale-deed to defendant No. 1 enabling him to give an equitable mortgage to plaintiff in Calcutta, where the parties reside, and actually inducing him to advance Rs. 13,000 on the strength of the title-deeds was, therefore, we think, gross negligence, and we are fortified in this opinion by the more recent case of *Walker* v. *Linon* (5), where Parker, J., as he then was, points out that the fraud mentioned in the older cases cannot have been such conduct as would justify a Judge or Jury in finding there had been actual fraud but such conduct as would justify the Court of Chancery in concluding that there had been fraud in some artificial sense, just as in the case now before us it is difficult to account for the duplicity and concealment of the defendant and his son on any other supposition than that they intended to defraud some one, but at the same time on what we can only gather from the record there is nothing to show what that fraud was or in fact whether there was any fraud in the ordinary sense of the word at all.

Then, again, as regards the ridiculous story that the defendant No. 1 was allowed to keep the title-deeds for two months to make copies which he had undertaken to make in five or seven days, Parker, J., says : "There are subsequent cases which suggest that at any rate in cases of postponement based on no enquiry having been made for the deeds, fraud is not necessary. It is for example clear from the case of *Oliver* v. *Hinton* (6) that a purchaser obtaining the legal estate but making no enquiry for the title-deeds or making enquiry and failing to take reasonable means to verify the truth of the excuse made for not producing them or handing them over, is, though perfectly honest, guilty of such negligence as to make it inequitable for him to rely on his legal estate so as to deprive a prior incumbrancer of his priority."

On that case Lindley, M. R., said that to deprive a purchaser for value without notice of a prior encumbrance of the benefit of the legal estate it is not essential that he should be guilty of fraud.

Here defendant No. 2 or his son, who did all his business for him, had full notice by default in the instalments that defendant No. 1 was not a good paymaster and might be unscrupulous in raising money for his needs, yet he persistently neglected to secure the return of the title-deeds being put off with

(4) (1860) 2 De G. F. & J. 578=30 L. J. Ch. 255.

(5) (1907) 2 Ch. D. 104=76 L. J. Ch. 500.
(6) (1899) 2 Ch. 264=68 L. J. Ch. 583.

flimsy excuses that copies could not be taken owing to certain deaths in the family. As the learned author of Fisher on Mortgages points out at page 573, S. 1122 of his work, Parker, J., reviews elaborately all the previous authorities and displaces the more narrow view previously held as to the necessity for fraud being shown.

The only other English cases we need refer to is that of *Colyer* v. *Finch* (7), where Campbell, L. J., says. "Cases are very different to deal with when you are obliged to use vituperative epithets (like 'gross') in order to enunciate a principle. What constitutes 'gross negligence' is always excessively difficult either to define, or, by way of anticipation, to illustrate, but it appears to me at present, that none of the cases, as far as I am aware of them, would entirely justify what was done by the mortgagee here" and under the circumstances of that case he held, as we must hold under the circumstances of this case, that the leaving of the title-deeds with defendant No. 1 was an act of gross negligence. Of Indian cases we have had cited before us and considered the cases of *Madras Building Company* v. *Rowlandson* (8), the same case in appeal *Shan Maun Mull* v. *Madras Building Company* (9), *Rangasami Naikan* v. *Annamalai Mudali* (10), and *Manji Karimbhai* v. *Hoorbai* (11) (the last on the question of notice). All these cases deal with the points on the particular facts and circumstances of those cases, but what we derive from them is that, in a case like the present, neglect to recover the title-deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster, and whereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title-deeds, is gross and culpable negligence, and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale-deed and a suggestion that the purchase-money was required in cash and paid accordingly.

Further that registration not being in itself notice, a search made by the clerk of the solicitor to the vendee who has an interest to conceal the encumbrance from the second mortgagee cannot saddle the latter with notice of the encumbrance. These two findings dispose of the appeal, which must accordingly be decreed so far as the lower Court refused to give relief to the plaintiffs against defendant No. 2 and it will be declared that the mortgage-bond of the 25th July, 1911 to the defendant No. 2 be postponed to that of the 21st September, 1911 in favour of the plaintiffs, that this day six months be fixed as the time for the defendants Nos. 1 and 2 jointly or severally to pay to the plaintiff the sum due on his mortgage with interest and costs and if the amount is not paid on that date, the mortgaged property will be sold.

V.B./R.K.

Appeal decreed in part.

(7) (1854-56) 5 H. L. Cas. 905=26 L. J. Ch. 65.

(8) (1890) 13 Mad. 383.

(9) (1892) 15 Mad. 268.

(10) (1908) 31 Mad. 7.

(11) (1911) 35 Bom. 342=8 I. C. 752.

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SHARFUDDIN AND TEUNON, JJ.

Deputy Superintendent and *Remembrancer of Legal Affairs, Bengal*—Petitioner.

v.

Kailash Chandra Ghose and *another*—Opposite Party.

Criminal Revn. No. 1034 of 1914, decided on 19th August 1914, against the order of Sessn. Judge, Pabna, dated 12th May, 1914.

Criminal P. C. (5 of 1898), Ss. 235 and 239—Wrongful confinement of several persons for one purpose of extorting money—Whole affair was one transaction and the offences can be joined in one trial.

Where certain persons were wrongfully confined by the accused, who fined them and realized a certain portion of the fines and released them on their promising to pay the balance of the fine three days later, but on their failing to do so they were again confined, maltreated and shoe-beaten and were turned out by the accused on being informed that the Police were coming:

Held, that as they were all confined for one purpose *i.e.*, for the purpose of extorting money, the whole thing was one transaction and that there was no misjoinder of charges if they were tried together. [P. 42, C. 2.]

Orr—for Petitioner.

J. N. Roy, *Harish Chandra Ray* and *Jogendra Narayan Majumdar* — for Opposite Party.

Judgment.—This Rule was issued calling upon the District Magistrate of Pabna and the opposite party to show cause why the order of the Sessions Judge, dated the 12th May, 1914, should not be set aside and the appeal re-heard on the merits. It appears that the two accused, Kailash Chandra Ghosh and Ram Chandra Ghosh, were tried under Ss. 347, 352 and 352 coupled with S. 114, Indian Penal Code, convicted and sentenced. On appeal to the Sessions Judge an order was passed for a re-trial on the ground of misjoinder. In order to understand how the question of misjoinder arose certain facts have to be stated. There is a gentlemen named Rai Banamali Ray Bahadur who is a *zemindar*. There is a prevailing practice in his estate that no one is allowed to slaughter cows. It appears that on the *Bakr-id* day just before the occurrence, some Muhammadans slaughtered a cow. This was considered to be a breach of the practice of the estate and on the 14th December four men, *viz.*, Mazamali Shekh, Abdul Shekh, Umedali Shekh and Manik Shekh, were called to the *cutchery* by two *peadas*, and the Inspector and *naib* fined Abdul Shekh Rs. 200, and Mazamali, Umedali and Manik Shekh Rs. 50 each on account of the slaughter of the cow. It appears that on the 14th December only Rs. 9 was realised and the rest was promised to be paid three days later. On the 17th, the rest of the money was not paid, with the result that on the 18th, these persons were again brought to the *cutchery* and again confined. On coming to know that information had been sent to the Police on behalf of the confined persons, they were beaten with shoe and ejected from the place in which they had been wrongfully confined. The question is, whether the occurrence that took place on the 14th December and the one that took place on the 18th December were two distinct transactions or form parts of one and the same transaction. It appears that the object was to punish certain Muhammadans of this estate for a breach of the rule of that estate in slaughtering a cow. It was with that object these four persons were brought to the *cutchery*, fined and a portion of the fines realised. These men had promised to pay the balance of the fines three days later, but they failed to do so, and so on the 18th, it is said, wrongful confinement again took place. There can be no doubt, therefore, that what took place on the 18th was in continuation of what took place on the 14th. It has been contended that on the 18th, another offence was committed, namely, offences under Ss. 352 and 352 read with S. 114, Indian Penal Code. Therefore, this was a distinct offence and not in the same transaction, even supposing that the wrongful confinement on both days constituted one transaction. We think that the shoe-beating and other maltreatment of the Muhammadans when released from their wrongful confinement were the concluding portions of the same transaction. They were all confined for one purpose, namely, for the purpose of extorting money, and on being informed that the Police were coming, these men were shoe-beaten and turned out. The whole thing was really one transaction. The learned Sessions Judge was, however, of opinion that these were two distinct transactions. Therefore, he held that there was a misjoinder and ordered a re-trial. The view that we have taken on the facts stated above is supported by the cases of *Emperor* v. *Datto Hanmant Shahapurkar* (1) and *Emperor* v. *Sherufalli Allibhoy* (2). Our attention has also been directed to two cases by Mr. Roy, the Counsel for the accused, *viz.*, the cases of *Budhai Sheikh* v. *Emperor* (3) and *Gul Mahomed Sircar* v. *Cheharu Mandal* (4). The facts of the two last-mentioned cases are different from the facts of the present case.

We, therefore, make the present Rule absolute, set aside the order of the learned Sessions Judge, dated the 12th May, 1914, and direct that the appeal be now heard on the merits.

Let this record be sent down at once.

V.B./R.K.

Rule made absolute.

(1) (1906) 30 Bom. 49.
(2) (1903) 27 Bom. 135.
(3) (1906) 33 Cal. 292.
(4) (1906) 10 C. W. N. 53.

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JENKINS, C. J. AND CHATTERJEE, J.

Peary Mohun Mukerjee and *another*—Defendants—Appellants.

v.

Chandra Sekhar Sarkar and *others*—Plaintiff and Defendants—Respondents.

Appeals Nos. 358 and 370 of 1909, decided on 1st June, 1915, from the Original Decrees of Offg. Sub-Judge, 2nd Court, Hooghly, dated 17th May, 1909.

(a) Civil P. C. (5 of 1908), O. 2, R. 2—Suit by usufructuary mortgagee for possession does not bar subsequent suit for redemption.

A mortgagee sued for the recovery of possession of immovable properties mortgaged by right of *ijara* and obtained a decree for possession, with a right to be in possession thereof so long as the moneys for which the properties were mortgaged were not re-paid out of the income arising from them :

Held, that this was a decree in a suit or ejectment and that a separate suit for redemption was not barred by S. 244 of the Civil Procedure Code, 1882. [P. 43, C. 2 & P. 44, C. 1.]

(b) Civil P. C. (5 of 1908), S. 97—(Per *Coxe, J.*)—Appeal against preliminary decree—Final decree passed pending appeal—Appeal can be heard.

Per *Coxe, J.*—An appeal filed against a preliminary decree can be heard although since the appeal was lodged, a final decree has been passed which has not been appealed against.

[P. 46, C. 2.]

Mohendra Nath Roy, Haradhan Chatterjee, Kumar Sankar Roy, Bagram and *Har Prasad Chatterjee*—for Appellants.

Jyoti Prasad Sarbadhikari, Kurunamoy Bose and *Panchanan Ghose*—for Respondents.

Facts of the case appear from the following dissenting judgments :—

Roy, J.—I regret that I cannot agree. I am of opinion that a suit for redemption lies and that the plaintiff is entitled to relief on the plaint as framed by him. We should treat the plaint as one for redemption on the original mortgage of June 1867. There was a suit No. 3 of 1876 by the mortgagees and the decree runs thus :—"For recovery of possession by right of *ijara* of a four-anna share of the rights to the *mahals, Mauza* Gopalnagar Majher Char, *Mauza* Nuta Char, Bhowanipur and village Bhowanipur together with Rajbagan, *Mauza* Gournagar, *Mauza* Mukundanagar, Gangaprasadpur with Char Paradanga, *Mauza* Jhewchur, Hat Bahadurgunge and others, comprised in revenue-free Taraf Balagiri and revenue-paying Char Balagari, being the mortgaged properties, in *Pargana* Banpur in the Districts of Hooghly and Nadia valued at Rs. 11,671-8-0.

"This suit has this day been heard by Mr. H. T. Prinsep, the Judge, in the presence of the Pleaders of both the parties, arguments have been made thereon and all the evidence, oral and documentary, produced by the plaintiff and the defendant have been heard and properly considered, whereupon this Court orders that the plaintiff's claims be decreed and that the plaintiff do get possession of the four-anna share of the *mahals* claimed by right of *ijara* and be in possession thereof so long as the moneys for which the said *mahals* were mortgaged are not re-paid out of the income arising from them and further that the plaintiff do get from the defendant Rasikananda the costs of this suit with interest thereon at the rate of 6 per cent. per annum from this day until realisation and also that interest shall run on the principal money at the rate of 9 per cent. per annum under the conditions contained in the mortgage-bond. Finis." That was clearly a decree in a suit for ejectment and it does not stand in the way of a suit for redemption. The Full Bench decision of the Bombay High Court in the case of *Ravji Shivram Joshi* v. *Kaluram* (1) and the case of *Har Prasad* v. *Sheo Ram* (2) are in point and the judgment of the Judicial Committee in *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (3) lends support to them. Their Lordships of the Judicial Committee observe :—"It was contended by the learned Counsel for the appellant that he could fall back upon the right to redeem the mortgage of 1806, the law of limitation, by Act XIV of 1859, providing that there should be sixty years for a suit to redeem from the time of the mortgage, or from the date of an acknowledgment made in writing signed by the mortgagee, or some person claiming under him. The difficulty in the way of the appellant availing himself of that is, that it is a different case from that which he made in the plaint. In the plaint he did not seek to redeem the mortgage of 1806, or allege that there had been an

(1) (1875) 12 B. H. C. R. 160.
(2) (1898) 20 All. 506.
(3) (1886) 10 Bom. 461 = 13 I. A. 66 (P. C.).

acknowledgment of that mortgage. If he had, the question whether there had been such an acknowledgment made, would have been enquired into in the lower Courts; but he treated the decree as the mortgage which he sought to redeem; and supposing that he could, according to the decision of the High Court of Madras, which was cited, fall back upon the mortgage of 1806, in their Lordships' opinion he is not at liberty to do that upon the present appeal." The case in the Madras High Court is *Periandi* v. *Angappa* (4). The Bombay High Court distinguishes the case of *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (3), and follows their Full Bench decision above referred to in the later case of *Narasimha Manohar* v. *Bhagvantrav* (5). Thus it appears to me there is a clear authority now that in a case like the present a separate suit for redemption would lie.

The mortgagees executed the decree in Suit No. 3 of 1876, and through Court obtained possession of the mortgaged property in 1879. The execution case was No. 70 of 1879. Syamadhone Mukherjee, the plaintiff's predecessor-in-interest, put in an application in the above-mentioned execution case for accounts, etc. This was on the 20th November, 1884. Mr. Gillon, the District Judge of Hooghly, pronounced judgment on this application on the 31st August, 1885. There was an objection that the application was not maintainable under S. 244, Civil Procedure Code. Mr. Gillon decided that it was. It appears to me that the decision need not hamper us. What we have to decide now is whether the present suit is barred by S. 244 of the Code or not. I hold that it is not. The plaintiff had made an application similar to that of Syamadhone. This was on the 19th September, 1903. The matter came up in appeal to this Court and the learned Vakil who opposed the application conceded that a separate suit for redemption would lie. The learned Judges who heard the case (Rampini and Woodroffe, JJ.) were also inclined to adopt that view.

The next question is whether the suit as framed is to be treated as a suit for redemption of the original mortgage of 1867. The plaint runs thus:—

"1. That the property described in the schedule below and situate partly within the ambits of *Thana* Balagarh, District Hooghly, and partly within the District of Nadia belonged to one Rasikananda Gossain of Balagarh, District Hoogly, and that the said Rasikananda Gossain, deceased, mortgaged the said property to James Henry Howard and others of Bandel, District Hooghly, who sued the said mortgagor in the Court of the District Judge of Hooghly (Suit No. 3 of 1876) and on the 3rd April, 1877 got a decree directing them to remain in possession of the mortgaged properties till their debt be satisfied out of the usufruct of the same.

"12. That on appeal by the plaintiff to the Hon'ble High Court (Appeal No. 236 of 1905), their Lordships have held that the proper remedy of the plaintiff lies in instituting a regular redemption suit and that the plaintiff is entitled to redeem the mortgaged properties.

"13. That the plaintiff believed that on proper account being taken from the decree-holders their entire dues will be found to have been already satisfied out of the usufruct of the mortgaged properties as provided for by the decree, and that the plaintiff will be entitled to recover from them the amount that they may have received in excess of their real dues.

"14. That the original amount of debt, *i.e.*, the principal money for which the properties were mortgaged was Rs. 8,000 and so the plaintiff values his claim at Rs. 8,000 and prays for the redemption of the mortgaged properties.

"16. That the cause of action accrued from the date of disposal of High Court Appeal No. 236 of 1905, *i.e.*, the 29th May, 1906, at Balagarh, District Hooghly, Sadar Sub-division, and other places.

"17. (*a*) That the plaintiff be entitled to redeem the mortgaged properties.

"(*b*) That the decree-holders defendants Nos. 1 to 6 be directed to submit a true and up-to-date account as to the decretal debt and its realisation, on the basis of the directions contained in the

(4) (1884) 7 Mad. 423.

(5) (1890) 14 Bom. 327.

order of the District Judge of Hooghly dated the 31st August, 1885" and

"(*i*) That such further relief may be given to the plaintiff as the Court may consider just and reasonable."

It appears to me that we should treat this plaint as one to redeem the mortgage of 1867. It cannot properly be treated otherwise. It cannot be said that the plaint is for redeeming a mortgage created by the decree in Suit No. 3 of 1876, because that decree did not create any such thing and the mortgage was not merged in that decree. Then the judgment of Mr. Gillon on the application of Syamadhone on the several points raised before him and relating to some of the conditions of the mortgage, if binding at all in this suit, is to be regarded as interpreting the mortgage and nothing more. The plaintiff has made a prayer that in the taking of accounts the directions in that judgment. may be followed. That does not mean that he bases his right to redemption on that judgment. "And an action for redemption will not certainly be dismissed at the present day, simply because the plaintiff insists upon his right to redeem upon certain definite terms which he is not entitled to claim:" Ghose's Mortgage, 4th Edition, page 613.

The form of the plaint in a redemption suit has been set forth in No. 46, Appendix A, First Schedule to the present Code of Civil Procedure and it does not differ in substance to that in the old Code. All the particulars required to be stated are to be found in the plaint or in the proceedings referred in it. I do not think that the plaint is materially faulty in that respect and "forms are no longer regarded as sacrosanct."

I agree with my learned colleague's decision on the other points raised in the suit and if my opinion on the points on which we differ prevails, I will have no difficulty in agreeing to the orders he may propose to make. The contents of the mortgage-deed may be ordered to be put in evidence and if the defendants wish to set up any new points of defence either in the taking of accounts or on the merits they may be allowed an opportunity to do it.

Coxe, J.—These two appeals have been heard at the same time and as there is no real difference between them they can be governed by one judgment. The appellant in Appeal No. 358 is a lessee under the appellants in Appeal No. 370. He is defendant No. 7 while they are the defendants Nos. 1 to 6.

The defendants Nos. 1 to 6 are the successors-in-interest of certain persons named Howards, in whose favour one Rasikananda Gossain executed some kind of mortgage of the property in suit in 1867. In 1877 a decree was passed in favour of the Howards against Rasikananda and his descendants as well as against six other persons, who appear to have purchased the whole or a part of Rasikananda's remaining rights in the property. According to a subsequent decision of the District Judge they had bought the whole of Rasikananda's interest. In this decree of 1877, the claim is described as being one for recovery of possession of the mortgaged property valued at Rs. 11,671-8-0. The decree was "that the plaintiffs do get possession of the four annas share of the *mahals* claimed by right of *ijara* and be in possession thereof so long as the moneys for which the same *mahals* were mortgaged are not re-paid out of the income." Thereafter on the 22nd September, 1881, the Howards executed a *dar-ijara* in favour of the defendant No. 7, under which he was to pay a gross rent of Rs. 2,434 and a net rent of Rs. 1,250. It was calculated that by this means the sum due would be paid to the Howards in 41 years. It must be remembered that in addition to the mortgage-money they were entitled to interest at 9 per cent. and also to a considerable sum for costs and interest thereon. A passage in the *dar-ijara* runs: "Then (1328) our dues from the Goswamis in respect of our claim in the suit, the decree wherein was executed in the said case No. 70, together with costs and interest will in accordance with a separate account made with the consent of the Goswamis have been fully paid. After payment of the said moneys the Goswamis shall get *khas* possession of the properties covered by the *dar-ijara* on the expiry of the term of this *dar-ijara*." On the same day the execution of the decree was struck off "on an application by the decree-holders intimating that arrangements have been made between the decree-holders and the debtors for the liquidation of the judgment-debt."

The plaintiff in this case is the successor-in-interest of three of the parties to the decree of 1877 who had purchased the interest of Rasikananda. They were not parties to this *dar-ijara*.

Then in the same execution case the predecessor-in-interest of the plaintiff on the 20th November, 1884 put in a petition in which he asked for an account, and for redemption.

The request runs as follows :—" It now being necessary to know whether the decretal money due to the decree-holders has been paid or not and if not wholly paid how much has been paid and how much still remains due to bring the mortgaged property to my own possession by redeeming the same on payment to the decree-holders of the money, if any, which still remains due, it is prayed by this petition that an order may be made directing the said decree-holders to file in Court an account showing the moneys they have realised since they took possession of the mortgaged property by executing the decree and if the decretal money has not as yet been fully paid to let the Court know how much still remains due by rendering a proper account thereof." The mortgagees were willing to restore the property on payment of what was due. Rasikananda's heirs objected that the matter could not be dealt with under S. 244 of the then Code, but this contention was overruled. The Court held that the objections to the application failed and that the petitioner could redeem the whole of the mortgaged property. The mortgagees had filed accounts and the then petitioner objected to them. The objections were upheld in part and the decree-holders were directed to file a revised account. This was put in and the petitioner was allowed a fortnight to examine it and file his objections, if any. This was in September 1885. Nothing further was done, however, for 18 years. Then in September 1903, an application was put in by the present plaintiff. It is not on the record but its effect may be gathered from the orders passed on it. The District Judge held that the order declaring Shamadhon's right to redeem was an order under S. 244 and had the effect of a decree, which ought to have been executed within three years from the date of its confirmation by the High Court in March 1886. He accordingly held that the application was barred by limitation and this view was upheld by the High Court on appeal. The plaintiff now brings this suit which he desires us to regard as a suit for redemption. It has been decreed and the defendants appeal.

A preliminary objection is raised that the appeal does not lie, because the decree appealed against is a preliminary decree and since the appeal was lodged a final decree has been passed which has not been appealed against. This point, however, must be decided against the respondents on the strength of the decision in *Nistarinee Dabee* v. *Rai Mohun Biswas* (6).

I need not waste many words on the plea of the defendants that the suit must fail because the other parties to the decree of 1877 have not been made parties to the suit. This is pressed by the defendant No. 7, who contends that his lease cannot be avoided unless all the persons entitled to the equity of redemption come in. These persons have never been heard of in connection with these proceedings for more than 30 years. Under O. 1, R. 13, all objections have to be taken before the issues, but here they are mentioned neither in the written statements nor in the issues. I think, therefore, that this objection fails.

The principal objection, however, is that the suit is not maintainable at all by reason of S. 244, now S. 47, of the Civil Procedure Code, and this contention is, in my opinion, well founded. The case seems to be governed by that of *Hari Ravji Chiplunhar* v. *Shapurji Hormasji Shet* (3). In that case there was a decree stating the amount due and directing that until the defendants cleared off the money, the plaintiffs should use and enjoy the field and on the day the defendants should pay the plaintiff should compute the sum due, receive the amount, and restore the land. And the operation of the decree was, in the opinion of their Lordships, that the mortgagors might at any time tender what was due and require restoration of the land. Now the original decree in this case in itself may perhaps amount to a decree such as was passed in the case cited above. But it is supplemented by and must be read with the order of 1885 which is clear enough,

(6) (1913) 20 I. C. 576.

and the two together amount, in my opinion, to a decree to just the effect of the decree in the case cited, namely, a decree giving possession of the land to the mortgagees till they were paid off and then restoring it to the mortgagors. And the decision of their Lordships amounts to this, that you cannot sue to enforce such a decree by suit but must enforce it by execution. The plaint in this suit is not really a plaint for redemption of the mortgage. The mortgage is not produced and the learned Pleader for the respondents says frankly that nobody knows anything about it. The learned Counsel for the appellants has given us certain figures which would go to show that if the mortgage had to be redeemed according to what were probably its terms, the result would be altogether different from that arrived at in this suit. I need not discuss these figures, because it seems clear to me that this is not really a suit to redeem the original mortgage but a suit to enforce the decree of 1885. The cause of action is given as the decision of this Court that the application for execution was barred by limitation and it is prayed "that the decree-holders defendants Nos. 1 to 6 be directed to submit a true and up-to-date account as to the decretal debt and its realisation, on the basis of the directions contained in the order of the District Judge, Hooghly, dated the 31st August, 1885." To use the words of their Lordships: "The suit as framed, then, apparently treats this decree as in the nature of a fresh mortgage and as regulating the rights of the parties from that time." The question whether a mortgage should be enforced by suit or execution depends on the question whether or not the mortgage has merged in a decree. This is explained in *Narasinha Manohar* v. *Bhagvantrav* (5), in which it was held that *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (3) did not apply because "the decree did not create any new relationship or get the original mortgage merged in it. Such a decree is no bar to a redemption suit based on the morgage." In that case the suit was based on the mortgage-bond itself and it was held that the suit was not barred. But here the decision in 1885 given at the plaintiff's instance, that he could redeem the property under S. 244, shows that the mortgage was finally merged in the decree and that a new relation between the parties was created.

No doubt it has been held in *Ravji Shivram Joshi* v. *Kaluram* (1) and *Har Prasad* v. *Sheo Ram* (2) that when a mortgagee gets a decree for possession until he is paid off, the mortgagor cannot apply to redeem him in execution. But that is not the question before us in this case, and also in these cases it was not held that the mortgagor could bring a suit for redemption, not on the terms of the mortgage, but on the terms of the subsequent decree. And in this Court a different view seems to have been taken in *Golam Russool Khan* v. *Kishen Mohun Shaha* (7). Moreover, I doubt very greatly if it is open to the plaintiff in this case to plead that he could not apply under S. 244. He has applied twice under that section. On the first occasion it was held in his favour after contest that the objection that he could not apply under S. 244, Civil Procedure Code, failed and that he was entitled to redeem; and on the second occasion no question was raised of his right to apply under the section but the application was held to be barred.

There is one point that is in the plaintiff's favour, namely, that the learned Pleader for the appellants conceded in the former case that a suit for redemption would lie. An admission, however, by a Pleader on a point of law will not bind a party, and in the second place it was not conceded that the plaintiff could sue for redemption otherwise than on the original mortgage. The concession seems not to have affected the decision of Rampini, J. He observes "It is conceded for the respondent that the petitioner may still sue for redemption. If this be so then the petitioner has a remedy which he ought to have recourse to." But the concession clearly affected the decision of Woodroffe, J., and if it had not been made it would seem from the terms of his judgment that he would not have agreed to the dismissal of the appeal on the ground that the application was barred by limitation. This, no doubt, is a hardship for the plaintiff. But we must take the decision as it stands and cannot disregard it because it was based on an admission by

(7) 1875) 23 W. R. 156.

the respondents' Pleader on a point of law.

I hold, therefore, that this is not a suit for the redemption of the original mortgage in which there may be special terms of which we know nothing, but a suit for enforcement of the decree of 1877 and 1885. A suit, in my opinion, does not lie for such a purpose and the decrees must be enforced by execution in the usual way, nor is it open to the plaintiff in the present suit after his previous applications to contest this proposition. This view may seem to involve hardship but the hardship is, I think, more apparent than real. The plaintiff knew in 1885 on what terms he could redeem the property and for 18 years he did nothing. The learned Subordinate Judge thought that he had full knowledge of the *dar-ijara* and there can be little real doubt that he acquiesced in the settlement of which the *dar-ijara* was the outcome. When that lease comes to an end his rights to recover the property will be unaffected by this decision, and it seems to me that it is not much hardship if he is compelled by the result of these proceedings to be subject for a few years more to an arrangement in which he has so long acquiesced.

I would, therefore, decree the appeals and dismiss the suit but under the circumstances the parties might bear their own costs throughout. My learned colleague, however, does not agree and the case must be laid before the Chief Justice for reference to a third Judge. The points of law may be formulated thus :—

1. In the circumstances of this case is a suit for redemption barred by S. 47 of the Code.

2. If not, can this suit be regarded as a suit for the redemption of the mortgage?

Roy, J.—I agree to the reference.

Judgment.

Jenkins, C. J.—(*May 18th, 1915*).—It appears that the decree of Mr. Prinsep on which the appellants before us principally rely came under consideration of the High Court on appeal. It would be difficult for us to form any opinion as to the effect of that litigation unless we see the decree of the High Court, because that decree perhaps modified, possibly superseded and certainly in some degree interfered with the decree of Mr. Prinsep. On this being pointed out to the appellants in both appeals they have expressed a wish to put in that decree. The respondents in both appeals assented, but on a condition which appears to us to be fair and which has been accepted by the appellants, that is, the original mortgage should also be received by us as a part of the record. Mr. Bagram, the Counsel for the appellants in R. A. No. 370 of 1909, makes a prayer which we think he is entitled to do, that the production of the mortgage at this date should not interfere with or prejudice his argument that the suit really is one on a decree and not on a mortgage.

Jenkins, C. J.—(*May 19th, 1915*).—This is a reference under S. 98 of the present Code of Civil Procedure. It provides, amongst other things, that "where a Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it." The appeal in this suit was heard by Coxe and Harinath Roy, JJ., and the points of law on which they differed in opinion were formulated by them as follows :— In the circumstances of this case is a suit for redemption barred by S. 47 of the Code? I agree with Mr. Justice Roy that this suit for redemption is not barred. And I so fully agree with the reasons that he has given that it would serve no useful purpose to endeavour to put them into different language. The only point to which I would take exception is that the question is erroneous in so far as it refers to S. 47. The reference should have been to S. 244, as this suit commenced in 1908 before the present Code came into operation.

Having answered that question in the negative, we are then asked whether this suit can be regarded as a suit for redemption of the mortgage. I am unable to regard it as anything else ; and here again I must express my complete acceptance

of the arguments advanced by Mr. Justice Roy.

The result then is that the matters on which the learned Judges were at variance should be decided in accordance with the opinion of Mr. Justice Roy. Unfortunately the learned Judges from whose difference of opinion this matter has come before us have left it in doubt as to what course should be taken in the event which has now happened, that is to say, in the event of our agreeing with Mr. Justice Roy. The only thing that can be done is that the case must be sent back to the Bench taking the group of this case.

N. R. Chatterjea, J.—I agree.

V.B./R.K.

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FLETCHER AND TEUNON, JJ.

Nandarani Dasi—Plaintiff—Appellant.

v.

Hari Charan Gangopadhya and *others*—Respondents.

Appeal No. 236 of 1915, decided on 22nd June, 1916, against the Original Decree of Sub-Judge, Howrah, dated 24th May, 1915.

Civil P. C. (5 of 1908), O. 11, R. 6—Scope—Multifariousness of causes of action—What is stated—Suit for accounts against executors under will and for declaration against trustees that a scheme settled by District Judge under compromise between executor and guardian of plaintiff was void being brought about by fraud—First cause of action was excluded and on second suit was dismissed for absence of sanction of Advocate-General—Held, in appeal, exclusion of first cause of action was improper and dismissal of suit on that ground was premature—Civil P. C. (5 of 1908), S. 9.

The case that is contemplated by O. 11, R. 6, Civil Procedure Code, is a case where the causes of action joined in the same suit are essentially of different character. [P. 50, C. 1.]

But where the facts alleged in the plaint arise out of facts that are common to both the causes of action joined in the suit, the Court is not justified in excluding one of them on the ground that it would not be convenient to try those two causes of action together.

[P. 50, C. 1.]

Where the plaintiff brought a suit against two classes of defendants, *firstly*, against the executors of her late husband's will to account for moneys come to their hands as executors and, *secondly*, against the trustees of certain charity established by her husband, under a scheme settled by the District Judge on a compromise entered into between the executors and the then guardian of the plaintiff, who was then a minor, for a declaration that the scheme relating to the charity settled by the District Judge was obtained by fraud and was not binding upon her and the Court excluded the first cause of action from the suit and as to the second held that that cause of action could not be tried without the consent of the Advocate-General which had not been obtained :

Held, that the order of the Court excluding one of the causes of action should be set aside ; that the Court was premature in deciding that the case was one in which the consent of the Advocate-General was required, as that would depend upon the facts that might be proved at the trial and the plaintiff might elect to go to trial at her own risk without obtaining such consent. [P. 50, C. 1.]

Dwarka Nath Chakrabarty, *Lalit Mohan Mitter* and *Amillya Chander Banerjee*—for Appellant.

Baidyanath Dutt, *Harakumar Mitter*, *Ramchandra Mozumdar* and *Mohini Nath Bose*—for Respondents.

Fletcher, J.—This is an appeal from the judgment of the learned Subordinate Judge of Howrah, dated the 21st May, 1915. The suit was brought by the plaintiff Nandarani Dasi, who is the widow of the deceased Rai Bahadur Kirode Prosad Pal, against two classes of defendants ; first of all, against certain persons who were formerly the executors of her husband's will and, secondly, against certain persons who had been constituted as trustees to a certain charity established by the late Rai Bahadur under a scheme settled by the District Judge under a compromise entered into between the persons who were the executors and the then guardian of the present plaintiff, she being at that time a minor. The causes of action are, first, an account against the late executors for moneys come to their hands as executors or trustees. That part of the suit has not been tried and nobody has suggested that that is not a perfectly good cause of action. The plaintiff also says that the scheme relating to the charity established by the late Rai Bahadur and settled by the District Judge was obtained by fraud and that that scheme is not binding on her. That portion of the case, the learned Judge has come to the conclusion, ought not to be tried in this suit, and, therefore, he has dismissed that cause of action apparently on two grounds ; *first* of all, that the consent of the Advocate-General is necessary to that cause of action and that that has not been obtained and, *secondly*, that it would not be convenient to the Court to try that cause of action at

the present stage. Of course, as regards a cause of action that has not been tried, the Court has got to be careful in the appeal as to what remarks it makes with reference to the allegations or statements made by one side or the other. But having regard to the allegations that have been made by the plaintiff in this case, it seems to me that the learned Judge was premature in deciding that this case was one in which the consent of the Advocate-General was required. Whether the consent of the Advocate-General is required or not depends upon the facts that may be proved at the trial and I do not wish to express any opinion as to whether that consent is necessary or not. If it is necessary, the plaintiff has elected to go to trial at her own risk. Of course, she must take that risk, which may at the end prove fatal to that part of the suit, if the Court comes to the conclusion that that consent is necessary. This is sufficient to dispose of the *first* point taken by the learned Subordinate Judge.

The *second* point that the learned Subordinate Judge took was that it was not convenient to try those two causes of action together. On the allegations or statements that have been made to us, I do not agree in the conclusion arrived at by the learned Judge. This case against the trustees, namely, that the scheme was fraudulently obtained seems to me essentially to arise out of and form a portion of the same transaction out of which the first cause of action is said to have arisen. The case that is contemplated by the Order in the Civil Procedure Code, which authorizes the Court to exclude a cause of action and direct a separate trial, is a case where the causes of action joined in the same suit are essentially of different character; such as, where the plaintiff sues upon a promissory note or a bill of exchange to recover money due and he also joins in it a case of damages for libel or slander. In such a case the Judge has the power to direct a separate trial of the two different causes of action. In this case, the facts, so far as they have been alleged by the plaintiff, seem to me to arise out of facts that are common to both the causes of action; if these facts are established I think the order of the lower Court excluding the cause of action against the trustees in the present suit should be set aside and the case should go back to that Court for the purpose of being tried and disposed of in the ordinary way The costs of this case will be provided for in the same manner as the learned Judge of the lower Court may direct on the result of the trial.

Teunon, J.—I agree.

V.B./R.K.

Appeal allowed; Case remanded.

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CARNDUFF AND RICHARDSON, JJ.

Jadu Nath Dey and *another*—Plaintiffs—Petitioners.

v.

Asan Mandal—Defendant—Opposite Party.

Civil Rule No. 1470 of 1913, decided on 20th February, 1914, against the decision of Sadar Munsif, 2nd Court, Mymensingh.

Civil Pro. Code (5 of 1908), O. 9, R. 13—Compromise decree, though one party was not authorised, cannot be set aside under R. 13.

A decree based on a compromise cannot be treated as an *ex parte* decree and set aside as such simply because one of the parties was not authorised to compromise. [P. 50, C. 2.]

Upendra Kumar Roy—for Petitioners.

Judgment.—The facts underlying this Rule are these: The petitioner sued the opposite party for rent. The suit was decreed in accordance with a petition of compromise signed apparently by both parties and their Pleaders. After the lapse of some two years, the opposite party applied to the Court for restoration of the suit, on the ground that he had not authorised the compromise and that the decree obtained against him was, in effect, an *ex parte* decree. The Court below allowed the application apparently under O. 9, R. 13, and this rule was issued on the opposite party to show cause why the order should not be set aside on the ground that the Court below had no jurisdiction to make it under the rule quoted above.

No cause has been shown and the rule is made absolute. We make no order as to costs.

V.B./R.K.

Rule made absolute.

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TEUNON AND NEWBOULD, JJ.

Aghore Nath Mukhopadhya—Plaintiff—Appellant.

v.

Abhoy Charan Nath—Defendant—Respondent.

Appeal No. 1966 of 1913, decided on 9th March, 1916, from the Appellate decree of Sub-Judge, 24 Parganas, dated 20th March, 1913.

Bengal Tenancy Act (8 of 1885), Ss. 30 (a) and 31-A—Village situate in district to which S. 31-A has not been extended—Seven different rates of rents paid by seven different tenants of village—Degrees of variation not infinitesimal—There is no "prevailing rate of rent".

There is no "prevailing rate of rent" within the meaning of S. 30 (*a*) of the Bengal Tenancy Act in a village situate in a district to which S. 31-A of the Bengal Tenancy Act has not been extended, if seven different rates of rent are paid by seven different tenants of the village for lands of similar description, varying from Rs. 2 to Rs. 7, and the degrees or stages of variation are by no means infinitesimal [P. 51, C. 1 & 2.]

Surendra Chandra Sen—for Appellant.

Manmothanath Mukerjee—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit brought for enhancement of rent on the ground that the rent paid was below the prevailing rate within the meaning of S. 30 (*a*) of the Bengal Tenancy Act.

The learned Subordinate Judge has found that in the village in question there are in fact seven different rates of rent paid by seven different tenants, the rates varying from Rs. 2-5-5 to Rs. 7-9-5 per *bigha*. In this state of facts he has held, and in our opinion rightly held, that there is no one prevailing rate up to which enhancement can be allowed. S. 31-A of the Bengal Tenancy Act not having been extended to the District in question, obviously he was right in dismissing the plaintiff's suit for enhancement. The case of *Alep Khan* v. *Raghu Nath Prosad Tewari* (1) has been cited before us, and we have been asked to hold on the authority of that case that the lowest rate found payable in this village should be taken as the prevailing rate. But in the case cited the facts are very different. There we find that there were 63 tenants and that they paid different rates varying from Rs. 1-8 to Rs. 2, the highest rate payable being arrived at by infinitesimal degrees or stages of variation. In the circumstances of that particular case, the Court held that the lowest rate being in fact indistinguishable from the next higher rate and the higher rate being indistinguishable from that above, the lowest rate might reasonably be taken as the prevailing rate. Here the facts are very different. The variation is from Rs. 2 to Rs. 7 and the degrees or stages of variation are by no means infinitesimal.

This appeal fails and is, therefore, dismissed with costs.

V.B./R K.

Appeal dismissed.

(1) (1897) 1 C. W. N. 310.

A. I. R. 1916 Calcutta 51 (2)

JENKINS, C. J. AND CHATTERJEA, J.

Kassim Mamooji—Defendant—Appellant.

v.

K. B. Dutt and *another*—Plaintiffs—Respondents.

Appeal No. 338 of 1913, decided on 9th July, 1914, from the Original Decree of Sub-Judge, 24 Parganas, dated 9th June, 1913.

(a) Civil P. C. (5 of 1908), O. 40, R. 1—Receivers, though the property does not vest in them, are competent to sue for possession of property alienated by one party—That absence of leave to sue does not affect the continuance of suit.

Ordinarily, a suit to recover possession of property can only be brought by him in whom there is a present title to it, and by the appointment of a Receiver no property becomes vested in the Receiver. But this rule is subject to modification by the Legislature, and the Code of Civil Procedure empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has, even if it may involve the setting aside of a voidable instrument executed by one of the co-owners who thereby purports to deal with the entire estate.

[P. 53, C. 2 & P. 54, C. 1.]

Where, therefore, one of two co-widows brought a suit against the other for a declaration that she was entitled to a half share in the estate of the deceased husband and for partition thereof, and the present plaintiffs were appointed Receivers under O. 40, R. 1 (*d*) of the Civil Procedure Code with the power to bring and defend suits in their own name and to use the names of the plaintiff and the defendant also, and where the present plaintiffs sued to recover possession of certain immovable property on the ground that a lease of 16th September 1906 purporting to have been execut-

ed by one of the widows in virtue of which the present defendant claimed to be a permanent tenant was invalid:

Held, (1) that the co-widows were the owners of the property and the suit in which the Receivers had been appointed comprised that property and that the Receivers were, therefore, as competent to bring this suit as the widows would have been; [P. 54, C. 1.]

(2) that the omission of the Receivers to get leave in the first suit to bring this suit might have consequences adverse to them in that suit but it could not affect their power to bring this suit. [P. 54, C. 1.]

(b) Lunacy Act (35 of 1858), S. 57—Scope of Act—Enquiry cannot extend to ascertainment of the beginning of the lunacy—Finding that lunacy commenced at period before the date of enquiry does not shift the burden of proof on the other side.

The Lunacy Act contemplates the question of lunacy or sanity at the time of the inquiry, there is no provision in it that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind. [P. 54, C. 2.]

Where, therefore, lunacy proceedings commenced in November 1906 and the widow who had executed the lease in September 1906 was found on the 24th September, 1907 to be of unsound mind and incapable of managing her own affairs:

Held, that the finding did not carry things back further than the inquiry which commenced in November 1906 and notwithstanding the result of that inquiry the burden still rested on the plaintiffs of showing that she was of unsound mind on the date of the execution of the lease. [P. 54, C. 2.]

(c) Contract Act (9 of 1872), S. 11—Lease by person of unsound mind is invalid, and creates no title.

That the executant of the lease being of unsound mind at the time it was executed, it created no title in the present defendant and the plaintiffs' right to possession was not barred. [P. 56, C. 2.]

(d) Pardanashin lady—Burden of proof—If terms not explained or understood transaction is void.

That even if lunacy be not established, the lease was void as its terms were not adequately explained to the executant, a *pardanashin* lady of weak intellect, and was not understood by her. [P. 55, C. 1 & 2.]

(e) Civil P. C. (5 of 1908), O. 40, R. 1—Receiver is competent to set aside a voidable transaction.

That the Receivers were competent plaintiffs even if the lease be held to be not void, but voidable. [P. 56, C. 1.]

(f) Civil P. C. (5 of 1908), O. 32, R. 15—It is not established rule that lunatic's manager alone can sue—Lunatic can sue by next friend—Next friend is not necessary party and his absence is immaterial.

That even if a lunatic's manager can sue still there is no established rule of practice in this High Court that requires suits relating to the lunatic's property to be brought by him and not by the lunatic and that on the contrary the Code of Civil Procedure contemplates suits by persons of unsound mind whether so adjudged or not and that though it is true that a person so incapacitated has to sue by next friend, yet a next friend is not a party and the absence of a next friend is immaterial. [P. 56, C. 1 & 2.]

Rash Behary Ghose, *Binode Behari Mukerjee*, *Kritanta Kumar Bose* and *Satyendra Nath Mukerjee*—for Appellant.

B. Chakraburty, *Provash Chandra Mitra* and *Norendra Chandra Bose*—for Respondents.

Jenkins, C. J.—This appeal arises out of a suit instituted in the first Court of the Subordinate Judge of the 24-Parganas to recover possession of immovable property in Bhowanipore, known as 7 Russa Road.

The plaintiffs are the Receivers of the estate of the late Gopal Lal Seal, and the contesting defendant and sole appellant (to whom I will hereafter refer as the defendant) is Haji Kassim Mamooji.

The plaint includes a prayer for a declaration that a lease executed by Nayan Manjari Dassi, one of Gopal Lal Seal's two co-widows, is void and inoperative.

The defendant, on the other hand, maintains that he has a good title to the premises as their permanent tenant and contends that in any case the plaintiffs are not competent to bring this suit. I will first give a short narrative of the events that led up to the appointment of the plaintiffs as Receivers of Gopal Lal Seal's estate.

Gopal Lal Seal, who was admittedly the owner of the property in suit, died on the 25th of May, 1897, without issue, but survived by his two widows, Kumudini Dasi and Nayan Manjari Dasi, who thus became his heiresses in the absence of a testamentary disposition. On the 15th of June, 1902 Kumudini applied for Letters of Administration to the estate of her deceased husband. The application was opposed, and was numbered as Suit No. 9 of 1902.

On the 21st of July, Gopal Lal Seal's mother and another propounded an alleged will of the deceased, and their application, being opposed, was numbered as Suit No. 11 of 1902. Mr. Donogh was appointed Administrator *pendente lite* in Suit No. 11 of 1902, but in August 1903, Probate was refused and so his appointment terminated. In the same

month Mr. Belchambers was appointed Administrator *pendente lite* in Suit No. 9 of 1902.

On the 8th August, 1906 Nayan Manjari commenced Suit No. 666 of 1906 against her co-widow. It was afterwards numbered 427 of 1907.

By this suit Nayan Manjari sought a declaration that she was entitled to a half share in the estate of Gopal Lal Seal for the estate of a Hindu widow, and prayed that the properties might be partitioned and her share allotted to the plaintiff.

On the 29th January, 1908 Suit No. 9 of 1902 was withdrawn, and Mr. Belchambers, the Administrator *pendente lite*, was discharged. On the same day a decree was passed in Suit No. 427 of 1907 and thereby Messrs. Shamal Dhone Dutt and Norendra Lal Dey were appointed Receivers of the movable property and of the rents, issues and profits of the immovable property belonging to the estate of Gopal Lal Seal.

By an order of the 8th January, 1910 in Suit No. 427 of 1907 the present plaintiffs, Mr. P. Chowdhuri and Mr. K. B. Dutt, were appointed Receivers in the place of Mr. Halder, who had succeeded Messrs. Dutt and Dey in that office with all the powers provided under O. 40, R. 1, clause (*d*), of the Civil Procedure Code, subject to certain exceptions not material to this case, and it was further ordered that the Receivers should have power to bring and defend suits in their own name and also should have power to use the names of the plaintiff and the defendant who were to be indemnified out of the estate and effects of the intestate.

On the 25th of October, 1911 this suit was instituted and on the 22nd March, 1912 an order was made in Suit No. 427 of 1907 that the Receivers be at liberty to continue the present suit.

It is in these circumstances that the plaintiffs claim that they are competent to maintain this suit. But before I deal with this point, I will explain the defendant's relations with the property.

As far back as 1893 the defendant became a tenant of the property, and though a difficulty was experienced in obtaining a formal lease, this at length was granted for a term of 15 years to expire in November 1908. The person named as lessee was Ismail Khan Mohammad, but it has been accepted by both sides before us that he was a *benamidar* for the defendant, Haji Kassim Mamooji.

But though this tenancy terminated on the 15th November, 1908, the defendant claims to be a permanent tenant under a lease of 16th September, 1906, which purports to be executed by Nayan Manjari Dasi. It is the plaintiffs' case that this lease is invalid, and so it is that they claim to be entitled to recover possession. First, then I will consider the plaintiffs' right to sue in their own names.

Ordinarily, no doubt, a suit to recover possession of property can only be brought by him in whom there is a present title to it, and by his appointment no property becomes vested in a Receiver.

But this rule, like all others, is subject to modification by the Legislature and the only question for our consideration is whether in India there has not been such a modification in favour of a Receiver.

It is profitless to discuss the English cases on the subject or to seek for guidance from American decisions; in England there is no such statutory rule as there is here, and I have no means of ascertaining what the American Law is.

Moreover, there is ample material in Indian enactments and authorities to afford a clue to the solution of the problem propounded. Originally a Receiver could not sue; this is shown by the decision of Phear, J., in *Wilkinson* v. *Gangadhar Sirkar* (1). That decision was in 1871. In 1877, however, was passed the Civil Procedure Code of that year; and in it was contained the provision which now finds a place in O. 40, R. 1, of the present Code (*see* S. 503 of the Code of 1877). The present Code empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has.

This provision is shown by decisions in Calcutta, Madras and Bombay to have been understood by those Courts as authorising suits by Receivers, and though I am not aware of any judgment in Allahabad to the same effect, I have not met with any decision in a contrary sense.

The words of O. 40, R. 1, warrant this view, and I see no reason for putting a narrower construction on the words, or for holding that they do not empower

(1) (1871) 6 Beng. L. R. 486.

Receivers to bring a suit for recovery of possession of immovable property, even though it may involve the setting aside of a voidable instrument executed by one of the owners who thereby purports to deal with the entire interest.

The co-widows of Gopal Lal Seal are the present owners of the property: and the suit in which the Receivers have been appointed comprises that property. The Receivers, therefore, are as competent to bring this suit as the widows would have been. It is true, they did not get leave to institute this suit in Suit No. 427 of 1907. This omission may have consequences adverse to them in that suit, but it cannot affect their power to bring this suit, nor has any reliance been placed on this omission before us.

The next point that calls for consideration is whether the instrument of the 16th September, 1906 furnishes the defendant with an answer to the plaintiffs' claim for possession.

If it was a valid document, it would, for it purports to create a permanent tenancy in the defendant's favour. Its validity, however, has been attacked on many grounds. Thus it is said (1) that Nayan Manjari, the sole executant, was of unsound mind, (2) that at any rate she was an illiterate *pardanashin* lady of weak intellect, whose execution of the lease was procured without explanation to her of its terms or comprehension by her of its effect, (3) that at the time of its execution Mr. Belchambers was Administrator *pendente lite* and that she had no interest in or power over the property, and (4) that her interest in the property did not extend beyond a half-share.

On all these points the Sub-Judge has come to a conclusion adverse to the defendant against whom he has passed the decree from which the present appeal has been preferred.

First, then, I will deal with the plea of Nayan Manjari's insanity. This unhappy lady's predicament has been so constantly before the Court in the several litigations in which she is involved that it is particularly necessary that we should be on our guard not to import into this case knowledge derived from other sources. and to see that our decision is based only on the materials afforded by the record in this suit.

The issue for determination is whether Nayan Manjari was of unsound mind on the 16th September, 1906.

We start with this that Nayan Manjari is admittedly now of unsound mind.

She was found to be of unsound mind in proceedings under Act XXXV of 1858 instituted as far back as November 1906. By his order in those proceedings of the 24th September, 1907 the District Judge of the 24 Parganas held that there could be no reasonable doubt that she was of unsound mind and incapable of managing her affairs. The Act, however, contemplates only the question of lunacy or sanity at the time of the inquiry; there is no provision in it that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind: *Bodhnarain Singh* v. *Omrao Singh* (2). So the finding of the learned District Judge does not carry us back further than the inquiry, which commenced in November 1906; so notwithstanding the result of that inquiry the burden still rests on the plaintiffs of showing that she was of unsound mind on the 16th of September, 1906. The learned Judge was satisfied that this burden was discharged and his estimate of the evidence on this point must necessarily carry great weight with us on appeal. It may, I think, be fairly said here, as it was in the Privy Council decision I have cited, that the burden becomes of a much lighter character when we find that the inquiry which resulted in the adjudication of lunacy supervened within two months of the critical time, the date of the execution of the lease. There is no reason to suppose that this unsoundness of mind could be fairly attributed to anything that occurred in the interval. On the contrary we find the lady's mental condition called in question, though unsuccessfully, as far back as 1892. But more significant of the estimate formed in the family of her previous mental condition is the application on the 14th of July, 1906 preferred by her two paternal uncles under Act XXXV of 1858. This apparently was rejected simply owing to their failure to procure a medical certificate in support of their allegations, a failure due, no doubt, to the fact that she was then residing in the house of her maternal

(2) (1869-70) 13 M. I. A. 519=6 Beng. L. R. 509 (P. C.).

uncle, Kuchil Lal Sen, in Muktaram Babu's Street. Kuchil Lal Sen, who had every opportunity of knowing Nayan Manjari's mental condition, has deposed before the Subordinate Judge that in July and September 1906 it was the same as in July and September 1907, and on this the learned Judge relied as he certainly was entitled to do, and I say this, notwithstanding the contention before us, that Kuchil was entrapped into this statement. In addition to this there is the evidence of Gour Mohun Dey, the brother of the co-widow Kumudini. He deposes to her insanity from 1903. His evidence is undoubtedly open to criticism, and the learned Judge does not expressly refer to it, so that it would be safer not to attach any great weight to it.

The Subordinate Judge was obviously not impressed with the evidence by which it was sought to prove Nayan Manjari's sanity at the date of the lease, and on this I am in full agreement with him. In so saying I do not forget that, in course of the argument before us, we were repeatedly reminded of the part taken by the Registration Clerk, but I attach little or no importance to it. The Sub-Judge, therefore, was (in my opinion) justified in his conclusion that it is clear that in September 1906 Nayan Manjari was of unsound mind and incapable of managing her affairs.

But if she was of unsound mind then, it is conceded, in view of the interpretation placed by the Privy Council on the Contract Act, that the lease was void. If our decision were final, this would be sufficient for the disposal of this appeal; but as the case may go further, it is right that I should discuss it on the hypothesis that lunacy on the critical date was not established: *Tarakant Banerjee* v. *Puddomoney Dossee* (3). This, therefore, I will proceed to do, though it must not be supposed that in so doing I feel any doubt as to the Subordinate Judge's conclusion on the question of Nayan Manjari's sanity. Nayan Manjari on the 16th September, 1906 was a *pardanashin* illiterate lady, apparently with no knowledge of English, and even if, as I assume for the present purpose, she was not a lunatic, she undoubtedly was of weak intellect. And yet it is to her that the defendant went for his permanent lease, though there was an Administrator *pendente lite*, Mr. Belchambers, and a senior co-widow a co-sharer with Nayan Manjari, as to whose sanity there never had been any question. The evidence further shows that at this time there was a firm of Attorneys acting for Nayan Manjari; still they were not consulted, and the lawyer who is supposed to have represented her in this transaction is Monoj Mohun Bose, a Police Court Pleader. It is clear beyond doubt that this Police Court Pleader in no way protected Nayan Manjari, and did not even take the trouble to ascertain the facts necessary for giving her sound advice, nor did Kuchil in any way look after the lady's interests or give her any effective advice. As he himself says: "the transaction was completed in hot haste," such "hot haste" indeed was there that the lease still contains blanks. The evidence that the document was read or explained to her or its contents or purport understood by her is not worthy of credit, and this omission is all the more serious as the document was in English, a language Nayan Manjari is not shown to have understood. The Subordinate Judge on a consideration of the evidence came to the conclusion that the document was not read over and explained to Nayan Manjari, that she did not know what she was doing, but executed the lease without knowledge of its contents, and that she had no independent advice.

In my opinion this conclusion is justified by the evidence and I agree with it. Even, therefore, if my finding that Nayan Manjari was insane be not accepted, still the transaction is one which cannot stand.

It has, however, been argued that apart from lunacy the transaction would be voidable and not void, and, therefore, it is urged it could not be avoided by any one but Nayan Manjari and in a suit to which her manager was a party. I am not aware of any case in which it has been directly discussed and determined whether such a transaction is void or voidable, but in *Lala Mahabir Prasad* v. *Musammat Taj Begum* (4) Lord Moulton, delivering the judgment of the Privy Council in the case where the bond of a *pardanashin* lady

(3) (1863-66) 10 M. I. A. 476=5 W. R. 63 P.C.).

(4) A. I. R. (1914) P. C. 95=23 I. C. 942.

came in question, said: "It follows, therefore, that as against the present appellants it must be taken that the terms of the mortgage-bond were extortionate and that the lady, the mortgagor, did not understand the effect of the deed by reason of its not having been adequately explained to her. The deed is, therefore, void and cannot be enforced against her."

It is argued before us that Lord Moulton's remarks were not directed to the distinction between a deed that was void and one that was voidable, and that, therefore, they must not be read too literally. In the absence of a more searching argument than that addressed to us, I must refrain from expressing any definite opinion on the question whether the deed of a *pardanashin* woman is void or voidable, or whether each case must not depend on its own peculiar circumstances. And I am the more impelled to this course, for, in the view I take and have already expressed, the Receivers are competent plaintiffs even if the lease is not void but voidable. It is sufficient for the purpose of this case to hold, as I do, that the evidence does not satisfy me that the lease on which the defendant relies was explained to the lady or understood by her.

Therefore, the defendant has failed to discharge the burden of proof that lay on him, and the Receivers are entitled to rely on this defect in his proof whether the lease be void or voidable. I do not overlook the argument that if the lease is only voidable, the suit is incompetent in the absence of the manager. It is contended that to avoid the transaction the manager is a necessary party. There is authority in England for the view that the Committee should ordinarily be a party where a transaction is sought to be avoided on the ground of lunacy; but on the hypothesis with which I am now dealing, the lease is impugned on the ground not of the lady's lunacy, but of the inadequate protection of a *pardanashin* lady. Moreover, even if a lunatic's manager can sue, still there is no established rule of practice in this High Court that requires suits relating to the lunatic's property to be brought by him, and not by the lunatic.

On the contrary the Code of Civil Procedure contemplates suits by per unsound mind, whether so adjudged or sons of not (*see* O. 32, R. 15, and Appendix A, "Descriptions of parties in particular cases.") It is true that a person so incapacitated has to sue by a next friend; but a next friend is not a party, and the absence of a next friend in this suit is immaterial. In any case the objection is one of pure technicality and it cannot be suggested that the absence of the manager has affected the merits of the case. And S. 99 of the Code provides that no decree shall be reversed or modified for error or irregularity not affecting the merits or jurisdiction. To sum up, then, this appears to me to be a peculiarly gross case of overreaching a lady who was in a special degree in need of advice and protection. I have already expressed my opinion that she was of unsound mind at the date of the lease. If I am wrong as to that, still it can hardly be denied that her mind was seriously unbalanced. In this transaction, she received no advice and no protection, and in place of her ordinary Attorneys, an uninformed Police Court Pleader professed to act for her. No explanation is forthcoming why the defendant should have gone to her for the lease, and not to the Administrator *pendente lite* or the senior and apparently sane co-widow, and in the absence of explanation the course pursued is eminently calculated to excite suspicion. And over and above all this the transaction was one of grave and obvious improvidence.

I, therefore, hold that the lease on which the defendant relies has created no title in him which bars the plaintiffs' right to possession, though they only sue as Receivers appointed by the Court. It was somewhat feebly suggested in the course of the appellant's opening that certain Small Cause Court proceedings estopped the plaintiffs from denying that the defendant was a monthly tenant and so entitled to notice to quit. But the defendant declines to be treated as a monthly tenant, and when the Vakil for the respondent proposed to deal with this point in the course of his argument, he was stopped by his opponent, who said he did not press it. I, therefore, need not deal further with this plainly unsustainable plea. No other argument than those with which I have dealt was

advanced as affording an answer to the plaintiffs' claim for possession.

The result then is that the plaintiffs have (in my opinion) been rightly awarded a decree for possession. They are also entitled to the mesne profits which have been decreed, subject to a small reduction of Rs. 63, the sum accepted by both parties as representing the brief period during which mesne profits would not be payable. The plaintiffs had filed a cross-objection as to the amount awarded in respect of mesne profits, but they were out of time, and were abandoned without our being asked to excuse the delay. The only topic that remains for consideration is the direction as to the new rooms alleged to have been constructed by the defendant. This has been left for determination in execution. But this is a survival of a procedure frequently condemned and no longer countenanced. It was a device commonly employed for the purpose of showing a more satisfactory return of work, but is not now sanctioned. The question involved is one that must be decided in the suit before a decree is passed, and both sides agree to our sending down an issue for the purpose of arriving at a final decision. We, therefore, send down the following issues: --What structures were erected by defendant No. 2 on the land in suit prior to the 15th of November, 1908? A description should be given of the structures so erected, distinguishing such of the structures as come within clause 10 of the lease. Both parties will be at liberty to adduce evidence on this point, and the return to this Court should be made in four months. When the return is made, we will dispose of the whole case and will deal with the question of interest on the Government papers in respect of which a claim is made by the appellants.

N. R. Chatterjea, J.—I agree.

V.B./R.K.

Case remanded.

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CHITTY, J.

In re *J. M. Lucas* and *another*—Insolvents.

Appln. in Insolvency Suit No. 50 of 1912, decided on 18th May, 1914.

(a) Presidency Towns Insolvency Act (3 of 1909), S. 36—Order under S. 36 when can be made is stated.

An order under S. 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent. [P. 58, C. 1.]

(b) Presidency Towns Insolvency Act (3 of 1909), S. 36—Scope of Cls. (4) and (5)—It does not apply to contentious matter or following property, concealed or fraudulently transferred.

Ss. 36 (4) and (5) is intended to provide a summary procedure for ordering payment of debts due, and delivery of property belonging to an insolvent when there is no dispute; it is never intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment. [P. 58, C. 2.]

Avetoom and *A. N. Chaudhuri*—for Official Assignee.

B. Chakravarthy and *B. K. Lahiri* for *Zamin* and *Longford James*—for *G. E. Pereiro.*

Judgment.—This is an application presented under S. 36 (5) of the Presidency Towns Insolvency Act, 1909, by the Official Assignee, praying that Mrs. Amy Zemin, who was examined under that section in the matter of C. J. and J. M. Lucas, insolvents, should be ordered to deliver over to the Official Assignee certain immovable property situate in Elliott Road, Calcutta, as being the property of the insolvent J. M. Lucas and now in her possession.

The insolvents were so adjudged on their own petition on February 21st, 1912. Admittedly the property in question was conveyed to the witness, who is the mother-in-law of J. M. Lucas, by deed dated September 26th, 1911, less than five months before the adjudication. The conveyance purports to have been made (subject to a mortgage and further charge of the Phœnix Assurance Co., Ltd.), for a consideration of Rs. 50,000 paid by Mrs. Zemin to J. M. Lucas. The story of the witness, as disclosed on her examination, was that Rs. 30,000 was actually paid, the other Rs. 20,000 being a debt due to her by her son-in-law for two loans of Rs. 12,000 and Rs. 8,000 made by her to him in 1904.

Mrs. Zemin was examined on March 8, 1913. Subsequently J. M. Lucas was proceeded against under S. 103 of the Act, one of the charges relating to this transfer. He was tried before me and found guilty. He has appealed, and the hearing of the appeal has been postponed

until orders have been passed on this application. In my opinion, the two matters are in no way dependent one upon the other. An order under S. 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent. A charge under S. 103 may be substantiated by oral and documentary evidence and the notes of the examination of the insolvent may be used against him. In this particular case, Mrs. Zemin was not examined in the proceedings under S. 103, either for or against the insolvent. This application must be decided on her statement and her statement alone. The criminal charge depended upon altogether separate evidence.

S. 36 is copied from S. 27 of the Bankruptcy Act, 1883, with this difference. The English Act says:—"If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may, on the application of the Official Receiver or Trustee, order him to deliver," etc. Here the words are:—"If, on the examination of any such person, the Court is satisfied that he has in his possession," etc. In my opinion, there is very little distinction to be drawn between the two modes of expression. Under the Indian Act, it may not be necessary to have an express admission from the witness as it is in England, but the fact of possession must appear from his examination, which amounts to very much the same thing, because the Court can only proceed on the witness' statements and no evidence can be called to contradict them.

In this case it was argued that Mrs. Zemin's statements could not be accepted as true, that what she said was so improbable that no Court could believe her. I agree, but even assuming that she is not worthy of credit, it does not follow that the converse of what she has stated can be held to be proved *on her examination*, and that is what is necessary for an order under this section. It is not suggested that Mrs. Zemin has made any statement which could be construed into an admission or be taken as satisfactory proof that this was a bogus transaction. It may well have been that, and in the criminal proceedings on other evidence I have held that it was. It cannot, however, be said to be satisfactorily established on her examination.

I regret this result, but in my opinion the Official Assignee has adopted the wrong procedure. What he should have done was to make such an application as is provided for by R. 5 (*d*), on which evidence could have been taken for and against, and the question of title properly decided. In my opinion, S. 36 (4) and (5) was intended to provide a summary procedure for ordering payment of debts due, and delivery of property belonging, to an insolvent when there was no dispute. It was never intended for contentious matters such as the present, or for following property the subject of fraudulent preference or dishonest concealment. It appears to me unnecessary to refer to S. 26 of the Indian Insolvency Act, 1848, or to cases decided upon it. The procedure now introduced is not the same, and is manifestly taken from the English Act of 1883. The application must be refused, but in the view that I take of Mrs. Zemin's evidence I make no order in her favour for costs.

The application for an order under S. 36 (4) against George Edmond Pereiro must fail for the same reasons. In this case it is asked that he be ordered to pay to the Official Assignee four sums, Rs. 640, Rs. 901-12-9, Rs. 5,750 and Rs. 6,750, aggregating Rs. 14,041-12-9 received by him from the insolvents and also Rs. 4,000, being the amount advanced to him by the insolvents for the purchase of their respective shares in their father's estate. I am of opinion that this application must fail for the reasons given above in Mrs. Zemin's matter. The first four sums are said to be payments made by way of fraudulent preference to Pereiro, who is entered in the insolvent's schedule as a creditor for Rs. 10,991-1-0. One of these sums, Rs. 5,750 or the shellac representing it, has been made the subject of a charge in the criminal case, and J. M. Lucas has been convicted on that charge. It is true that Pereiro has mentioned these four sums, but there is nothing in his answers amounting to an admission or satisfactory proof that these sums or any of them belong to the insolvent. As regards the Rs. 901-12-9 he did say that if the Court ordered, he would pay it; but that is all.

As I have said above, in my opinion the procedure laid down by S. 36 is inappropriate in dealing with cases of fraudulent preference. I must not be regarded as accepting Pereiro's statements as correct. I have little doubt that they are false.

As to the Rs. 4,000, I do not think that the Official Assignee could claim this in any case. Subsequently to the examination, which closed in April 1913, *viz.*, on June 5, 1913, the Official Assignee has executed a conveyance in favour of Pereiro of the shares of the insolvents in their father's estate. He cannot now be allowed to say that the insolvents and not Pereiro were the purchasers.

This application also fails but, as in Mrs. Zemin's case, I make no order as to costs.

V.B./R.K.

Application refused.

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MOOKERJEE AND ROE, JJ.

Biseswar Gangooly and *another*—Plaintiffs—Appellants.

v.

Bhagabati Charan Banerjee and *another*—Defendants—Respondents.

Appeal No. 3914 of 1913, decided on 13th May 1915, against the Appellate Judgment and decree of Sub. Judge, Faridpore, dated 22nd August, 1913.

Adverse possession — Co-owner — Co-owners entering into possession as lessees of adverse claimant—Possession is adverse to other co-owners.

Where after the dispossession of the owners of a land by an adverse claimant some of them come into possession under a lease granted by the adverse possessor, their possession must be referred to the title which they acquired under the lease and not to their title as co-owners of the property and consequently, it will be considered adverse to the other co-owners, so as to extinguish the title of the latter under the Limitation law. [P. 59, C. 2.]

Brojendranath Chatterjee—for Appellants.

Ashitaranjan Ghosh—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for declaration of title to land and for recovery of joint possession thereof along with the defendants. The land in dispute is included in an estate owned jointly by the plaintiffs and the defendants. Both the plaintiffs and the defendants were dispossessed by the proprietor of a neighbouring estate, who took possession of the land on the assertion that it formed part of his estate. Subsequently, the defendants took a lease of this land from the adverse possessor. The plaintiffs assert that as the defendants are their co-sharers, their possession cannot be treated as adverse to them. The Courts below have concurrently overruled this contention, which appears to us to be wholly unfounded.

Reliance has been placed by the plaintiffs on the decision of the Judicial Committee in the case of *Corea* v. *Appuhamy* (1), where Lord Macnaghten stated, with regard to the possession of a co-owner, that his possession is in law the possession of his co-owner, and it is not possible for him to put an end to that possession by any secret intention in his mind; nothing short of ouster or something equivalent to ouster can bring about that result. That doctrine has no application to the circumstances of the present case. Here the possession of the plaintiffs was not terminated by the defendants. The possession of both of them was terminated by a hostile claimant. The defendants subsequently came into possession under a lease granted by the claimant. Their possession must be referred to the title which they acquired under the lease, and not to their title as co-owners of the property held by them and the plaintiffs jointly. No doubt, as observed by Wood, V. C., in *Thomas* v. *Thomas* (2), possession is never considered adverse, if it can be referred to a lawful title. Here, however, the possession of the defendants is referable only to their title as lessees under a person who claims to hold adversely both to the plaintiffs and the defendants. We must, consequently, hold, on the principles explained in *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (3), that there was an ouster of the plaintiffs by the defendants, and as that ouster has continued for more than 12 years, the title of the plaintiffs has been extinguished.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

V.B./R.K.

(1) (1912) A. C. 230.
(2) (1855) 2 K. & J. 79.
(3) (1915) 27 I. C. 465.

A. I. R. 1916 Calcutta 60

CHATTERJEA AND CHAPMAN, JJ.

Bhikariram Bhagat and *others*—Defendants—Appellants.

v.

Maharaj Bahadur Singh—Plaintiff—Respondent.

Appeal No. 572 of 1913, decided on 7th June, 1915, from Appellate Decree of Dist. Judge, Murshidabad, dated 25th September, 1912.

Bengal Tenancy Act (8 of 1885), S. 185—Applicability—Occupancy right in site of shop held by *raiyat*—Provisions held applicable to lease of lands for building shop.

A *raiyat* who acquired lands under a lease for building a shop, in which he has resided and from where he has carried on his agricultural operations in another village and in respect of holdings under the same landlord, can claim the protection of S. 182 of the Bengal Tenancy Act in respect of the lands. 9 I. C. 922; 9 C. W. N. 416; 10 C. W. N. 944 and 10 I. C. 139, foll.

[P. 60, C. 1 & P. 61, C. 1.]

Ram Chandra Majumdar and *Nagendra Nath Sen*—for Appellants.

Dwarka Nath Chakravarthi—for Respondent.

Judgment.—The defendants were *raiyats* holding certain *jamas* under the father of the plaintiff at Nalhati. When the Bokhara station on the Naihati-Azimganj Railway (broad gauge) was opened, the father of the plaintiff wanted to establish a bazar. To do so he wanted shop-keepers to settle on his lands near the station. The defendant Bhikhari was asked to come and open a shop, and he did come and was given some lands to build his shop which would necessarily be his dwelling house also. He built a *katcha* thatched house and held his shop there for a time. Then after a short time he built a *pakka* room and subsequently other *pakka* rooms and resided with his family there and held his shop as well. He acquired several *raiyati jamas* in this place also under the plaintiff, so that he is a *raiyat* under the plaintiff at Nalhati as well as this place called Sanko or Raipur Telkul. Being a *raiyat* at Nalhati he acquired the lands for building the shop where he resided, and then he became a *raiyat* at Raipur Telkul or Sanko and resided in the shop-building and carried on his agricultural operations from there.

The plaintiff, at first, sued to evict him as a trespasser but failed, the Court holding that the defendants were tenants and could not be ejected without a proper notice.

This suit was then brought after the service of a notice. The question whether the tenancy is governed by the Transfer of Property Act or by the Bengal Tenancy Act was raised in the previous case, but in view of the finding on the question of notice the Court did not think it necessary to go into the question. In this case the Trial Judge held that, as the land was originally taken for building a shop, it was governed by the Transfer of Property Act and made a decree for ejectment on the payment of Rs. 1,200 as compensation. On appeal by the plaintiff and cross-appeal by the defendants, the learned District Judge decreed the entire suit, allowing the defendants time to remove the materials of their *pakka* house.

In second appeal, it has been contended that both the Courts below are wrong in not applying the provisions of the Bengal Tenancy Act. We think this contention is supported by a number of decisions of this Court dating back from 1893. In the case of *Golam Mowla* v. *Adbool Sowar Mondul* (1) Mr. Justice Rampini held that if a *raiyat* holding *jotes* with occupancy rights in a village holds *bastu* land in the same village, not as a *raiyat* but separately from his *raiyati* holding, he would, in the absence of a local custom to the contrary, have a right of occupancy in the homestead also. It is not clear from the report whether the homestead and the *jote* were held under the same landlord. Then in the case of *Protap Chandra Das* v. *Biseswar Pramanick* (2) the homestead was under one landlord and the *jote* under another in the same village. Mr. Justice Geidt held that S. 182 of the Bengal Tenancy Act applied. Mr. Justice Ghose did not think it necessary to go into the question. This was in 1904. Then in 1906 came the case of *Kripa Nath Chakrabutty* v. *Sheikh Anu* (3), in which Rampini and Mookerjee, JJ., held that the homestead and the *raiyati* need not be in the same village or under the same landlord and S. 182, Bengal

(1) (1911) 9 I. C. 922.
(2) (1905) 9 C. W. N. 416.
(3) (1906) 10 C. W. N. 944.

Tenancy Act, applied when both were different. The above cases were followed by Mookerjee and Teunon, JJ., in the case of *Harihar Chattopadhyaya* v. *Dinu Bera* (4), and it was held that for the application of S. 182 of the Bengal Tenancy Act it was not necessary that the homestead and the *raiyati* should be either in the same village or under the same landlord. Under these rulings, the defendants would be holding the homestead lands at Sanko subject to the provisions of the Bengal Tenancy Act from the beginning.

But supposing that during the first two or three years during which the defendants merely held their shop and resided on the disputed land and held *jotes* at Nalhati, they could not invoke the aid of S. 182 of the Bengal Tenancy Act, there can be no manner of objection under a long course of rulings of this Court to their claiming the protection of that section after they became agriculturists at Sanko and carried on agriculture from their residence at Sanko, which was also used as a shop. The incidents of their tenure of the homestead are, therefore, governed by the Bengal Tenancy Act, as no local custom to the contrary is alleged or proved. The suit for ejectment, therefore, fails. As the parties have not been able to agree as to the rent payable for the homestead, that must form the subject of a separate suit.

The appeal is allowed and the suit of the plaintiff dismissed with costs in all Courts.

V. B./R. K.

Appeal allowed.

(4) (1911) 10 I. C. 139.

A. I. R. 1916 Calcutta 61

MUKERJEE AND BEACHCROFT, JJ.

Ganga Ram Agarwalla and *another*—Defendants—Appellants.

v.

Lachi Ram Kishen Dyal—Plaintiff—Respondent.

Appeal No. 303 of 1912, decided on 28th July 1914, from the Original Decree of Sub-Judge, Shibsagar, dated 26th June, 1912.

(a) Evidence Act (1 of 1872), Ss. 9, 11 and 34—Absence of entry of repayment in account book is relevant under Ss. 9 and 11 and not under S. 34—Weight of such evidence depends on circumstances.

The absence of an entry in a book of account is regarded as a relevant fact not under S. 34, but under Ss. 9 and 11 of the Indian Evidence Act, to prove that an alleged payment was not made; but the weight to be given to such absence depends upon the circumstances of each case. 13 I. C. 120 and 25 All. 90 (F. B.), ref. to. [P. 62, C. 2.]

(b) Deed—Execution—The place and manner of signature is immaterial—When executant scribes document insertion of name at commencement is sufficient.

The place and manner of signature of a document are immaterial, provided that the signature is inserted in such a manner as to authenticate the document; and where an instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement. *Holmes* v. *Mackrell*, (1885) 3 C. B. (N. S.) 789, ref. to. [P. 63, C. 1.]

(c) Deed — Execution — Release — Document giving release to a co-debtor though not signed is valid—But would not operate to prejudice the other in question of contribution.

Hence, a document giving a co-debtor release from all liabilities is operative as such though not signed by the executant, and is a valid agreement although it may not operate to the prejudice of the other debtor, should a question of contribution arise, as between them. [P. 63, C. 1 & 2.]

N. C. Bardaloi—for Appellants.

Manmohan Dutt—for Respondent.

Judgment.—This is an appeal by the defendants in a suit for recovery of money due on a settlement of accounts. It appears that there were sale and purchase transactions between the firms of the plaintiff and defendants. The case for the plaintiff is that upon adjustment of accounts to the end of the year 1964 (*Sambat*) Rs. 10,049-15-0 were found due from the firm of the defendants (Ganga Ram and Moti Ram) to the firm of the plaintiff (Luchi Ram Kishen Dyal), and that thereafter payments were made, with the result that at the date of the institution of the suit, a sum of Rs. 7,900 was payable to the plaintiff by the defendants jointly. The defendants, who are brothers, filed separate written statements. The first defendant stated that he had separated from his brother and had made, on his own account, a payment of Rs. 1,200 to the father of the plaintiff on the 15th July 1908, in consideration whereof the latter had agreed to release him from all liability on account of the transactions mentioned. His defence in substance was that there was no cause of action against him. The second defendant admitted liability to the extent of

Rs. 4,669-9-9. The first defendant in support of the defence taken by him produced a document, called a *farkati*, which he asserted was in the handwriting of the father of the plaintiff. The document is in these terms: "Ram Ram of Luchi Ram Kishen Dyal to honoured Ganga Ram Chota Ram. There was money due to this firm, out of that I have received Rs. 1,200. Out of the amount due from his firm, I received Rs. 1,200 from him and struck out his name. I have no business left with Ganga Ram Chota Ram I shall realise from Moti Ram Sheo Ram. No claim against Ganga Ram Chota Ram remains. Whatever is found due in my *khata*, I shall take from Moti Ram. I have no complaint against Ganga Ram. If I do, I shall be held a liar in Court. *Sambat* 1965, month *Saon Badi* 2=15th July." This document, it will be observed, does not bear the signature of the alleged executant. The plaintiff repudiated the document as a forgery. The Subordinate Judge has held upon the evidence on the record that the document is genuine, and that the whole of it was written by Luchi Ram, the father of the plaintiff, Kishen Dyal. But he has held that the document is not operative in law, because it was never signed by the executant, in his opinion, the document was in substance little more than a draft which Luchi Ram might have intended to execute. In this view the Subordinate Judge has refused to give effect to the contention of the first defendant that upon payment of Rs. 1,200 to the creditor, he had secured a release from all liability in connection with the transactions mentioned. The result has been that the Subordinate Judge has made a joint decree against the defendants for the entire sum claimed, but he has made it payable in 12 monthly instalments.

In the present appeal by both the defendants, it has been urged that the document was valid and operative though not signed by the executant, and, was in any view, admissible in proof of the payment of Rs. 1,200. On behalf of the plaintiff-respondent, it has been argued that the document is not genuine and that the alleged payment was never made. The first question for consideration consequently is whether the document is genuine. In our opinion there is no room for reasonable doubt that, as found by the Subordinate Judge, the document is genuine.

The document was shown to one Gobind Ram Maheswari, who was examined as a witness on behalf of the plaintiff. He was first asked whether he knew the handwriting of Luchi Ram. He answered in the affirmative and then stated that the document was in the handwriting of Luchi Ram. The Pleader for the plaintiff then alleged that the witness had been gained over; but beyond a mere assertion there is nothing tangible to show that the witness was hostile to the plaintiff. There is also the testimony of Mr. Hardless, the handwriting expert, who states affirmatively that the document in question was written by the same person as the executant of seven other documents which were admittedly written by Luchi Ram. The expert is positive in his assertion that the writer of all these documents was the same person. We have in addition the testimony of Tarakeshwar Sarma and Ganga Ram that Rs. 1,200 was actually paid. Reliance, however, has been placed by the plaintiff upon the circumstance that the payment is not entered in the books of the firm represented by the plaintiff. The absence of an entry in a book of account has no doubt been regarded as a relevant fact, not under S. 34, but under Ss. 9 and 11 of the Indian Evidence Act, to prove that an alleged payment was not made [*Imrit Chamar* v. *Sridhar Panday* (1), see also *Ali Nasir Khan* v. *Manik Chand* (2)]. But the question remains, what weight should be attached to this circumstance in the present case The books of the firm, which the plaintiff represents, were, it may be assumed, even during the lifetime of his father, written by himself. But as the payment was made in the shop of the defendants where the creditor had called to receive the money, it is conceivable that if the fact of payment was not mentioned by the father of the plaintiff to him, no entry would be made in the account books. We must hold in concurrence with the Subordinate Judge that the document was written by Luchi Ram and was made over to the first defendant on receipt of Rs. 1,200 from him.

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(1) (1912) 13 I. C. 120.

(2) (1903) 25 All. 90 (F. B.).

The question next arises, whether the document, though not signed by the creditor, is operative as a release. It is worthy of note that the document is produced by the first defendant, and that there is no suggestion that he obtained possession of it by unfair and fraudulent means. Consequently the theory, which found favour with the Subordinate Judge, that the document was incomplete and was little more than a draft which Luchi Ram might have intended to execute, cannot be accepted as well founded. Does the circumstance then that the document does not bear the signature of Luchi Ram affect its legal operation as a release? It has not been disputed that the document was not required to be signed or executed in any particular manner under any statutory provision. Consequently the well settled principle applies that the place and manner of signature of a document are immaterial, provided that the signature is inserted in such a manner as to authenticate the document; and where an instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement. Lord St. Leonards in his Classical Treatise on 'Vendors and Purchasers' states the rule in the following terms (14th Edition, page 142): "The signing of the name at the beginning of an agreement, which is required to be signed under the Statute of Frauds, will take it out of the Statute, as if a person write an agreement himself and begins '*A B* agrees to sell;' and such a signature will be sufficient, although space be left for signature at the bottom of the instrument." This statement is borne out by cases of the highest authority, amongst which we may mention those of *Ogilvie* v. *Foljambe* (3), *Propert* v. *Parker* (4), *Lobb* v. *Stanley* (5) and *Holmes* v. *Mackrell* (6). We are of opinion that the document in this case was operative as a release though not signed by the executant. The position consequently is that the creditor received Rs. 1,200 from the first defendant and released him from all liability under his claim. This was a valid agreement, although it might not operate to the prejudice of the other debtor, should a question of contribution arise as between them. But it is plain that the plaintiff, as representative of Luchi Ram, cannot recede from the position deliberately assumed by his father and impose a liability upon the first defendant in contravention of the terms of the release.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The suit will stand dismissed with costs in both the Courts as against the first defendant. The suit will, however, be decreed as against the second defendant for a sum of Rs. 6,466. This amount is obtained by a deduction of Rs. 1,200 together with interest thereon at the rate of 9 per cent. per annum, from the 15th July, 1908 (date of payment) to the 22nd September, 1910 (date of the institution of the suit), from the sum of Rs. 7,900 claimed by the plaintiff as the sum due to him. The plaintiff will be entitled to his costs on the sum now decreed as against the second defendant only in the Court of first instance. As between the plaintiff and the second defendant, there will be no order for costs in this appeal. The order for payment by instalments made by the Subordinate Judge will stand cancelled. A self-contained decree will be drawn up in this Court.

V.B./R.K.

Appeal partly allowed.

(3) (1817) 3 Mer. 53.
(4) (1830) 1 Russ. & M. 625.
(5) (1844) 5 Q. B. 574.
(6) (1885) 3 C. B. (N. S.) 789.

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MOOKERJEE AND BEACHCROFT, JJ.

Surendra Narain Roy Chowdhury—Plaintiff—Appellant.

v.

Dinanath Bose and *others*—Defendants—Respondents.

Appeal No. 1449 of 1914, decided on 22nd July, 1915, from the Appellate Decree of Sub. Judge, 1st Court, Backergunj, dated 20th March, 1914.

Landlord and Tenant—Rent—Apportionment can be claimed for eviction by person holding paramount title than his lessor—Burden of proof of what is fair rent is on tenant—Evidence Act (1 of 1872), S. 102.

Where a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor as an answer, and if he is evicted from part of the land, an apportionment of the rent may take place; but the onus is on the lessor to show what is the fair rent of the lands out of which the tenant was not evicted. [P. 64, C. 1.]

Dwarkanath Mitter and *Baikuntanath Mitter*—for Appellant.

Judgment.—This is an appeal by the plaintiff in a suit for arrears of rent. The plaintiff claimed rent at the rate of Rs. 27 a year. The defendants contended that they had been dispossessed of a portion of the tenancy by title paramount and that the plaintiff was consequently not entitled to the entire rent claimed. The Court of first instance found that the defendants had not been dispossessed of any lands of their tenancy by title paramount and decreed the claim in full. Upon appeal, the Subordinate Judge has found that the defendants have been deprived of a portion of the lands of their tenancy by title paramount and that they are entitled to an abatement of rent. He has, however, dismissed the suit, as there is no evidence to show what rent is payable to the plaintiff in respect of the lands still in the occupation of the tenants. On the present appeal, it has been argued that the burden of proof was upon the defendants to show, to what extent they are entitled to abatement of rent. In our opinion, there is no foundation for this contention.

It was pointed out by Sir Barnes Peacock, C.J., in the case of *Gopaumd Jha* v. *Lalla Gobind Pershad* (1), that where a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor as an answer, and if evicted from part of the land, an apportionment of the rent may take place; but the onus is on the lessor to show what is the fair rent of the lands out of which the tenant was not evicted. This view is plainly well-founded on principle, because as stated in S. 102 of the Indian Evidence Act, the burden of proof lies on that person who would fail if no evidence at all were given on either side. The defendants asserted that they had been dispossessed of a portion of the land of the tenancy by title paramount. The burden lay upon them to establish the truth of this allegation. They have discharged that burden; consequently, it is plain that the plaintiff cannot recover rent at the rate of Rs. 27 a year. If the contention of the plaintiff were well-founded, that the burden lay upon the defendants to prove the extent of abatement, it would be incumbent upon the Court, if no evidence were given on either side, to award the plaintiff a decree at the full rate claimed, although the Court was satisfied that he was not entitled thereto. It is thus unquestionable that the burden lay upon the plaintiff to establish what rent he was entitled to recover from the tenants in respect of the lands now in their occupation. This he has entirely failed to do; he directed all his energy to prove that there had been no dispossession of the tenants by title paramount, and did not adduce evidence to show what would be fair rent for the lands in their occupation. As a last resort, the plaintiff has prayed that the case may be remitted to the Court of first instance in order that the question of apportionment of rent may be determined in this litigation. We are of opinion that we should not accede to this request. The burden, as we have said, lay upon the plaintiff to establish his case. He has failed to discharge that burden, because he came into Court with an untrue allegation that the defendants were still in occupation of all the lands of their tenancy and did not adduce direct evidence to show what rent was fairly payable in respect of the lands actually in their possession. Such evidence, indeed, could not be adduced by the plaintiff because that would have been destructive of his case that the defendants were in occupation of all the lands of their tenancy. The plaintiff cannot now be permitted to take the case back to the Court of first instance and to have the question of fair rent tried. It will be open, however, to the plaintiff in any future litigation to claim re-adjustment of rent.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed.

V.B./R.K.

Appeal dismissed.

(1) (1869) 12 W. R. 109.

A. I. R. 1916 Calcutta 64

JENKINS, C. J. AND CHATTERJEA, J.

Ram Prasad—Plaintiff—Appellant.

v.

Ram Charan Singh and *others*—Defendants—Respondents.

Appeal No. 332 of 1912, decided on 22nd May, 1914, from the Appellate Order of Offg. Sub-Judge, Saran, dated 13th November, 1911.

(a) Bengal Tenancy Act (8 of 1885), S. 65—Scope of S. 65—It applies only when relation between landlord and tenant subsists—Landlord who has parted with proprietary rights cannot avail himself of S. 65.

Under S. 65 of the Bengal Tenancy Act the sale of a holding is possible, so long as the rent is a first charge thereon, and it remains the first charge only so long as the relationship of landlord and tenant subsists. [P. 65, C. 2.]

Therefore, a landlord who has parted with his proprietary interest, is not entitled to invoke the special remedies vested in a landlord under S. 65 of the Bengal Tenancy Act, but still he can have a sale in execution of his decree under the Code of an interest which is saleable. [P. 65, C. 2.]

(b) Civil P. C. (5 of 1908), O. 21, Rr. 89, 90 and 92—Though the rules are not applicable the Court can decline to confirm sale when decree is satisfied and parties desire that sale be set aside.

Where after a sale in execution of a decree the decree-holder is paid the amount of his decree and there is a concurrent wish of the parties that the sale should be set aside, the Court, although not warranted by any provisions of R. 89 and onwards of O. 21 of the Civil Procedure Code, 1908, to set aside the sale, may treat the sale as being of no effect and may decline to confirm it.

[P. 65, C. 2 & P. 66, C. 1.]

Umakali Mukerjee and *Rajendra Prasad*—for Appellant.

Sachindra Prasad Ghose—for Respondents.

Jenkins, C. J.—This second appeal arises out of a suit in effect for possession of land, and the case made by the plaintiff against defendant No. 1, who is the principal defendant, is, *first*, that the land in suit is *zerait*, and *secondly*, that defendant No. 1 is a trespasser and not a tenant. He established both these points to the satisfaction of the Munsif.

The learned Officiating Subordinate Judge, however, took an opposite view on both these points, and we must, therefore, apart from any point of law which can be opposed to that conclusion, accept as binding on us, *first*, that the land is not *zerait* and *secondly*, that defendant No. 1 is not a trespasser but is a tenant.

To the first of these propositions no objection has been or can be taken in second appeal. But it has been argued with ingenuity that on the facts as found defendant No. 1 cannot be regarded as still a tenant, for by a sale in execution of a decree obtained by one Radhe Misser, the defendant No. 1's interest as tenant passed to the purchaser under that decree.

Now, this calls for a word of explanation Radhe Misser was the proprietor. Defendant No. 1 was his tenant. There was a failure or omission to pay rent and this led to the institution of a suit in May 1904 by Radhe Misser against defendant No. 1. A decree was obtained on the 21st September, 1904. On the 6th of October, 1904, Radhe Misser's proprietary right was purchased by the plaintiff. Subsequently to this, Radhe Misser took steps for the execution of his decree. There was a sale in execution, and it is said that under that sale the holding of defendant No. 1 passed to Radhe Misser who was the purchaser at that sale. This argument has been founded upon the theory that S. 65 of the Bengal Tenancy Act was still applicable at the time of the execution proceedings. Whether it was so or not is a point of some nicety, but we are assisted in determining the scope of that section by a recent decision of the Privy Council, *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1). It is true that the precise position with which we are now confronted was not before their Lordships on that occasion, but I think that the first result of their decision is that the sale of the holding is possible so long as the rent is a first charge thereon. But the rent remains a first charge only so long as the relation of landlord and tenant subsists; in other words, the charge is an incident of that relationship. Certainly this is a convenient view, because otherwise there might be introduced into this law, which regulates the relation between landlord and tenant, a supervening right of serious consequence, and, I think, we must in the circumstances hold that Radhe Misser, having parted with his proprietary interest, was not entitled to invoke the special remedies vested in a landlord under S. 65 of the Bengal Tenancy Act. Still there could be a sale in execution of the decree under the Code, but it would be a sale of that which is saleable. I am not at present satisfied that the interest of defendant No. 1 was saleable. Over and above that, we have the important circumstances that notwithstanding the fact that there had been a sale, yet prior to its confirmation, Radhe Misser, the decree-holder, was paid by the judgment-debtor

(1) A. I. R. (1914) P. C. 111=41 Cal. 926=23 I. C. 632=41 I. A. 91 (P.C.).

the decretal amount. That decretal amount was accepted by the decree-holder in full satisfaction of his decree, and the decree-holder, as any honest man would do, brought this to the notice of the Court and asked that the sale should be set aside. The learned Judge before whom this reasonable application was made seems to have felt that his action was paralyzed, because this particular predicament did not fall within the precise words of the R. 89 onwards of O. 21. But I venture to think that where a case of that kind arises, it certainly is open to the Court not to confirm the sale and to treat the sale as being of no effect, that being the concurrent wish of the parties and the obvious requirement of the case.

In the circumstances of the case then, I think, it may fairly be said, as it does not appear that the defendant No. 1 had a saleable interest and as there can be no suggestion of defendant No. 1 being still bound by the execution proceedings, that the interest of defendant No. 1 did not pass to Radhe Misser.

The result is that though this point was not discussed, and as far as I am aware not raised before the lower Courts, still the conclusion of the lower Appellate Court must be affirmed by reason of the findings of fact at which that Court arrived, for the point now suggested does not justify us in disturbing those findings.

The result is that the decree must be confirmed with costs.

N. R. Chatterjea, J.—I agree.

V.B./R.K.

Decree confirmed.

A. I. R. 1916 Calcutta 66 (1)

MOOKERJEE AND RICHARDSON, JJ.

Yusuf Akram—Plaintiff—Petitioner.

v.

Arfan Ali Khan — Defendant —Respondent.

Civil Rules Nos. 120 and 121 of 1915, decided on 30th July, 1915, against the decision of Munsif, Bhanga, dated 14th November, 1914.

Provincial Small Cause Courts Act (9 of 1887), S. 17 (1)—No deposit is required for restoration of suit dismissed in default.

A plaintiff who applies for revival of his suit, which has been dismissed for default by a Small Cause Court, has not to make the deposit or furnish the security as required by the proviso to sub-S. (1) of S. 17 of the Provincial Small Cause Courts Act, as his application is not for an order to set aside a decree passed *ex parte*. 2 C. W. N. 693, foll. [P. 66, C. 2.]

Hem Chunder Mozumdar — for Petitioner.

Mookerjee, J.—We are invited in this Rule to set aside an order of the Small Cause Court Judge dismissing an application for revival of a suit which had been dismissed for default. The Small Cause Court Judge held that the plaintiff had failed to deposit, as required by law, the amount of costs due from him to the defendant under the decree or to furnish security to the satisfaction of the Court. In our opinion, this view is clearly erroneous. The proviso to sub-S. (1) of S. 17 of the Provincial Small Cause Courts Act lays down that an applicant for an order to set aside a decree passed *ex parte* shall make the requisite deposit or give security. But an applicant for an order to set aside an order of dismissal for default is plainly not an applicant for an order to set aside a decree passed *ex parte*. This view is in accord with the decision of this Court in the case of *Jamina Bibi* v. *Seri Chand Bhagat* (1). The matter has now been placed beyond controversy by clause (2) of S. 2 of the Code of 1908, which lays down that an order of dismissal for default is not a decree.

The result is that this Rule is made absolute, the order of the Small Cause Court Judge set aside and the case returned to him in order that the application for revival of the suit may be heard on the merits. As the Rule is not opposed we make no order for costs.

This judgment will govern Rule No. 121 of 1915 in which a similar order will be drawn up.

V.B./R.K.

Rules made absolute; Cases remanded.

(1) (1898) 2 C. W. N. 693.

A. I. R. 1916 Calcutta 66 (2)

CHATTERJEA AND NEWBOULD, JJ.

Abdul Wahab and *others*—Plaintiffs—Appellants.

v.

Secy. of State and *others*—Defendants—Respondents

Appeal No. 3731 of 1912, decided on 20th December 1915, from the Appellate Decree of Dist. Judge, Chittagong, dated 27th August, 1912.

Civil P. C. (1882), S. 424—Notice under S. 424—Case set up in plaint different from that stated in notice—Notice is not proper.

A notice under S. 424 of the Civil Procedure Code, 1882, is not a proper notice if the case set up in the plaint is altogether different from the case stated in the notice and, therefore, a suit instituted upon such a notice cannot be maintained. [P. 67, C. 1.]

Dwarka Nath Chakerbutty and *Kali Kinker Chakerbutty*—for Appellant.

Ram Chandra Mitra—for Government.

Dhirendra Lal Kastgir and *Prabhat Chandra Dutt* for *Kshitesh Chandra Sen* and *Satish Chandra Ghose*—for Respondent.

Biraj Mohan Mozumdar—for Deputy Registrar.

Judgment.—We think that the suit of the plaintiffs-appellants must fail on the ground that the notice given under S. 424 of the Code of Civil Procedure was not a proper notice. The question of notice was raised in the sixth issue in the case and the Subordinate Judge's decision on that issue runs as follows :

"The case set up in the plaint is altogether different from the case stated in the notice, Exhibit 13, served on the defendant No. 1. In the notice the plaintiffs admitted the principle of distribution of the Collector to be quite correct, but said that the map drawn was not correct, inasmuch as instead of drawing the boundary lines at right angles to their *jote* land, they were drawn so as to include obtuse angles, so the notice appears to be defective and the suit must fail on that ground."

The lower Appellate Court, no doubt, has not come to any finding upon this point, apparently because the plaintiffs did not argue the point before it. But we think the Subordinate Judge is right in holding that the notice is defective, and upon such a notice the suit cannot be maintained. The suit must, therefore, fail on that ground. The appeal is accordingly dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 67

CHAPMAN AND WALMSLEY, JJ.

Gurai Kar and *others*—Plaintiffs—Appellants.

v.

Kuarmoni Singha Mandhata—Defendant—Respondent.

Second Appeals Nos. 2519 to 2525 of 1912, decided on 15th March, 1915, against the decrees of Dist. Judge, Midnapur, dated 21st December, 1911.

(a) Civil P. C. (5 of 1908), S. 100—Custom reasonable or not, is question of law.

The question whether a custom is reasonable or not is a question of law and not one of fact. *Bradburn* v. *Foley*, 3 C. P. D. 129, foll. [P. 68, C. 2.]

(b) Custom—Reasonable—Custom of appropriation of timber on holding by its tenants is reasonable—When custom not unreasonable stated.

It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber trees on a holding by the tenant. *Moult* v. *Halliday* (1898) 1 Q. B. 125, ref. to. [P. 69, C. 1.]

Where there is nothing unfair or dishonest or contrary to the public good in a custom, the custom is not unreasonable. [P. 69, C. 1.]

Monindra Nath Roy, *Monmatha Nath Mookerjee* and *Satindra Nath Mookerjee*—for Appellants.

Bankim Chandra Mookerjee for *Kali Kinkar Chakrabarti*—for Respondent.

Judgment.—These are appeals by the plaintiffs. The suits were brought under S. 106 of the Bengal Tenancy Act for declarations that the tenants had the right to cut and appropriate trees. The Assistant Settlement Officer decreed the suits. The landlord appealed. The District Judge, in the course of his judgment, came to a finding that the custom has been established, but that it was unreasonable in so far as it permitted the appropriation of timber trees. By an oversight, however, the learned Judge recorded an order dismissing the landlord's appeal thus preserving the judgment of the Assistant Settlement Officer intact. Upon an *ex parte* application by the landlord, the learned Judge amended his judgment and converted his order dismissing the appeal into an order directing that the decree of the Assistant Settlement Officer should be modified, in accordance with his finding that the custom should not be upheld so far as timber trees are concerned. The tenants, thereupon, appealed to this Court. They

relied in their grounds of appeal both on the contention that the learned Judge was wrong in holding that the custom was unreasonable and upon the contention that it was not open to the learned Judge to alter his judgment. The learned Judges who disposed of the appeal dealt in their judgment with the latter contention only and directed that the judgment should be restored to its original condition. The learned Judges proceeded to say that it would be open to the respondent landlord to apply for a review. Thereupon, the landlord applied for a review of this judgment and on that application for review, the learned Judge amended the judgment again, altering it into a judgment modifying the decree of the Assistant Settlement Officer in accordance with the finding that the custom was unreasonable so far as timber trees were concerned.

In appeal to this Court, the tenants take three grounds. The *first* ground is that the application for review was barred by limitation. The judgment which was sought to be amended by that application for review was dated the 23rd August, 1911, that is, the judgment in the form in which it stood after the restoration made in it in accordance with the order passed by the learned Judges of this Court in second appeal. The application for review of this judgment was made on the 20th September, 1911, and was within time. The appellants' contention that this application for review must be held to relate to the original judgment of the 7th April, 1909, cannot be sustained, although there are certain expressions, in the judgment of the learned District Judge now appealed against which might support their contention.

The *next* contention in appeal is that the learned Judge had no jurisdiction to entertain this application for review. The judgment purports to pass the order under S. 151 of the Code of Civil Procedure, holding that the judgment, the review of which was applied for, was the judgment of his predecessor and that, therefore, he had no jurisdiction to deal with the application under O. 47. We are of opinion, however, that the learned Judge fell into an error in the view which he took, that the judgment the review of which was applied for, was the judgment of his predecessor. It is true that the original judgment delivered on the 7th April, 1909, was the judgment of the learned Judge's predecessor, Mr. Forrester. But the judgment, which in law was the judgment which had to be reviewed, was not that judgment but the judgment, dated the 23rd August, 1911, which was the result of the alteration made by the learned Judge, Mr. Cornes, himself. It was his judgment made under the order of the High Court. That was the judgment which had to be reviewed and the learned Judge had jurisdiction under O. 47, R. 1, to review that judgment on account of what he held, and rightly held, to be a mistake on the face of the record.

The appellants, however, contend that the judgment is wrong, upon the ground that the learned District Judge was not justified in holding that the custom was unreasonable in so far as it permitted the tenants to appropriate timber trees. The respondent argued that the question whether a custom is reasonable or not is a question of fact and not of law. We need only to refer to the judgment of Lord Lindley in the case of *Bradburn* v. *Foley* (1), for authority for saying that the reasonableness or unreasonableness of a custom is a question of law. The respondent then argued that this point having been taken in the grounds of appeal to this Court at the time when this case came up before this Court on the previous occasion, it must be held that the point was then decided against the appellants and cannot now be re-argued. We are, however, satisfied that the learned Judges of this Court did not then decide this point. The appellants then succeeded on the technical ground which they took and whether this point was argued or not, we are of opinion that it is open to them to argue it now. The learned Judge upheld the findings of the Assistant Settlement Officer upon the question whether the custom of appropriating trees by the tenants had been established. The learned Assistant Settlement Officer held upon the facts that this custom covered large numbers of trees of different kinds which are mentioned in this connection and the Assistant Settlement Officer recorded the findings that the custom covered all classes of trees. This finding was upheld by the learned Judge in appeal. The learned

(1) (1878) 3 C. P. D. 129=47 L. J. C. P. 331.

Judge gives no reasons for holding that this custom was unreasonable in so far as it permitted the appropriation of timber trees, and we are unable to agree with him that there was any unreasonableness in the custom. As was said by Channell, J., in *Moult* v. *Halliday* (2): "There can be very few cases, where a custom has been sufficiently proved, in which a Court could hold that it was unreasonable, for that it must be convenient is shown by the fact that it has been established and followed." There is nothing unfair or dishonest or contrary to the public good in the custom and we are unable to say that it was unreasonable.

The result is that this appeal is allowed, the judgment of the learned District Judge set aside and the judgment and decree of the Assistant Settlement Officer restored. The appellants are entitled to their costs. They are allowed three sets of costs for the seven appeals in this Court.

V. B./R. K.

Appeal allowed.

(2) (1898) 1 Q. B. 125=67 L. J. Q. B. 451=77 L. T. 794.

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CHITTY AND WALMSLEY, JJ.

Chandra Kanta Kanjilal and *another* – Petitioner.

v.

Emperor – Opposite Party.

Criminal Revn. No. 411 of 1916, decided on 18th May, 1916.

Criminal P. C. (5 of 1893), Ss. 144, 195 and 476 —Injunction issued on mere complaint without taking evidence is irregular—Held, also issue of summons under S. 188, I. P. C. in such case next day without enquiry under S. 476 or application under S. 195 is wholly illegal and without jurisdiction—Indian Penal Code (45 of 1860), S. 188.

On a complaint by a servant of the first party before a Sub-Divisional Magistrate that the second party had made arrangements to construct a drain obliterating a pathway and that if the first party opposed there would be a likelihood of a serious breach of the peace, the Magistrate, without taking any evidence, issued an injunction against the second party under S. 144, Criminal Procedure Code. On the following day, on the complaint of the same person, the same Magistrate issued summons against the second party under S. 188, Indian Penal Code.

Held, that the proceeding under S. 144 Criminal Procedure Code, was wholly irregular and the order of the Magistrate summoning the 2nd party under S. 188, Indian Penal Code, was without jurisdiction, as the Magistrate, having instituted the proceedings under S. 144, Criminal Procedure Code, could not take cognizance of the offence under S. 188, Indian Penal Code. There should have been either action taken by him under S. 476 or an application for sanction under S. 195. [P. 69, C. 2 & P. 70, C. 1.]

Dasarathi Sanyal and *Ramani Mohan Chatterjee* – for Petitioner.

Monmotha Nath Mukherjee, *Jogesh Chandra Gupta* and *Camell* – for the Crown.

Judgment. – We have heard the learned Deputy Legal Remembrancer who shows cause in this case on behalf of the Magistrate; but we think that the proceedings now commenced under S. 188, Indian Penal Code, are defective for more than one reason. In the first place, the order as made under S. 144, Criminal Procedure Code, by the Sub-Divisional Officer on 9th December, 1915, ought never to have been made. A servant of the first party presented a petition to the Sub-Divisional Officer, in which he complained that the second party had made arrangements to construct a *pucca* drain obliterating a pathway and for that purpose they had collected a large number of *sirdars* and *lathials* and that if the defendants obliterated the said pathway or constructed a drain there and if the first party opposed them, then there would be a likelihood of a serious breach of the peace. The Magistrate took no evidence and had nothing before him in which to make the necessary record of material facts of the case, but on that petition alone he passed an injunction against the second party under S. 144, Criminal Procedure Code. This appears to us to be wholly irregular. The threat of a breach of the peace was from the first party and the Magistrate might well have on that petition said to the person who presented it that he would bind him down under S. 107. The proceedings were pushed through with great haste; the order is said to have been served at 9 P.M. on that day. On the 10th, on the complaint of the same man, Parbati Sarkar, the same Sub-Divisional Officer passed the following order:—"Summon Chandra Kanta Kanjilal, Debendra Nath Ganguli, Khider Sarkar and Chandra Lal Singh under S. 188, Indian Penal Code, for 9th January, 1916." As we read this order, it can only mean that the

Sub-Divisional Officer was taking cognizance of the offence under S. 188, which he had clearly no power to do. There would have to be either action by him under S. 476 or an application for sanction under S. 195. It is now suggested that that order should be taken to be an order under S. 476, because on 22nd March, a long time after, the Sub-Divisional Officer transferred the case to the file of another Magistrate for trial. It may be noted in passing that the Magistrate to whom he then purported to transfer it had no jurisdiction to try the case, if the order was under S. 476. We think that the whole proceedings were irregular. The Rule must be made absolute. The order under S. 144, Criminal Procedure Code, has expired, but it is set aside as being the foundation for the proceedings under S. 188, Indian Penal Code, which are also quashed.

V.B./R.K.

Rule made absolute.

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SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Sarojini Dassi and *others*—Defendants—Appellants.

v.

Gnanendra Nath Das and *others*—Plaintiffs and *others*—Defendants—Respondents.

Appeals Nos. 25 and 27 of 1915, decided on 14th December, 1915, from the Original Decrees of Chitty, J., dated 17th December, 1914.

(a) Will—Construction—Will held to create valid trust of surplus income for religious or charitable purposes.

Where the terms of a will gave to the *shebait* a power to accumulate the surplus income, which would exist over and above the amount required for defraying the expenses specified for the worship of idols and the management of the properties, without setting any limit to the accumulated fund, and expressly imposed no obligation upon the *shebait* to spend any part of the surplus income, but directed that the *shebait* for the time being should meet any emergent and unforeseen expenses out of the said fund and have power to make safe investment and to acquire other properties for increasing the corpus of the *debuttar* estate and also have power to celebrate the *puja* of any other god or goddess of the Hindus, to perform any other religious ceremonies or to perform any other charitable work :

Held, that the will created a valid trust of the surplus income for religious and charitable purposes. [P. 71, C. 1 & P. 72, C. 1.]

(b) Words and phrases—Cash—Meaning of.

Per *Sanderson, C. J.*, (*Woodroffe, J.*, agreeing)—"Cash" in the ordinary acceptation of the word has a narrower meaning than money. [P. 71, C. 2.]

(c) Will—Construction—Mere expression that heir-at-law shall not take any part of testator's estate is not sufficient to disinherit him.

Per *Mookerjee, J.*—A mere expression in a will that the heir-at-law shall not take any part of the testator's estate is not sufficient to disinherit him, without a valid gift of the estate to some one else. Case-law discussed. [P. 72, C. 2.]

(d) Will—Construction—Unconditional gift to charity—Direction for accumulation is invalid.

Where there is an unconditional gift to charity, a direction for accumulation is invalid, but the only result is that the income is immediately distributable in charity, the heirs or next-of-kin are not let in. Case-law discussed. [P. 73, C. 1.]

(e) Will—Construction—Doubt as to testacy with regard to portion of estate—Dispositions showing intention to dispose of all properties—Will should be read so as to lead to testacy.

Where the question is whether there is intestacy in regard to a part of the testator's estate and the various dispositions contained in the will, taken together, point to the conclusion that the testator intended to dispose of all his properties, then if there is any doubt the will ought, if possible, to be so read so as to lead to a testacy rather than to an intestacy. Case-law discussed. [P. 73, C. 2 & P. 74, C. 1.]

N. Sircar and *B. K. Ghosh*—for Appellants.

B. C. Mitter, B. L. Mitter, N. N. Bhose, C. C. Ghose, N. C. Ghose, S. R. Das and *H. D. Bose*—for Respondents.

Sanderson, C. J.—This appeal raises questions as to the true construction of the will of Sreenath Das, dated 13th January, 1904.

The first clause deals with a dedication of certain property to the family idols. I do not refer to the details of the clause, as they have been already so fully discussed in the course of the argument and they appear from the will itself.

It has been argued, *first* of all, that this clause does not constitute a complete dedication of all the property to the idols, but merely created a charge on the property in favour of the idols : *secondly*, that there is no valid trust for religious and charitable purposes with regard to the surplus income arising from the so-called *debuttar* estate.

I do not give any decision on the *first* point, *viz.*, whether the clause contains a complete dedication, because it was admitted by the learned Counsel for the appellant that if the clause does contain

a valid trust of the surplus, if any, for charitable purposes, the *first* point becomes immaterial, and that it does not matter whether the will constituted a complete dedication or merely a charge on the property in favour of the idols, because the whole of the testator's interest in the property specified in clause I would be exhausted.

In my judgment the clause does create a valid trust for religious and charitable purposes.

The ground on which the clause is attacked is as follows: It was argued that the terms of the clause gave to the *shebait* a power to accumulate the surplus income, which would exist over and above the amount required for the defraying of the expenses specified for the worship of the idols and the management of the properties, to an unlimited extent, and that it imposed no obligation upon the *shebait* to expend any part of the surplus income. As an instance, it was argued that under the clause it was open to the *shebait* and his successors to accumulate the surplus income for a thousand years or more and that they need never spend any of the surplus income upon religious or charitable purposes. In my judgment this is not a proper or reasonable construction to put on the will.

The clause relating to accumulation is merely incidental to the provisions relating to the dedication and management of the property, and in my judgment the intention of the testator can clearly be gathered from the terms of the clause, *viz.*, that a power, and it may be said a necessary and reasonable power, is given to the *shebait* from time to time in the course of the management of the properties to make safe investment of surplus income and thus increase the *debuttar* fund, and a direction is necessarily implied that the income not required for the specified expenses, shall be used within a reasonable time and in a reasonable way for other religious ceremonies and other charitable work. It is left to the discretion of the *shebait* to decide the exact form and the exact time when the income should be so used, but it is contrary to the intention of the testator as expressed in the clause, when read as a whole, that the *shebait* and his successors should hold up the surplus income and accumulate it for hundreds of years. For this reason, in my judgment, the appeal fails on the points raised in the first clause.

The *second* point raises the question whether there is an intestacy as to certain of the testator's property which, I understand, consists of rents uncollected at the testator's death, mortgage debts outstanding at the said date and shares and securities.

It was argued by the appellants' Counsel first of all that an extended meaning must be given to the word "cash" so as to include the property which I have mentioned already.

In my judgment this is not the true construction. "Cash" in the ordinary acceptation of the word has a narrower meaning than money, and when taken in conjunction with the words "Government promissory notes," in my judgment, it means cash in the ordinary meaning of the word and nothing more.

But a further point is taken, and this, I admit, has caused me some doubt as to the proper construction. It was argued for the appellant, that the terms of the will read as a whole showed a clear intention of the testator to dispose of the whole of his property. With this I agree. The question remains whether the terms of the will are sufficient to carry out that intention as to his residuary estate so as to cover the property above mentioned, *viz.*, uncollected rents, mortgage debts and shares. After due consideration of the able argument of Mr. Dass, I have come to the conclusion that clauses 12, 13 and 14 read together do sufficiently contain a devise of the residuary estate to his two sons, Surendra and Rajendra; and consequently, in my opinion, the judgment of Mr. Justice Chitty, in so far as he held there was an intestacy as to this property, should be reversed. As to the library at Srinath Das' Lane, I think it may be said to be included in clause II.

Costs of the appeal to come out of the estate. Executor's costs as between attorney and client.

Woodroffe, J.—I agree.

Mookerjee, J.—Two questions have been argued on these appeals, namely, *first*, was there intestacy in respect of any interest in the properties dedicated by the testator to his family idols; *secondly*, were the two sons of the testator, Surendra Nath Das and Rajendra

Nath Das, constituted residuary legatees under his will, in respect of properties other than his immovable properties.

The determination of the *first* question depends upon the true construction of the first clause of the will. In the first paragraph of that clause, the testator dedicates certain specified properties to his family idols and directs the performance of the ceremonies named by him. He further prescribes the sums to be spent for this purpose, which amount to an aggregate of Rs. 6,765 a year. In the second paragraph, he directs the revenues, rents, cesses, taxes and costs of management and repairs of the dedicated properties to be paid out of the income thereof, and, then states as follows: "if after defraying all the above mentioned expenses any money be left in the hands of the *shebait* for the time being, the same shall accumulate as a *debuttar* fund. The *shebait* for the time being shall meet any emergent and unforeseen expenses out of said fund and shall have power to make any safe investment and to acquire other properties and thus to increase the corpus of the *debuttar* estate. Out of the income of such fund, the *shebait* for the time being shall also have power to celebrate the *puja* of any other god or goddess of the Hindus, to perform any other religious ceremonies, or to perform any other charitable work. The above mentioned properties and the income thereof or any portion of the same shall never belong to any of my heirs or any of the *shebaits* nor shall the same be in any way liable for his personal debts." The appellants have contended that the properties mentioned in the clause were not absolutely dedicated to the family idols, that they continued to be secular properties subject to a religious charge of Rs. 6,765 a year, and that there was no valid legal disposition of the remainder, so that there was an intestacy in respect thereof. This contention is, in my opinion, unsound. Reliance has been placed upon the decisions of the Judicial Committee in *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1); *Ashutosh Dutt* v. *Durga Charan Chatterjee* (2) and *Surendro Keshub Roy* v. *Durga Soondary Dossee* (3). These cases are clearly distinguishable, and do not assist the contention of the appellants. The dispositions there provided for the performance of religious acts and ceremonies, and were followed by a bequest of the surplus to the members of the family of the founder for their own use and benefit; in these circumstances, it was ruled that the dedication was not, to use the language of Sir Arthur Wilson in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (4) of the completest character, but merely created a charge for religious and ceremonial purposes on property which still retained an essentially secular character. Here the position is entirely different. The testator clearly intended to dedicate his entire interest in the property for religious and charitable purposes. He states explicitly that no portion of the income of the properties shall ever belong to any of his heirs or be in any way liable for their personal debts. I am not unmindful that an expression of this character is not necessarily decisive, for, as Peacock, C. J., said in *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (5), a mere expression in a will that the heir-at-law shall not take any part of the testator's estate is not sufficient to disinherit him, without a valid gift of the estate to some one else, or as Willes, J., said in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (6), the heir-at-law, though in terms excluded from benefit under the will, cannot be excluded from his general right of inheritance, without a valid devise to some other person; this is in conformity with *Pickering* v. *Lord Stamford* (7), *Johnson* v. *Johnson* (8) and *Fitch* v. *Weber* (9). The clause mentioned, however, plainly indicates the intention of the testator, and even if it be assumed that the entire interest in the properties was not dedicated to the family idols, there is no room for dispute that the remainder was dedicated for religious and charitable purposes. This brings me to the question, whether, in this view, the supplementary dedication was valid in law, and, if invalid, whether the heirs are benefited

(1) (1859-61) 8 M. I. A. 66=11 Suth. P. C. J. 37 (P. C.).
(2) (1880) 5 Cal. 438=6 I. A. 182 (P. C.).
(3) (1892) 19 Cal. 513=19 I. A. 108.
(4) (1905) 32 Cal. 129=31 I. A. 203 (P. C.).
(5) (1870) 4 Beng. L. R. (O. C. J.) 103.
(6) (1872) 9 Beng. L. R. 377=18 W. R. 359 (P. C.).
(7) (1795) 3 Ves. 332=30 E. R. 787.
(8) (1841) 4 Beav. 318=49 E. R. 361.
(9) (1848) 6 Hare 145=17 L. J. Ch. 361.

thereby. The appellants have argued that there was a direction for accumulation not permissible under the law. I do not think this is a fair construction of the devise. The testator authorised an accumulation of the surplus and an increase of the corpus of the *debuttar* estate; but he empowered the *shebait* to apply the income for religious and charitable purposes and his intention obviously was that it should be so applied. It has been argued, however, that under the words of the will, it was not obligatory on the *shebait* to apply the income in this manner, that he might accumulate the income for an indefinite time, and that consequently the direction for accumulation is void. Reliance has been placed in this connection upon a class of cases of which *Williams* v. *Kershaw* (10); *Hunter* v. *Attorney-General* (11); *Blair* v. *Duncan* (12) and *Grimond* v. *Grimond* (13) may be taken as the type. The principle which underlies these decisions does not assist the appellants; there, the bequests were for charitable and for other indefinite purposes, and were, consequently, held void for uncertainty, as the trustees might or might not apply the fund for a charitable purpose; here, on the other hand, the income, if spent at all, must be zpent for religious and charitable purposes. Further, I do not accept the contention that this is a case of a mere power: it is, on the other hand, I think, to use the language of Lord Eldon in *Brown* v. *Higgs* (14), a case of a power which the party to whom it is given is entrusted with and required to execute. But even if we assume that the *shebait* is authorised by the clause to accumulate the income indefinitely and that such direction is invalid in law, how does it help the appellants? It is well settled that where there is an unconditional gift to charity, a direction for accumulation is invalid, but the only result is that the income is immediately distributable in charity; the heirs or next-of-kin are not let in. This was decided by the House of Lords in *Wharton* v. *Masterman* (15), which overrules the contrary view expressed by Wickens, V. C., in *Harbin* v. *Masterman* (16). Reference may also be made to a long line of cases which support the view I take: *Martin* v. *Maugham* (17); *Attorney-General* v. *Poulden* (18); *Shillington* v. *Portadown Urban District Council* (19); *Ogilvi* v. *Kirk of Dundee* (20); *Maxwell* v. *Maxwell* (21); *Chamberlayne* v. *Brockett* (22); and *Swain, In re, Monckton* v. *Hands* (23). The decision in *Ewen* v. *Bannerman* (24) may seem at first sight to support the opposite view; but it has been adversely commented on and plainly disapproved by Lord Chelmsford and Lord Wensleydale in *Magistrates of Dundee* v. *Morris* (25). There is no room for reasonable doubt that the doctrine recognised by the House of Lords in *Wharton* v. *Masterman* (15) is based on sound principle; the trustees of a charity are not bound to spend the whole of the income of the charity every year; they can lay by money for an ulterior purpose just as an individual can, provided the purpose is within the scope of the charitable trust: [see the observations of Lord Dunedin in *Lindsay's Trustees, In re,* (26)]. Consequently, even if the clause were construed as a trust for accumulation, and the direction were held invalid in law, the heirs would not be benefited. The *first* question must be answered in the negative.

The determination of the *second* question depends upon the true construction of the last three clauses of the will. I am disposed to agree with Mr. Justice Chitty that the term 'cash,' used by the testator in clause 12, does not include arrears of rent, debts due and the like properties. But Mr. Mitter has argued that the two sons, Surendra Nath Das and Rajendra Nath Das, were constituted residuary legatees. This contention, I think, must prevail, notwithstanding the able argument of Mr. Das in support of the contrary view. The various dispositions contained in the will, taken together,

(10) (1835) 5 Cl. & Fin. 111=5 L. J. (N. S.) Ch. 84.
(11) (1899) App. Cas. 309=68 L. J. Ch. 449.
(12) (1902) App. Cas. 37=71 L.J.P.C. 22.
(13) (1905) App. Cas. 124=92 L. T. 477.
(14) (1803) 8 Ves. 561=4 R. R. 323.
(15) (1895) App. Cas. 186=64 L. J. Ch. 369.
(16) (1871) 12 Eq. 559=40 L. J Ch, 760.
(17) (1844) 14 Sim 230=13 L. J. Ch. 392.
(18) (1844) 3 Hare 555=8 Jur. 611.
(19) (1911) 1 I. R. 247=44 I. L. T. R. 200.
(20) (1846) 8 Dunlop 1229.
(21) (1877) 5 Retti 248=15 Scot. L. R. 155.
(22) (1872) 8 Ch. App. 206=42 L. J. Ch. 368.
(23) (1905) 1 Ch. 669=74 L. J. Ch, 354.
(24) (1830) 2 Dow. & Cl. 74=4 Wils. & Sh. 346.
(25) (1858) 3 Macqueen H. L. 134.
(26) (1911) 48 Scot. L. R. 470.

point to the conclusion that the testator intended to dispose of all his properties; if there is any doubt, we ought, if possible, to read the will so as to lead to a testacy, not to an intestacy: *Redfern In re*, *Redfern* v. *Brying* (27); *Harrison In re*, *Turner* v. *Hellard* (28): *Kirby-Smith* v. *Parnell* (29); *Edwards*, In re, *Jones* v. *Jones* (30). On an examination of the entire scheme of the will I think it is reasonably plain that clause 5 disposes of the residue of the immovable properties, while the last sentence of clause 12 effectively disposes of the residue of the other properties. This view is to my mind supported by the dispositions in clause 14; it would be unreasonable to hold that in the contingency contemplated in that clause, the testator burdened his two sons, Surendra and Rajendra, with the funeral expenses, the costs of the Probate proceedings and the legacies though they were not the residuary legatees. The *second* question must be answered in the affirmative.

On these grounds, I agree with the learned Chief Justice in the order he proposes to make in these appeals.

V.B/R.K.

Decree modified.

(27) (1877) 6 Ch. D. 133=47 L. J. Ch. 17.
(28) (1885) 30 Ch. D. 390=55 L. J. Ch. 799.
(29) (1903) 1 Ch. 483=72 L. J. Ch. 468.
(30) (1906) 1 Ch. 570=75 L. J. Ch. 321.

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HOLMWOOD AND CHAPMAN, JJ.

Amjadennessa Bibi and *others*—Plaintiffs—Appellants.

v.

Rahim Buksh Shikdar and *others*—Defendants—Respondents.

Second Appeal No. 97 of 1912, decided on 28th May, 1914, against the decree of Offg. Sub-Judge, 3rd Court, Tipperah, dated 30th May, 1911.

(a) Contract Act (9 of 1872), S. 16—Money paid on agreement not to prosecute is one under undue influence and money can be recovered back.

If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned. *Jones* v. *Merionethshire Permanent Benefit Building Society*, (1892) 1 Ch. 173, ref. to. [P. 74, C. 2.]

(b) Contract Act (9 of 1872), Ss. 23 and 65—Money paid for compounding, non-compoundable offence being against law—Money cannot be recovered—S. 65 does not apply.

But in every case of illegal composition of a non-compoundable criminal offence, a refund cannot be demanded at law. [P. 75, C. 1.]

S. 65 of the Indian Contract Act does not apply to such cases of refund of money. [P. 75, C. 1.]

Rajindra Chandra Guha—for Appellants.

Satis Chandra Ghose—for Respondents.

Judgment.—The only point raised, in this second appeal, is that the agreement really having been *in invito* a refund suit can be maintained in Court. We have only to point out that neither the pleadings nor any issue nor any finding of the lower Courts, nor apparently any evidence appears in support of the question of fact that there was any pressure upon the plaintiff to pay this money in consideration for not being prosecuted. The so-called admission of the defendants in their written statement, goes directly to the contrary.

It is urged that in every case the fear of punishment is an undue influence and that if the defendant accepts money to screen the plaintiff from punishment he thereby exerts this undue influence. The exceptions given by Pollock, the one on which alone reliance is placed is "unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief." It is obviously not voidable under S. 19 inasmuch as there was no coercion whatever, and we are unwilling to read into S. 16 a fictitious use of the dominant position of the defendant. The law says that not only the defendant must have a dominant position but he must use it, and this has been carefully guarded against in all the cases in England to a number of which we have been rather unnecessarily referred. The rule derivable from these cases can be thus stated:—If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned. There is one rather doubtful passage in the judgment of Lord Justice Bowen in the case of *Jones* v. *Merionethshire Permanent Benefit Building*

Society, (1) which might be taken to extend the principle further; but the learned Judge expressed himself with extreme hesitation and abstained from expressing any opinion on it. Were we to extend the principle in the way we are asked to do by the learned Vakil for the appellant, it is perfectly clear that in every case of illegal composition of a non-compoundable criminal offence a refund can be demanded at law. We have no desire and no intention to extend the law to any such result. It has been held that S. 65 does not apply to a case of this kind.

The appeal is, therefore, dismissed with costs.

V.B./R K.

Appeal dismissed.

(1) (1892) 1 Ch. 173.

A. I. R. 1916 Calcutta 75

MOOKERJEE AND ROE, JJ.

Gobinda Chandra Basak—Defendant—Appellant.

v,

Haridas Basak—Plaintiff — Respondent.

Appeal No. 1765 of 1913, decided on 20th May, 1915; from the Appellate Decree of Dist. Judge, Dacca, dated 18th March, 1913.

Contract Act (9 of 1872), S. 254—Accounts—Interest on capital—Generally not allowed but on excess amount advanced.

As a general rule, interest between partners is not allowed, unless there is an express stipulation, or a particular course of dealing between the parties as shown by the partnership books or a trade custom to the contrary; but this general rule is subject to an important qualification, namely, that subject to any agreement between the partners, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he had agreed to subscribe. [P. 75, C. 2.]

Jogesh Chandra Roy and *Bepin Chandra Bose*—for Appellant.

Probodh Chandra Roy—for Respondent.

Mookerjee, J.—This is an appeal by the defendant in a suit for dissolution of partnership and adjustment of accounts. The plaintiff and the defendant were partners. Their original idea was that capital should be contributed equally by both of them; but in the events, which have happened, the defendant, it is said, has contributed a much larger sum than the plaintiff has done. The defendant prays that in the settlement of accounts he may be allowed interest on the excess sum contributed by him towards the capital. The Courts below have disallowed this claim. In our opinion the view taken by the District Judge cannot be supported.

On behalf of the respondent, it has been urged that, as a general rule, interest between partners is not allowed, unless there is express stipulation, or a particular course of dealing between the parties as shown by the partnership books, or a trade custom to the contrary. This may be accepted as a correct statement of the general rule, and is recognised in a long line of authorities. [*Rushton* v. *Grissell* (1); *Hill* v. *King* (2); *Rhodes* v. *Rhodes* (3); *Stevens* v. *Cook* (4); *Cooke* v. *Benbow* (5); *Boddam* v. *Ryley* (6) and *Peim* v. *Harris* (7).] But upon this rule, there has been engrafted an important qualification, namely, that an advance by a partner to the firm is treated, not as an increase of its capital, but rather as a loan on which interest should be paid; and that, subject to any agreement between the parties, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he had agreed to subscribe. This principle is obviously consistent with the rules of justice, equity and good conscience which we are bound to administer. In *Millar* v. *Craig* (8) Lord Langdale, M. R., observed: "Can one believe that a party, to whom the whole capital belonged renounced his advantage in that respect, and continuing to take an equally laborious part in the transaction of the business, should bring in his whole income, both partnership and private, and yet intend to reserve no advantage of that income upon the settlement of accounts between himself and co-partner? I must say, I have great difficulty in coming to such a conclusion as that." A similar view was expressed by Knight

(1) (1868) 5 Eq. 326.
(2) (1863) 3 De G. J. & Sm. 418.
(3) (1860) 6 Jur. (N. S.) 600.
(4) (1859) 5 Jur. (N. S.) 1415.
(5) (1863) 3 De G. J. & Sm. 1.
(6) (1783) 1 Brown. C. C. 239.
(7) (1876) Ir. R. 10.
(8) (1843) 6 Beav. 433.

Bruce, L. J., in *Ex parte Chippendale* (9): "But there remains the question of interest. As to this I have doubted. Without, however, relying merely on Lord Hardwicke's authority, as for instance, on *Omychund* v. *Barker* (10) and *Barmelt* v. *Parker* (11), I think that mercantile usage and the general course of trade dealings do, where a partner in a trade has duly and properly advanced money of his own for the purposes of the partnership business, so as to become justly a creditor in account with the partnership for the amount, raise an implied contract for interest, so as to entitle the partner advancing to have his account with the firm credited with interest accordingly, although his partners may not have authorised, and may not have known of the transaction, at least in the absence of any express contract to the contrary." To the same effect are the observations of Turner, L. J., that the view can be defended on grounds of equity. In our opinion, it is fairly clear that in the present case the plaintiff-respondent who claims the benefit of the profits which have accrued from the sums advanced to the partnership business by the defendant, is bound in justice to make an allowance for interest on those sums to his partner.

The result is that this appeal is allowed in part and the preliminary decree made by the District Judge modified. We direct that on all sums advanced by the defendant towards the partnership concern in excess of his share of the capital, interest be allowed in his favour at the rate of six per cent. per annum. Each party will pay his own costs throughout the litigation.

V.B./R.K.

Appeal partly allowed.

(9) (1853) 4 De G. M. & G. 19.
(10) (1744) 1 At. 21.
(11) (1751) 2 Ves. Sen. 364=28 E. R. 233.

A. I. R. 1916 Calcutta 76

HOLMWOOD AND CARNDUFF, JJ.

Angnu Ghasi and *others*—Defendants—Appellants.

v.

Chuthu Patras and *others*—Plaintiffs—Respondents.

Appeal No. 1412 of 1911, decided on 7th December, 1914, from the Appellate Decree of J. C., Chota Nagpur, dated 24th March, 1911.

(a) Chota Nagpur Tenancy Act (6 of 1908), S. 11—Transferee of tenure cannot recover rent for period prior to registration in landlord's office.

Under S. 11 of the Chota Nagpur Tenancy Act (B. C. VI of 1908), the transferee of a tenure can never recover any rent for the period prior to his application to the landlord for registration in his office.

(b) Evidence Act (1 of 1872), Ss. 35 and 114—Entries in record-of-right gives transferee *prima facie* right to recover rent but it is inoperative against a statutory provision.

An entry in the record-of-rights gives the transferee only the presumption of possession under the title he claims, but it cannot give him the right to recover rent which is barred by a statutory provision of the rent law, and such entry cannot take the place of the procedure which the law has laid down as a condition precedent to the collection of rent.

Harihar Prasad Singh and *Rajeshwari Prasad*—for Appellants.

Kulwant Sahay—for Respondents.

Holmwood, J.—This second appeal was remanded to the lower Appellate Court for a finding whether the plaintiffs' claim was barred by S. 11 of Chota Nagpur Tenancy Act. The lower Appellate Court has treated the issue as if it was whether the plaintiffs' suit was barred by that section, which is rather a different question. It has held that the entry in the finally published record-of-rights, a copy of which was served on the *zemindar*, amounts to registration, and that the plaintiffs' suit is, therefore, not barred. But this is an insufficient finding and does not touch the case, which is, whether the plaintiffs are able to recover rent for the period between the acquisition of their title to the tenure and the application for registration in the landlord's *sherishta* which, as laid down in the section, has to be accompanied by a tender of the necessary fee to the landlord. On the plain wording of the section, we must hold that however good the plaintiffs' title may be and whatever their rights to sue for rent under the law may be, they cannot recover the rent claimed by them in this suit, and that no decree can, therefore, be passed in their favour.

It was held by a majority of the Full Bench in the case of *Alimuddin Khan* v. *Hira Lal Sen* (1) in a case under the

(1) (1896) 23 Cal. 87.

Land Registration Act, where the impediment was not nearly so clear as under the Chota Nagpur Tenancy Act, that the right to the rent of an estate is in the true proprietor, although unregistered, and his right to sue for rent is not taken away by anything in the sections of the Act, which do not affect his cause of action, but merely put an impediment in the way of his realizing the rent, until he has complied with the law by obtaining registration. Now even on this rule the plaintiffs would recover nothing in this suit, since it is not pretended that they have complied with the provisions of the law. But the provisions of S. 11 go much further and lay down that they can never recover any rent for the period prior to their application to the landlord for registration in his office. Clearly therefore any application they might make during the pendency of the suit or in future would not operate retrospectively and their claim for rent is altogether barred and will remain barred as to the rents prior to the date of application, even when they have complied with the provisions of the Act. The entry in the record-of-rights gives them only the presumption of possession under the title they claim; but it cannot give them the right to recover rent which is barred by a statutory provision of the rent law, and such entry cannot take the place of the procedure which the law has laid down as a condition precedent to the collection of rent.

I am, therefore, of opinion that the learned Judicial Commissioner's finding is erroneous and the appeal of the defendants must be decreed and the plaintiffs' suit dismissed with costs in all Courts.

Carnduff, J.—I agree. Where the language of an enactment is clear, there is no room for speculating as to the object of the Legislature and suggesting that something different from what the law prescribes should be accepted as sufficient, because it would equally give effect to the supposed object. Here the language of S. 11 of the Chota Nagpur Tenancy Act, 1908, is perfectly plain, and I cannot entertain the view that the granting by the Settlement Department to a landlord of a copy of a *khewat* containing the name of a certain person as the holder of a tenure, is equivalent to registration in the office of the landlord of the transfer of the tenure to that person, which the section expressly requires such person to have effected. Nor do I understand how it is possible in this case to assign any date to the transferee's application for registration referred to in the section, or how we can surmount the difficulty that here there has been no tender of the registration fee to the landlord within the time prescribed.

V.B./R.K.

Appeal decreed.

A. I. R. 1916 Calcutta 77

HOLMWOOD AND MULLICK, JJ.

Kartick Chandra Das—Defendant—Appellant.

v.

Satya Nidhi Ghosal and *others*—Plaintiffs—Respondents.

Appeal No. 2994 of 1915, decided on 16th December, 1915, from the Appellate Decree of Sub-Judge, 24 Parganas, dated 30th June, 1913.

(a) Civil P. C. (5 of 1908), O. 41, R. 23—Remand of appeal without retaining appeal on its file re-opens whole case—Lower Appellate Court must hear appeal on judgment of first Court.

A remand made by an Appellate Court without retaining the appeal on its own file necessarily re-opens the whole case and the lower Court of Appeal to which the case is remanded is bound to hear the appeal upon the judgment of the Court of first instance. [P. 78, C. 2.]

(b) Practice—High Court—Remand of appeal—High Court can limit scope of certain appeal remanded to lower Courts without keeping them on its own file.

A High Court in the exercise of its powers of supervision under the Charter can assume, in certain cases, an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them on its own file. But in such a case, it is absolutely essential that the High Court should lay down clearly that it did intend to limit the scope of the appeal to certain specified questions. [P. 78, C. 2.]

(c) Civil P. C. (5 of 1908)—Remand of appeal—Whole appeal becomes open for decision.

In the absence of any limitation, the whole appeal on remand becomes open for decision by the lower Appellate Court. [P. 78, C. 2.]

(d) Landlord and tenant—Permanent tenancy—Presumption—Original of tenancy lost—Tenancy held under *shebaits*—Tenants described as *bharatia* tenants—No presumption of grant of permanent tenancy arises.

No presumption of a grant of permanent tenancy can arise, if at the point of ancient time where the origin of the tenancy is lost in

obscurity, it was held under *shebaits* whose origin is also lost in obscurity and the tenants were described as *bharatia* tenants.

[P. 78, C. 2 & P. 79, C. 1.]

(e) Civil P. C. (5 of 1908), S. 100—Decision of lower Appellate Court on meaning of common word is final.

A decision of an Appellate Court upon the ordinary meaning of a word in common use is final in second appeal. [P. 79, C. 1.]

Shib Chandra Palit and *Rash Behari Ghose*—for Appellant.

Mohini Mohan Chatterjee and *Sarat Chandra Sen*—for Respondents.

Judgment.—This is an appeal after remand from the judgment and decree of the learned Subordinate Judge of the 24 Parganas, who agreeing with the Court of first instance has decreed the plaintiffs' suit for ejectment of the defendants. The defendants claimed a permanent right in the land which is situated in Kidderpore, a suburb of Calcutta. They alleged that they had acquired such a right by long possession beyond the memory of man at a fixed rent and that their predecessors had erected permanent structures on the land. In the first appeal from the Munsif's judgment which was heard by another Subordinate Judge, it was held that the *kabuliyat* set up by the plaintiffs of the year 1301 was a forgery and that the defendants were entitled to the presumption from long possession and from the existence of permanent structures and he accordingly dismissed the plaintiffs' suit. The plaintiffs appealed to this Court and the appeal was heard by Jenkins, C. J., and Nalini Ranjan Chatterjea, J., who remanded the case reversing the decree of the lower Appellate Court and sending back the appeal for re-hearing in the light of the remarks they had made. Those remarks were chiefly two in number, *firstly*, that the presumption which was made by the Subordinate Judge in the first Court offended a legal principle, inasmach as if the original lessor was a *shebait* of *debuttar* he would not have acted in discharge of his duty as *shebait* by giving a rent for all time which would in future be wholly inadequate, and it was, therefore, necessary to make a further inquiry into the origin of the tenancy, whether at the origin of the tenancy the property had acquired a *debuttar* character, as upon this would depend the applicability of the presumption. There was a *further* suggestion that the weight to be attached to the word *bharatia* should also be considered by the learned Subordinate Judge.

In strict law a remand made by an Appellate Court without retaining the appeal in its own file necessarily re-opens the whole case, and the Court of Appeal to which the case was remanded is bound to hear the appeal upon the judgment of the Court of first instance and on nothing else. It is true that this Court in the exercise of its powers of supervision under the Charter has assumed, and we think rightly assumed, in certain cases authority to limit the scope of certain appeals remanded to the lower Courts without keeping them in its own file. But whenever this is done, it is in our opinion absolutely essential that this Court should lay down clearly without any possibility of mistake that it did intend to limit the scope of the appeal to certain specified questions. We are, therefore, of opinion that the learned Subordinate Judge who has now re-heard the case was right in holding that the whole appeal was open to him for decision. The importance of this lies in the fact that the first Appellate Court found that the *kabuliyat* which is now found to be the real origin of the present tenancy was a forgery.

The Subordinate Judge on remand has found and has given very good reasons for finding that this *kabuliyat* must have been a genuine document. He therefore holds that there is no question that at the inception of this tenancy in 1301 the lessor was the *shebait* of *debuttar* property. But he has gone further and has found that eliminating this *kabuliyat* as the origin of the tenancy there can be no presumption of a grant of a permanent tenancy, the earliest *dakhila* which is the first evidence of the existence of this tenancy being of the year 1246 and in this also the landlord signed as *shebait*. If the appellants say that the tenancy originated before 1246 and that at the time the land was not *debuttar*, the learned Subordinate Judge says that that fact must, he thinks, be proved by evidence; but they have not been able to produce any evidence on the point.

We come, therefore, to the fact that at the point where the origin of the tenancy is lost in obscurity and where the presumption would arise if it ever arose, the tenancy was held under *shebaits* whose

origin must also be considered to be lost in obscurity, and not only was it held under *shebaits* but it was expressly stated that the tenants were *bharatia* tenants. This was the second point which the learned Subordinate Judge was specially directed to devote his attention to in deciding the appeal, and his finding on this point is that the word *bharatia* which has been used from the earliest times to describe these tenants cannot be said to mean permanent .tenants. The learned Judge, who is an officer of very great experience and very sound judgment and must be intimately acquainted with the use of such terms as *bharatia*, says : " I have never seen the word *bharatia* used with reference to the annual tenants with permanent rights ; the word as ordinarily used signifies monthly tenants of houses or lands without any permanent right." Now this is not a question for the Judge as to the legal effect of the word. It is a question essentially for the Jury of the ordinary meaning of word in common use, and the decision of the learned Subordinate Judge on the point is therefore, final and not open to us to discuss in second appeal.

We think, therefore, that on all the points the appeal of the defendants fails and must be dismissed with costs.

V.B/R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 79

FLETCHER AND BEACHCROFT, JJ.

Emperor.

v.

Mohar Ali Sheikh—Accused.

Criminal Ref. No. 36 of 1914 and Criminal Appeal No. 983 of 1914, decided on 14th January 1915, made by the Addl. Sessions Judge, Mymensingh.

(a) Practice—Criminal trial—Accused on capital a charge should not be allowed to go undefended.

When an accused appears before a Judge on a capital charge, he ought not to be allowed to go undefended, the custom being for the Judge to appoint or request any member of the Bar to conduct the defence of the accused. [P. 79, C. 2]

(b) Criminal P. C. (5 of 1898), Ss. 374 and 376 (b)—High Court is competent to order fresh trial on same or amended charge.

Under S. 376 (b), Criminal Procedure Code, the High Court has jurisdiction to order a new trial on the same or an amended charge.

[P. 79, C. 2 & P. 80, C. 1.]

Orr—for the Crown.

Birbhusan Dutt –for Accused.

Judgment.—This case comes before us on a reference made by the learned Additional Sessions Judge of Mymensingh under the provisions of S. 374, Code of Criminal Procedure, and also on appeal by the accused. The accused was tried before the learned Additional Sessions Judge with the aid of a Jury on two charges : *first* of all, with having murdered one Jamir Sheikh and *secondly*, with voluntarily causing hurt by a cutting instrument to one Kocha. The present case is one that has caused us considerable anxiety, because the accused was undefended before the learned Sessions Judge. That is a course which ought not to be adopted in cases where the accused is tried on a capital charge. There has been a practice long established and well-recognised that when an accused appears before the Judge on a capital charge, the Judge is accustomed to request a member of the Bar who practises before him to undertake the defence of the accused. That obligation has, so far as I am aware, always been recognized by the profession, who always have willingly undertaken the defence of the accused so charged at the request of the presiding Judge. However, the learned Judge in the present case did not appoint or request any member of the profession to conduct the defence of the accused, the result being that the case has been tried practically *ex parte* and the difficulties that appear on the evidence have not been cleared up in the course of the cross-examination either by the accused himself or by the learned Judge. The evidence, as it stands on the record, is such that we are unable to confirm the sentence passed on the accused. What the points of difficulty transparent to any person who has any knowledge of the value of evidence are, it is not our duty to state at present nor do we think it right that at the present moment we shall enumerate which are the points that have pressed upon us. The only question is, what ought we to do in the present circumstances? If the story relied upon by the prosecution be true, an exceedingly cruel murder has been perpetrated and public safety requires that, if possible, the person who has perpetrated that murder should be brought to justice. S. 376 (*b*),

Code of Criminal Procedure, gives us jurisdiction to order a new trial on the same or an amended charge. That being so, we consider that, in this, case, we are bound to send the case back to the learned Judge with a direction that the accused be re-tried on the same charges that have already been framed against him and we would request the learned Judge to see that, in the new trial, some gentleman represents the accused before him.

We, therefore, decline to confirm the sentence of death passed on the accused and send the case back to the learned Judge for the accused being re-tried.

V. B./R. K.

Re-trial ordered.

A. I. R. 1916 Calcutta 80 (1)

CHATTERJEA AND RICHARDSON, JJ.

Shashi Shekhareswar Roy Bahadur—Plaintiff—Appellant.

v.

Nanda Lal Mandal—Defendant—Respondent.

Appeal No. 486 of 1914, decided on 3rd March, 1916, from the Appellate Decree of Sub. Judge, Rajshahye, dated 24th November, 1914.

Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 2 (6)—Applicability of—Suit for rent of *jalkar*.

A suit for rent of a *jalkar* (fishery right) is governed by the limitation prescribed in Sch. III, Art. 2, Cl. (*b*) of the Bengal Tenancy Act. 27 I. C. 614, foll. [P. 80, C. 1 & 2.]

Broja Lal Chakrabertty—for Appellant.

Babu Jotindra Mohan Choudhary—for Respondent.

Judgment.—The only question in this appeal is whether a suit for rent of a *jalkar* is governed by the rule of limitation (of three years) prescribed by Art. 2 of the third Schedule of the Bengal Tenancy Act. S. 193 of the Bengal Tenancy Act provides that the provisions of the Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of (among other things) rights over fisheries. The lease in the present case was merely in respect of a right of fishery. The provisions of the Act applicable to suits, therefore, apply to the suit. S. 184 of the Act provides that the suits specified in Sch. 3 shall be instituted within the time prescribed in that Schedule. The limitation prescribed in Sch. 3, Art. 2, Cl. (*b*) is, therefore, applicable to the suit. The same view was taken in the case of *Krishna Lal* v. *Salim Mahomed* (1).

The appeal accordingly fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1915) 27 I. C. 614.

A. I. R. 1916 Calcutta 80 (2)

CHATTERJEE AND BEACHCROFT, JJ.

Brojendra Kumar Das and *others*—Defendants—Appellants.

v.

Gobinda Mohan Das and *others*—Plaintiffs—Respondents.

Appeal No. 325 of 1915, decided on 17th March, 1916, from the Original Decree of Sub-Judge, 1st Court, Barisal, dated 3rd March, 1914.

(a) Civil P. C. (5 of 1908), O. 1, R. 10 (2)—Power of Court to order for transposition of parties.

O. I, R. 10 (2), Civil Procedure Code, empowers a Court to make a transposition of parties, the omission in the new Code of the words "the Court might make a plaintiff a defendant or a defendant a plaintiff" in Act XIV of 1882 being due to avoidance of redundancy. 2 B. H. C. R. 310; 7 Bom. 167 and 20 Bom. 677, appr. [P. 82, C. 1.]

(b) Civil P. C. (5 of 1908), S. 115, O. 1, R. 10 (2)—Dismissal of application for transposition of parties—Discretion of Court—High Court will not interfere in revision.

It is in the discretion of a Court to refuse an application under O. 1, R. 10 (2) and where a Court refuses to transpose parties in the exercise of its discretion, the High Court will not interfere in revision. Where, however, the order is expressly based on a want of jurisdiction by the Court the order is subject to revision by the High Court under S. 115, Civil Procedure Code. [P. 82, C. 2.]

(c) Civil P. C. (5 of 1908), O. 23, R. 3—Compounding of differences—Prayer for withdrawal of suit without further relief—Dismissal for want of prosecution on appropriate order—No appeal lies.

A Court is not bound to draw up a decree on an application under O. 23, R. 3, Civil Procedure Code, where the plaintiff, after compounding his differences with some of the defendants, prays only for withdrawal of the suit without further relief. The appropriate order to pass under the circumstances is one

of dismissal for want of prosecution. Against such an order no appeal lies. [P. 81, C. 2.]

(d) Civil P. C. (5 of 1908), O. 1, R. 10 (2), O. 23, R. 3—Suit for dissolution of partnership and accounts—Compromise pending suit by some defendants—Petition to withdraw suit—Defendants not joined in compromise applying to be substituted as plaintiffs and to continue suit—Court refusing to transpose and to draw up decree—Appeal was held incompetent—Lower Court had power to transpose parties—Failure to exercise jurisdiction—High Court held competent to interfere in revision.

Plaintiff sued defendants for dissolution of partnership and for accounts. During the pendency of the suit plaintiffs and some of the defendants entered into a compromise, and the plaintiffs, after stating the nature of the settlement to Court, applied for permission to withdraw the suit. The Court passed an order dismissing the suit for want of prosecution without entering a decree. Thereupon, the defendants who had not joined in the compromise, applied to be substituted as plaintiffs and to continue the suit. In the alternative they asked that a decree might be prepared to enable them to appeal. The Court refused both prayers, holding that it had no power to transpose parties under the new Civil Procedure Code and that a decree was unnecessary. The objectors-defendants then appealed to the High Court, and, as an alternative, invoked the High Court's interference under S. 115, Civil Procedure Code:

Held, (1) that no appeal lay against the order under O. 23, R. 3, Civil Procedure Code; [P. 81, C. 2.]

(2) that the lower Court had power to transpose parties under O. 1, R. 10 (2); and [P. 82, C. 1.]

(3) that as the lower Court had failed to exercise a jurisdiction vested in it by law, it was competent to the High Court to interfere with the order in revision. [P. 82, C. 2.]

B. Chakravarty, Upendra Lal Roy, Bhupendra Chandra Guha and *Jitendra Nath Roy*—for Appellants.

Rash Behary Ghosh, Bepin Chandra Mullick, Sarat Chandra Dutt and *Sib Chandra Palit*—for Respondents.

D. Chatterjee, J. — The plaintiffs brought the suit giving rise to these proceedings in 1909, for declaration of title to certain shares in a certain partnership business with its branches, for dissolution of the said partnership and for accounts. The suit went on for several years through various vicissitudes of fortune until in March 1914, the plaintiffs made a compromise with the principal defendants and on receipt of consideration from them made an application for withdrawing from the suit, the said defendants giving up costs. The petition of compromise stated the nature of the settlement, but did not ask for any relief and in fact under the circumstances related no decree was required, as the plaintiffs stated that they had received the value for the rights given up by them under a deed of release.

Upon the said application being made by the plaintiffs, the appellants before us, *i. e.*, the defendants who had not joined in the petition of compromise, applied to be made plaintiffs, to amend the plaint, and to continue the suit as one on their behalf. The learned Subordinate Judge refused their application on the ground that the present Civil Procedure Code did not authorise him to make the transposition asked for, that the applicants had not asked for retaining the original plaintiffs on the record as defendants, that there was conflict of interests between the original plaintiffs and the appellants, so that it could not be said that the old suit was to be continued. The suit was accordingly dismissed without costs as the objectors did not ask for costs. The appellants then asked that a decree might be prepared so that they might appeal from the same, but the learned Subordinate Judge refused their application saying that no decree was necessary as the suit had been dismissed for want of prosecution. Against the said order the appellants filed the above appeal and as an alternative obtained the above rule.

If the Court below had been bound to make a decree and had not, we might have entertained the appeal.

We find, however, no reason to differ from the learned Subordinate Judge on this point. The plaintiffs had settled their differences and received satisfaction out of Court by the execution of separate deeds and intimated to the Court that they would not proceed with the suit.

The Court was not required to give them any relief and the Court could not give them any. It is contended that the Court was bound to pass a decree under O. 23, R. 3. The parties to the compromise, however, which had been effected out of Court, did not ask for a decree, and the objectors, who were no parties to the same, could not ask for one, so that the only course left to the Court was to dismiss the suit, as it did, for want of prosecution, unless, of course, it saw its way to continue the suit at the instance of the objectors. There is no appeal against an

order of this kind, and the appeal fails. As regards the rule, it is contended that the learned Judge, in refusing to make the transposition of parties and amendment asked for, refused to exercise a jurisdiction vested in him by law. It is true that the provision in S. 32 of Act XIV of 1882 that the Court might make a plaintiff a defendant and a defendant a plaintiff, has been omitted from the present Code, but, I think, it was omitted as redundant as the provision of O. 1, R. 10 (2), for striking out or adding parties is sufficient to cover the case of such a transposition, being, in effect, the striking one party off the side of the suit in which he had been placed and re-adding him on the opposite side.

Such transpositions are frequent in partnership cases: see *Krishnabai* v. *Sonubai* (1) and *Edulji* v. *Vullebhoy* (2), and there is nothing in the Code to take away the power of the Court to make orders in that behalf when the circumstances require it. The Court below distinguishes the last case on the ground that the applicants did not ask the Court to make the original plaintiffs-defendants. I do not think that the distinction is legitimate, because in the *first* place the original plaintiffs had parted with all their interest in the partnership in favour of defendants Nos. 1 to 15 and had, therefore, no subsisting interest in the suit: see *Sayad Abdul Hak* v. *Gulam Jilani* (3), and in the *second* place the applicants did not say that they did not want to have the original plaintiffs as defendants, and the Court had ample power under O. 1, R. 10, to make them defendants if it thought necessary. The Court below was in error therefore in holding that it was not authorized to make the transposition under the new Code. It is true that the Court had a discretion in the matter and might refuse to make the order in the exercise of that discretion. The learned Judge, however, thought he had no jurisdiction and cannot, therefore, be said to have exercised the discretion which he had in the matter, with that consciousness of power and competence which is necessary to strengthen his hands in the use of the discretion. He has made other distinctions also on minor points which can be met by amendments. He has, therefore, I think, refused to exercise a jurisdiction vested in him by law. The case of *Edulji* v. *Vullebhoy* (2) is exactly in point, and I think the learned Judge should have followed it and allowed the appellants to continue the suit which had passed through five years in Court and was ripe for hearing. It is true that the appellants have subsequently filed an independent suit of their own which is pending, but if that suit has to pass through another five years to be ripe for hearing, the proceedings may be endless. I think, therefore, the right order would be to dismiss the appeal as incompetent and to make the Rule absolute, and order the Court below to restore the suit to its file, make the necessary amendments and proceed to trial in accordance with law. No costs.

Beachcroft, J.—I agree.

V. B./R. K.

Rule made absolute;
Appeal dismissed.

(1) (1864-66) 2 B. H. C. R. 310.
(2) (1883) 7 Bom. 167.
(3) (1896) 20 Bom. 677.

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CHATTERJEA AND GREAVES, JJ.

Krishna Lal Choudhuri and *others*—Plaintiffs—Appellants.

v.

Salim Mahamed Choudhury—Defendant—Respondent.

Second Appeal No. 860 of 1912, decided on 16th December, 1914, against the decision of the Dist. Judge, Rajshahi, dated 14th January, 1912.

(a) Lease—Construction—Lease of fishery with condition for no reduction of rent in case of drought cannot be construed to confer any right to the soil.

Where a lease merely gives a right to fish in a *jalkar*, the fact that the lessee is not to claim reduction of the *jama* on the ground of drought or inundation does not necessarily show that any right to the soil is also conferred.

[P. 83, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), S. 193 and Sch. III, Art. 2 (b)—Suit for lease money of fishery lease falls under S. 193 and is governed by Art. 2 (b)—This money is not rent and therefore stipulated rate of interest can be recovered.

A suit to recover money due under such a lease comes under S. 193 of the Bengal Tenancy Act and is barred if not brought within the special period provided by Sch. III, Art. 2, Cl. (*b*) of the Act. [P. 84, C. 1.]

The money payable in respect of a fishery is not rent within the meaning of the Bengal

Tenancy Act, and as such, interest at the rate stipulated in the lease is recoverable on the amount. [P. 84, C. 2 & P. 85, C. 1.]

(c) Bengal Tenancy Act (8 of 1885), S. 67—Restriction on the liability of tenants to pay interest is substantive right and is not applicable to suits.

S. 67 of the Bengal Tenancy Act relating to interest affects the contract between the parties, and the restriction on the liability of the tenants to pay interest at the rate of 12½ per cent. per annum is a matter of substantive right, and does not apply to suits. [P. 84, C. 2.]

Brojola Chuckerbutty and *Jogesh Chandra Bose*—for Appellants.

Judgment.—This appeal arises out of a suit for recovery of money payable under a registered *kabuliyat* in respect of a *jalkar* for the years 1312 to the *Pous* instalment of 1317 B. S.

The Courts below have disallowed the claim for the years 1312 and 1313, B. S., on the ground that the claim for those years is barred by the special limitation provided by Schedule III, Article 2, Cl. (*b*), of the Bengal Tenancy Act. If the special limitation does not apply to the suit, the claim for the years 1312 and 1313 would be in time under Article 116 of the general Limitation Act.

Now S. 193 of the Bengal Tenancy Act lays down that the provisions of the Act applicable to suits for recovery of arrears of rent, shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like. S. 184 of the Act provides that the suits specified in Schedule III shall be instituted within the time prescribed in that Schedule, and Schedule III, Article 2, Cl. (*b*), prescribes a period of three years within which a suit for recovery of arrears of rent is to be instituted.

It is contended on behalf of the appellants that the lease in the present case not merely confers a right over a fishery within the meaning of S. 193 of the Bengal Tenancy Act, but also creates an interest in land and that as such does not come within the purview of the Bengal Tenancy Act. A *jalkar* does not necessarily imply any right to the soil [see *David* v. *Girish Chandra Guha* (1) and *Radha Mohan Mundal* v. *Neel Madhub Mundul* (2)] and we are of opinion that the lease in the present case does not confer any right to land. It merely gives a right to fish in a *jalkar* belonging to the plaintiffs' *zemindari*. The fact that the lessee was not to claim reduction of the *jama* (rent) on the ground of drought or inundation does not necessarily show that any right to the soil was conferred. The name of the *jalkar mara nadi* (dried-up-river) and the reference to the fishing period in the lease indicate that the *jalkar* was not full of water at all seasons of the year. The tenant took the risks of inundation and failure of rains and the agreement was that he would not be entitled to claim any reduction on those grounds. Then the stipulations that the lessee would not exceed the boundaries and would be bound to give information to the Police and to the lessor, if any murder was committed within the boundaries of the *jalkar*, are not inconsistent with the lease being a fishery lease, as the *zemindar* after letting out the *jalkar* would no longer keep any watch over the *jalkar*.

It is contended that cesses cannot be charged on a *jalkar* unconnected with any right to the soil, and the fact that the tenant agreed to pay cesses shows that a right to land was conferred by the lease. But the mere fact that the tenant agreed to pay a charge, which he might not be legally compelled to pay, cannot alter the nature of the tenancy. Nor is it by itself sufficient to indicate that any right was created in land.

Reliance is placed on the case of *Mahananda Chakravarti* v. *Mongala Keotani* (3), in which importance was attached to the condition that the lessee was to continue liable for the rent even in case of drought and non-rearing of fish. But in that case, there was a lease of a tank in which fish has to be reared, and which cannot be done if there is a drought. The lease did not specify the rights to be exercised by the lessee in the tank. In the present case the *jalkar* appears to be a river which in the rainy season is full of water and in which fish has not to be reared, and the only right conferred on the lessee is the right of catching fish. The question is one of construction, and must depend upon the terms of the particular lease.

(1) (1883) 9 Cal. 183.
(2) (1875) 24 W. R. 200.
(3) (1904) 31 Cal. 937.

Upon a consideration of all the terms of the lease, we are of opinion that the lease merely conferred a right of fishing and no right to land was conferred.

That being so, the case comes under S. 193 of the Bengal Tenancy Act, and the arrears for 1312 and 1313 B. S. have been rightly held by the Courts below to be barred by limitation, under Schedule III, Article 2, clause (*b*) of the Bengal Tenancy Act.

The next question is whether the Court below was wrong in allowing interest only at the rate of 12½ per cent. per annum on the arrears, instead of at the rate of Rs. 2 per cent. per month as stipulated in the *kabuliyat*.

S. 67 of the Bengal Tenancy Act, no doubt, provides that an arrear of rent shall bear interest at the rate of 12½ per cent. but it is contended that money payable in respect of a fishery is not 'rent' within the meaning of the Act, as 'rent,' according to S. 3, clause 5 of the Act means whatever is payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant.

We think, this contention must prevail. We have found that the lease of the *jalkar* does not create any interest in *land*. That being so, the money reserved in the *kabuliyat* is not 'rent' within the meaning of S. 67 of the Act. In *Shib Prasad Choudhuri* v. *Vakai Pali* (4) there is an observation that there is nothing in the definition of the word 'rent' in the Bengal Tenancy Act which excludes fishery rent. But the attention of the learned Judges apparently was not drawn to the fact that the word 'rent' in that section has reference to anything payable for use or occupation of *land* held by the tenant. If what is payable in respect of any rights over fisheries had been 'rent' within the meaning of the Act, S. 193 would not have laid down that the provisions of the Act applicable to suits for the recovery of arrears of 'rent' shall, as far as may be, apply to suits for the recovery of *anything payable or deliverable* in respect of fishery rights and in that case S. 193 would have been wholly unnecessary. A similar view was taken in the case of *Abdulla Sarkar* v. *Ashraf Ali Mondal* (5), where the learned Judges were of opinion that money payable in respect of forest rights is not 'rent' within the meaning of S. 3, Cl. (5) of the Act.

The learned Subordinate Judge refers to the second clause of S. 3, Cl. (5), where it is laid down that in S. 67 (and certain other sections) of the Act, 'rent' includes also money recoverable under any enactment for the time being in force as if it was rent. But the word 'any enactment' obviously refers to any enactment other than the Bengal Tenancy Act; otherwise S. 193 would have been included among the other sections mentioned therein. They have reference to cases where the money, though not 'rent', is by any enactment recoverable as if it was rent; for instance, cesses under S. 47 of the Cess Act (Bengal Act IX of 1880) or drainage charges (payable by a tenant to his landlord) under S. 44 of the Drainage Act (Bengal Act VI of 1880). S. 193 of the Bengal Tenancy Act does not make money payable in respect of a fishery recoverable as if it was rent. That section merely lays down that the provisions of the Act applicable to suits for recovery of rent shall apply, *as far as may be*, to anything payable in respect of fishery rights. We are accordingly of opinion that money payable in respect of a fishery is not 'rent' within the meaning of the Act.

Then the question arises whether the provision of S. 67 of the Act relating to interest on arrears of rent is a provision applicable to suits for recovery of rent. If it is so, the provision would apply to money payable in respect of fishery rights, having regard to the provisions of S. 193 of the Bengal Tenancy Act. But 'provisions of the Act applicable to suits' have reference to the procedure laid down in the Act relating to suits, and do not include the provisions of the Act regulating the rights and liabilities of landlords and tenants. The provisions of S. 67 relating to interest affect the contract between the parties, and the restriction of the liability of tenants to pay interest at the rate of 12½ per cent. per annum is a matter of substantive right and cannot be called a provision applicable to suits. The Court, it is true, cannot award interest at a rate higher

(4) (1906) 33 Cal. 601.

(5) (1908) 7 C. L. J. 152.

than 12½ per cent. if a suit is brought for recovery of rent, but that is because the Act has restricted the liability of the tenant as to the amount of interest payable.

We are accordingly of opinion that the plaintiff is entitled to interest at the rate stipulated in the *kabuliyat*.

The decree of the lower Appellate Court will be modified accordingly and the parties will be entitled to proportionate costs in all the Courts.

V.B./R.K.

Decree modified.

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CHATTERJEA AND ROE, JJ.

Krishna Kalyani Dasi—Appellant.

v.

R. Braunfield and *others*—Respondents.

Appeals Nos. 534 of 1909 and 44 of 1910, decided on 27th August, 1915, from the Original Decrees of Special Land Acquisition Judge, 24 Parganas, dated 16th August, 1909.

(a) Evidence Act (1 of 1872), S. 83—*Thak* map—Evidentiary value—Accuracy is presumed—Ancient maps—Substantial and not mathematical accuracy is to be looked to.

Thak maps have always been considered by Courts as good evidence, and although the value of a *thak* map depends upon its accuracy, there is no presumption against its accuracy. [P. 89, C. 2.]

Mathematical accuracy is hardly to be expected in relying on ancient maps, substantial accuracy being all that is necessary for practical purposes. [P. 90, C. 2.]

(b) Evidence Act (1 of 1872), S. 102—Purchaser at revenue sale claiming as appertaining to land purchased—Defendant claiming it as his tenure—Purchaser must prove that the land formed part of *mal* assets at Decennial Settlement—On such proof burden is shifted to defendant.

The purchaser of an estate at a sale for arrears of revenue who claims a land within its ambit as appertaining to it as against a person who claims to hold it as a tenure existing at the time of the Decennial Settlement, must prove a *prima facie* case that the land in question formed part of the *mal* assets at the Decennial Settlement. But his *prima facie* case once proved, the burden is shifted on the tenure-holder to make out that his tenure existed before December 1790. [P. 91, C. 1 & 2.]

(c) Bengal Land Revenue Sales Act (11 of 1859), S. 37—Formal notice to avoid encumbrance is not necessary—Intention must be informed in unequivocal terms.

It is not essential for a purchaser at a sale for arrears of Revenue to give a formal notice to avoid an incumbrance. All that is necessary is to notify to the incumbrancer by some unequivocal act the intention to annul the incumbrance. [P. 92, C. 2.]

(d) Bengal Land Revenue Sales Act (11 of 1859), S. 37—Delay in signifying intention to annul encumbrance—No waiver can be presumed where land is claimed rent-free.

From delay in signifying intention to annul an incumbrance, no inference can be drawn that the purchaser waived his right, where the incumbrance set up is a *lakhiraj* right, that is, a right to hold the land without payment of rent. [P 92, C. 2.]

(e) Land Acquisition Act (1 of 1894), S. 16—Purchaser at revenue sale need not annul encumbrance before claiming compensation for the encumbrance—Bengal Land Revenue Sales Act (11 of 1859), S. 37.

Where a tenure, an incumbrance, is acquired under the Land Acquisition Act after the sale of the estate, to which it appertains, for arrears of revenue, it cannot be held that the purchaser, in order to be entitled to the compensation money, must have exercised his right to avoid incumbrance before proceedings were taken under the Land Acquisition Act. [P. 92, C. 1.]

(f) Land Acquisition Act (1 of 1894), Ss. 16, 17 and 18—Court can decide question of title to determine to whom compensation is payable—Not bound to award, in favour of only ostensible owner.

The Court in a land acquisition case can go into the question of title for the purpose of determining which of the contending parties is entitled to the compensation; it is not bound to award compensation to the ostensible owner in possession at the time of the acquisition. [P. 94, C. 1.]

Pugh, Caspersz, Basanta Kumar Bose, Ambica Pada Chowdhury and *Sarosi Charan Mitter* – for Appellant.

Donough and *Remfry* and *Joti Prosad Sarbadhicari, Sarat Chandra Roy, Surendra Nath Roy, Satyendra Nath Roy* and *Shib Chandra Palit*—for Respondents.

N. R. Chatterjea, J.—This appeal arises out of a reference made by the Collector of the 24 Parganas under S. 30 of the Land Acquisition Act. The reference was made as there were disputes about title between the parties claiming the compensation awarded by the Collector.

The land acquired was about 37 *bighas*, and is situated in *Mauza* Majerhat, which consists of Estates Nos. 167, 53 and several other estates which are referred to as *ejmali* estates which have no concern with the case.

The claimant No. 4, Mr. Braunfield, was at the time of the acquisition admittedly in possession of all the lands with the exception of those purchased by the Banerjees or Prince Kamar Kader (the claimants Nos. 5 and 6). He asserted that the greater portion of the lands were

lakhiraj and claimed the whole of the compensation.

The claimant No. 2, Krishna Kalyani, claims about 17 *bighas* as appertaining to *taluk* No. 167 purchased by her from one Charu Chandra Bose, who purchased the *taluk* at a sale for arrears of Government revenue on the 21st June, 1900.

The claimants No. 1 (Abdul Matlab and others) claim an interest in more than 10 *bighas* and the claimant No. 7, Apurva Kumari, also claims an interest in more than 10 *bighas*. The claimants Nos. 5 and 6, *viz.*, the Banerjee brothers and Prince Kamar Kader, claim more than 13 *bighas* and there is a question as between them as to who is entitled to receive the compensation for the lands.

The following issues were framed for trial :—

(1) Does any portion of the land in suit fall within *taluk* No. 167 and if so, which? As regards such land, is the interest of Mr. Braunfield or Prince Kamar Kader protected under S. 37 (Act XI of 1859)?

(2) If so, who is entitled to the compensation for such land?

(3) Did or did not Mani Lal Banerjee, claimant No. 5, as agent of Prince Kamar Kader purchase the portion of the land in suit from Gopi Krishna Mandal and others?

(4) Who is entitled to the compensation therefor? Whether Prince Kamar Kader or Moni Lal Banerjee?

(5) For what land is Mr. Braunfield entitled to receive compensation?

(6) Has claimant No. 7, Apurva Kumari Dasi, a mortgage lien on some portion of the acquired land?

(7) Is any portion of the acquired land included in Estate No. 53? If so, who is entitled to the compensation for it? and

(8) How should the compensation money be apportioned amongst the claimants?

In order to determine whether the lands claimed by the claimant No. 2 fall within *taluk* No. 167, a Pleader, Babu Chandra Kumar Das, was appointed Commissioner to relay the *thak* map of *Mouza* Majerhat. He found that about 17 *bighas* of land (being portions of the different premises acquired) fell within plots Nos. 1, 4 and 6 of the *thak* map of *taluk* No. 167.

The case was tried in the first instance by Mr. Goodeve, who held that no reliance could be placed upon the *thak* map or on the relaying thereof by the Commissioner Babu Chandra Kumar, and accordingly held that claimant No. 2 had failed to establish that any of the lands fell within *taluk* No. 167. He also held that the claimants No. 1 failed to show that the lands claimed by them fall within *taluk* No. 53, or were in the possession of Mr. Braunfield but as the latter admitted that he held two *mokarari jamas*, the claimants No. 1 were entitled to receive the value of the rentals payable for them capitalized at 20 years' purchase.

As to claimant No. 7, Mr. Goodeve held that the claimant No. 7 is entitled to the whole of the compensation awarded for 10 *bighas* after deducting the amount which he found was payable to the claimants No. 1.

As to the land purchased by the claimants No. 5 from the Mandals, the learned Judge found that it was approximately 12 *bighas*, but he found that the Banerjees purchased the land for the claimant No. 7, Prince Kamar Kader, as his agents, and the latter was the true owner of the property, and entitled to the whole of the compensation money awarded for the same.

In the result Mr. Goodeve held that the claimant No. 2 Krishna Kalyani and the claimants No. 5 the Banerjees were not entitled to anything and apportioned the compensation among the other claimants according to the findings arrived at by him. The claimant No. 2 appealed to this Court in Appeal No. 534 of 1909 and the claimants No. 5 the Banerjees appealed in No. 44 of 1910.

Appeal No. 534 of 1909 came on for hearing on the 7th March, 1912 before Chitty and Teunon, JJ., who were of opinion that there was considerable doubt as to the correctness of the Pleader Commissioner's survey and its results, and remanded the case to the Court below for findings on the first and second issues after having a fresh local investigation and survey made by a competent officer of the Court.

As no surveyor from the Surveyor-General's Office was available Babu Dwijendra Nath Mukherjee, a Pleader, was appointed Commissioner by the Court below, none of the parties objecting to

the appointment. He held a fresh local investigation and submitted his plan and report. The case then came on for hearing before Mr. Chotzner, the Land Acquisition Judge, and he was of opinion that Dwijendra Nath had been no more successful than his predecessor in his relay of the *thak* map, and doubted whether with the extremely inadequate materials available it is possible to relay it at all. He accordingly held that the claimant No. 2 had failed to show that any portion of the acquired land fell within *taluk* No. 167, and in that view did not consider it necessary to decide the latter portion of the issue No. 1 or issue No. 2.

It appears that a large number of documents which had been tendered in the Court below on behalf of the claimant No. 2 were rejected by Mr. Goodeve and when they were tendered before Mr. Chotzner the latter also rejected them on the ground that "The High Court did not take in these documents."

The appeal came on for hearing before Fletcher and Richardson, JJ., on the 19th May, 1914, with the findings of Mr. Chotzner. The learned Judges held that the previous order of remand did not in any way preclude the Court below from admitting the documentary evidence tendered before it, and again remanded it to the lower Court. Richardson, J., added that "the evidence already on the record will be receivable subject to any just exceptions, and the parties will be at liberty to produce any further evidence which they may desire to produce."

When the case went back on remand for the second time, it was heard by Mr. Cuming. The claimant No. 2 again tendered the documentary evidence before him, but he rejected them on the ground that "all these documents had been tendered when the case was originally heard by Mr. Goodeve and Mr. Goodeve rejected them. This evidence is not, therefore, on the record and it cannot be considered as further evidence. Mr. Goodeve's order rejecting the evidence still stands. It has not been set aside and, therefore, it is not open to me to admit this evidence which Mr. Goodeve rejected."

Mr. Cuming, however, came to the conclusion that the findings of the second Pleader Commissioner (Babu Dwijendra Nath Mukherjee) were correct, and accordingly found the first part of issue No. 1 in the terms of the Commissioner's report. With respect to the second portion of issue No. 1 the learned Judge was of opinion that the only clause of S. 37 of Act XI of 1859 under which the present case could come would be the clause beginning "fourthly" and held that the interest of Mr. Braunfield or Prince Kamar Kader was not protected interest within the meaning of S. 37; and that the claimant No. 2 was entitled to the whole of the compensation for the lands falling within *taluk* No. 167.

Objections were filed on behalf of the claimant No. 2 against the order of Mr. Cuming rejecting the documentary evidence tendered on her behalf and objections were filed against his findings on behalf of the claimants Nos. 4 and 6 and the representative of claimant No. 7.

The first question for our consideration is whether the result of the local investigation made by Babu Dwijendra Nath Mukherjee is correct.

There was a plan (Land Acquisition Plan) prepared by Mr. Smart, but the Commissioner was directed by the Court below to make an independent survey and he accordingly made an independent survey in order to find out whether the portions of the acquired lands claimed by the claimant No. 2 fall within plots Nos. 1, 4 and 6 of the *thak* map of *Mouza* Majerhat.

The main point in connection with the relaying of the *thak* map is, whether the trijunction point has been correctly found by the Commissioner. He found that out of the trijunctions shown in the *thak* plan, station No. 28 is the nearest to the disputed lands. It is the only trijunction with which the *chuks* in the interior are connected and is the trijunction point of the three *Mouzas* Majerhat, Durgapur and Shahpur. He says:—"If the points be satisfactorily identified at the *locale*, the *chuks* Nos. 1, 4 and 6 can be easily relaid as the stations on the boundaries of those *chuks* are connected with this point and the distances and the directions of the connecting lines are recorded in the field-book given in the margin of the *thak* plan."

The starting point, which was pointed out on behalf of the claimant No. 2, is the north-east corner point of the junction between Diamond Harbour Road and Goragacha and

Shahpur Road. The other claimants stated that it was not possible to locate *Mouza* Majerhat or any trijunction point, and did not show any point from which any enquiry could be made.

The Revenue Survey Map shows the Diamond Harbour Road to the east of *Mouza* Majerhat, and to the west of Durgapur and the Garden Reach-Tollygunge Road to the south of Majerhat and Durgapur and to the north of Shahpur.

It appears from the *thak* map of Majerhat that the stations Nos. 28, 27, 21, etc., are to the east of a road, and stations Nos. 30 to 33, etc., are to the south of another road and station No. 29 lies to the east of the junction.

The statement of boundary pillars of *Mouza* Majerhat, dated the 6th January, 1848, (Exhibit III), describes pillar No. 28 east of the village at a distance of 33 rods towards the south from pillar No. 27, east of the road. East of Gopal Barik's shop, up to this point, is Durgapur and then the boundary of Shahpur begins.

This would go to show that the Diamond Harbour Road, in so far as it lies between Majerhat and Durgapur, and the western portion of the Garden Reach-Tollygunge Road now called Goragacha Road are included within *Mouza* Majerhat.

The *khusra* map of Durgapur, dated 1849 (Exhibit VI), supports the above. The map shows that Majerhat lies to its immediate west and Shahpur to its immediate south, and no portion of the road to its west or south is shown as included within any of the *dags* of the *mouza*, though the map describes all the *dags* in the *mouza*.

The map of Shahpur, dated 1847, describes the road to the west of the junction as the road of *Mouza* Majerhat. The eastern portion of the road is marked *dag* No. 521 to the north, and *dag* No. 61 to the south, the former being described as road *patit* and the latter as the *khas patit* metalled road from Behala to Durgapur and Kidderpur, and on the south of the Majerhat Road, whereas the road to the west does not bear any *dag* number which indicates that it was not included within Shahpur. The field-book of the map of Shahpur shows that stations Nos. 5, 4, 3 and 2 are to the north of the *mouza* situated to the south of the road, and the stations Nos. 7, 8, 9, etc., to the east are to the north of the road. From what is stated above it will appear that the roads to the south and east of *Mouza* Majerhat are included within that *mouza*, and the eastern portion of the Garden Reach-Tollygunge Road to the north of Shahpur is included within *mouza* Shahpur and that the meeting point of the three *mouzas* is at the north-eastern corner of the junction. The Commissioner in his report has shown that the description of stations Nos. 28 and 29 of the field-book of the Majerhat *thak* map, those of stations Nos. 6 and 7 of the Shahpur plan and station No. 52 of the Durgapur plan support the above conclusion and we think that he has given good grounds for the same. Then the question is whether the trijunction point can be identified on the spot.

The Revenue Survey Map, Exhibit VIII, shows the meeting points of two roads and they appear to be similarly situated as shown in the case map. The other claimants, however, do not admit that the roads from Garden Reach to Tollygunge as shown in the Revenue Survey Map are the present Goragacha and Shahpur Roads, but they could not point out the junction of the roads in the Revenue Survey Map when asked by the Commissioner to do so. The Commissioner found that the identity of the roads in the Revenue Survey Map with the present Diamond Harbour Road, Goragacha and Shahpur Roads in the locality to have been established, and the north-eastern corner of the junction having been found to be the trijunction point of the three *mouzas*, held that the position of the trijunction station No. 28 of the Majerhat *Thak* Map to be identified in the locality. This, however, involved one assumption, *viz.*, that the roads have been in the same position all along. There is a bend in the present Goragacha Road and the bend is also shown in the Revenue Survey Map. There is some evidence to show that these roads have been in the same position all along (see witness No. 2 for claimant No. 1). The breadth of Shahpur Road according to the Shahpur Chita would be 57 feet, and the breadth of Diamond Harbour Road would be 63½ feet. The distance between stations Nos. 28 and 29 (S and B in the report of the Commissioner at page 19 of the paper-book) is 62 feet, and the distance a few feet away from the junction (between S and B in the

said plan) is 57 feet, the difference being only five feet.

As the Commissioner points out, "it is unreasonable to expect that the exact mathematical point could be fixed with precision after such a lapse of time. It is impossible to avoid small errors in survey works and in attempting to relay an old plan like the *thak*, small errors would inevitably creep in. A work may be relied on when the errors are reduced to the lowest practical limits. Here the errors in fixing the position of the trijunction point, if any, may be but a few feet only and may be left out of consideration as it would not lead to any appreciable difference in the practical results."

Having fixed the position of the starting point in his plan after survey the Commissioner relaid the *chuks* Nos. 1, 4 and 5 according to the field-book given in the *thak* map of Majerhat, and found that the evidence on the record corroborated the description of some of the lands mentioned in the field-book which he detailed in his report.

A good deal of argument was addressed to us, as to the exact position of Gopal Barik's shop. In the statement of boundary pillars of *Mouza* Majerhat (Exhibit III) pillar No. 28 is described as east of the village at a distance of 33 rods towards south from pillar No. 27 east of the road east of Gopal Barik's shop. Up to this point is Durgapur and then the boundary of Shahpur begins; and pillar No. 29 is at the south-eastern corner of the village at a distance of 7 rods towards south from pillar No. 28 between north-western corner of Gopal Barik's shop and east of the junction of four roads falls Shahpur. The Commissioner has shown two shops of Gopal Barik in his report, one at the north-west corner of the junction of the roads and the other at the south. It is pointed out on behalf of the respondents that the evidence shows the existence of only one shop of Gopal Barik and that there was no evidence to show that there were two shops.

On behalf of the appellant we were referred to the *khusra chitta* of Shahpur (Exhibit B) of 1847, which shows that *dag* No. 446 was the "*brohmottar* of Gopal Barik, *jote* of Bhandra potter." In 1848 it is described as Gopal Barik's shop in the *stambha sumari* of Shahpur (see Exhibit XXII) and it is suggested that the shop of Gopal was on the north and the shop in the possession of the potter in 1847 came into the possession of Gopal Barik in 1848 and probably became known as his shop. This may or may not be a possible explanation, but the question as to the exact situation of Gopal Barik's shop is not very material inasmuch as an error of a few feet in ascertaining its position does not affect the general accuracy of the map.

It is contended on behalf of the respondents that *thak* maps are not reliable and reference is made to certain passages in "Notes on the Old Revenue Surveys" by Captain Hirst at pages 9 to 14 of that book.

The learned author states that generally speaking there are three kinds of *thak* maps to be considered, *viz.*, (*a*) eye sketches in which no actual measurements were made, (*b*) maps in which rough magnetic bearings were used and rough lineal measurements made, (*c*) maps made from careful magnetic bearings and careful lineal measurements, and states his opinion that the vast majority of *thak* maps made before 1852 are eye sketches and that some maps made after 1852 are little better. He also gives various reasons to show why *thak* maps are generally unreliable in determining the boundaries of villages and specially of boundaries of isolated estates within a village, except when they come under class (*c*) as stated above.

It is pointed out on behalf of the respondents that the *thak* maps relied upon on behalf of the claimant No 2 were made before 1852, and are, therefore, unreliable. But although the maps were made before 1852, the *thak* map of Majerhat is certainly not an eye sketch. It is stated on the map that it was "made after measurements by compass." The scale is given. There is the field-book which gives the bearings and distances. The map was prepared in the presence of the agents of the owners of the various estates in the villages, and bear their signatures.

It appears, therefore, that the *thak* map in the present case cannot be rejected as unreliable. *Thak* maps have always been considered by Courts as good evidence, and although the value of a *thak* map depends upon its accuracy, we do not think that there is any presumption that *thak* maps must be

inaccurate. The Judicial Committee in the case of *Maharaja Jagadindra Nath Roy* v. *Secretary of State for India* (1) observed: "Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made." These observations were made in connection with *thak* as well as Revenue Survey Maps as a reference to the case in their Lordships' judgment will show.

In the present case we do not see sufficient reasons to reject the *thak* map of Majerhat as unreliable. The *thak* plans of Durgapur and Shahpur are not of the same class as the *thak* map of Majerhat but they can be relied upon, as they agree with the *thak* map of Majerhat.

It appears that Dwijendra Mohan had only copies of the *thak* map of Majerhat and not the original map, when he made the measurements, but he says that he subsequently compared the copies with the original and it appears that he gave notice on the 30th April, 1913 to all the parties to attend on the 1st May when the original map would be produced before him. The original map was sent for by this Court, and the parties have not shown any difference in the copies.

Some arguments were addressed to us upon the question of magnetic variation. But Dwijendra Mohan appeared to have allowed the magnetic variation in accordance with the letter from the Director of Survey about the variation in the magnetic north at the time of the *thak* map and at the present time.

Then as to the allowances for closing circuits, Dwijendra Mohan says, "in plotting the *chuks* I had to make small allowances ranging from 2 to 5 feet in the length of some lines in order to close the circuit according to the accepted rules of survey." He was cross-examined with regard to the distances between points Nos. 3 to 4, 5 to 8, 6 to 7 and 10 to 11. The figures given in the schedule to his report show that the limits allowed for closing circuits were not exceeded, except perhaps in one case in which it was seven feet It is to be noticed that the claimants did not set up any substantive case of their own as to the trijunction point or as to any matter in connection with the relaying of the map, and their criticisms are directed to showing inaccuracies. But as already pointed out, mathematical accuracy is hardly to be expected in relaying ancient maps, substantial accuracy being all that is necessary for practical purposes.

On the whole I do not see sufficient reasons for differing from the conclusions arrived at by Babu Dwijendra Mohan which have been accepted by Mr. Cuming, and I hold that the lands claimed by the claimant No. 2, Krishna Kalyani Dasi, lie within the ambit of *Taluk* No. 167. My learned brother also has arrived at the same conclusion considering the matter from other points of view.

With respect to the documents tendered on behalf of the claimant No. 2 and rejected by the Courts below, it appears that some of them, Nos. 5 and 6, are copies of papers which are part of the record of the present case as to which, of course, no question could arise of their admissibility. For the purpose of the present appeal, the rest of the papers are unnecessary in the view we take of the case.

The next question, *viz.*, that covered by the second portion of the first issue is "as regards such land is the interest of Mr. Braunfield or Prince Kamar Kader protected under S. 37 of Act XI of 1859?"

Mr. Cuming, as stated above, was of opinion that the only clause of S. 37 of Act XI of 1859 under which the present case could come, would be the clause beginning with "fourthly." That clause relates to leases of lands whereon dwelling-houses, manufactories or other permanent buildings have been erected or whereon gardens, plantations, etc., have been made. It is true Mr. Braunfield had arrowroot plantations and buildings on a portion of the land, but with the exception of six *cottas* of land it is not alleged or proved that there was any lease in respect of the other lands. That being so, he can claim protection under the 4th clause of S. 37 only in respect of the six *cottas* and four *chittaks* of land covered by *kobala*

(1) (1903) 30 Cal. 291 = 30 I. A. 44 (P. C.).

No. 5 (from Munshi Abdul Basat to Mr. Braunfield). With respect to the remaining lands his case as well as that of Prince Kamar Kader, as stated in their petitions of claim, was that they were *lakhiraj*. Mr. Goodeve who tried the case in the first instance did not come to a definite finding on the point. Mr. Chotzner who heard the case on the first remand did not think it necessary to decide the point having regard to his finding that the lands did not fall within *Taluk* No. 167 at all, and Mr. Cuming on the second remand considered that Mr. Braunfield or Prince Kumar Kader could claim protection only under the fourth clause of S. 37. So that the question whether the lands were *mal* or *lakhiraj* up to this time has not been decided.

No doubt under S. 37 of Act XI of 1859 the purchaser of an entire estate sold for arrears of revenue acquired the estate free from all incumbrances which may have been imposed upon it after the time of the Settlement. But the *lakhiraj* rights set up by Mr. Braunfield or Prince Kamar Kadar must be shown to be incumbrances which had been imposed upon the estate since the Permanent Settlement, in other words, that the lands formed part of the *mal* assets of the estate at the Decennial Settlement. Unless that is shown, Mr. Braunfield and Prince Kamar Kader would be protected and apparently that is the protection which was claimed by them in their petitions of claim. Some arguments were addressed to us upon the question of proof in such cases, and also upon the evidence such as is there on the record. As laid down in the case of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (2), "it lies upon the plaintiff to prove a *prima facie* case. His case is that his *mal* land has, since 1790, been converted into a *lakhiraj*. He is surely bound to give some evidence that his land was once *mal*. The High Court in the judgment already considered has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790 or by documentary or other proof that the land in question formed part of the *mal* assets at the Decennial Settlement. His *prima facie* case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790." It was also laid down in that case that the fact that the lands were within the ambit of the estate is not sufficient to meet the burden of proof thrown upon the plaintiff.

The principles laid down above are applicable to cases of ordinary nature as well as to cases of auction-purchases at sales for arrears of Government revenue [see *Arfunnessa* v. *Peary Mohun Mookerjee* (3)] and even to the case of very small estates such as consisting of 5 *bighas* of land, see *Koylashbashiny Dossee* v. *Gocoolmoni Dossee* (4). Whether in a particular case the plaintiff has been able to prove a *prima facie* case would depend upon its own circumstances.

It may be pointed out that, although the lands have been acquired, the claimant No. 2 must be treated as if she is in the position of the plaintiff, as the rights of the parties have to be considered with reference to the state of affairs before the lands were acquired.

I do not express my opinion as to whether there is *prima facie* proof on the part of the claimant No. 2 in the present case, or whether the other claimants have been able to rebut it. The attention of the parties does not appear to have been directed to the questions and the materials on the record are not sufficient for coming to a decision on the points. Under the circumstances, although the case has already been twice remanded before, I think that for the ends of justice the case should go back to the Court below again for decision of the question, whether the lands which have been found to lie within *Taluk* No. 167 were *mal* or *lakhiraj* at the time of the Permanent Settlement.

It is contended by Mr. Donough on behalf of Braunfield that the purchase of the estate (*Taluk* No. 167) by the claimant No. 2, the wife of Lal Behary, for Rs. 500 from Charu Chunder Bose and the purchase at the revenue sale by the latter for Rs. 13 were really purchases made by Lal Behary Mitter and are merely speculative ones. The purchases appear to be speculative, but neither that fact nor the fact that Lal Behary was the real

(2) (1872) 8 B. L R. 566=14 M.I.A. 152 (P. C.).

(3) (1875-76) 1 Cal. 378.
(4) (1882) 8 Cal. 230.

purchaser (assuming it to be so as to which, however, there is no direct evidence) affects the legal rights of the parties or the merits of the case. It is next contended that the letters by Lal Behary Mitter to Mr. Braunfield show that the former offered to confirm the rights of the latter. But he offered to do so on certain terms which Mr. Braunfield did not accept and the attempted settlement fell through. It appears on the other hand that Charu Chunder, the purchaser at the revenue sale, gave notice on the 29th November, 1900, to Mr. Braunfield to vacate the lands in his possession (although with respect to only 5 *bighas*) and the claimant No. 2, on the 17th October, 1906, gave a notice to him to vacate all the lands.

It cannot be said, therefore, that the purchaser or his transferee did not signify their intention to annul the incumbrance of Mr. Braunfield.

Mr. Remfry on behalf of Prince Kamar Kader contends that his client was not served with any notice and that the purchaser ought to have taken steps to annul incumbrances before the lands were acquired. It is said that in 1900 the Prince advanced money in the name of the Banerjees to the Mandals for the purchase of the lands (claimed by him in these proceedings), a suit for specific performance had to be brought and ultimately the conveyance was executed by the Court in pursuance of the decree passed in the suit, and although the revenue sale took place in 1900 the purchaser or his transferee never gave any notice of any intention to annul the incumbrance. It is urged that a person having a right to avoid an incumbrance, must do so within a reasonable time and before he transfers his rights, and neither the purchaser nor his transferee can wait until third persons have acquired rights or dealt with the property in the meantime.

It cannot, however, be held that the purchaser at a revenue sale must exercise his right to avoid an incumbrance before proceedings are taken under the Land Acquisition Act. Such proceedings may be taken immediately after a revenue sale takes place, and it cannot be said that in such a case the rights of the incumbrancer hold good against the purchaser although he had no time to take steps for setting aside the incumbrance. In the second place, the assignee or transferee of the auction-purchaser is entitled to exercise the rights of the purchaser. In the third place, it is not essential to give a formal written notice to avoid an incumbrance. All that is necessary is to notify to the incumbrancer by some unequivocal act the intention to annul the incumbrance. It is unnecessary to consider whether delay in signifying intention to annul an undertenure may lead to any inference that the purchaser is willing to continue the tenancy, and I express no opinion on the point. No such inference, however, can be drawn in a case where the incumbrance set up is a *lakhiraj* right—a right to hold the land without payment of rent. Lastly, the law gives the purchaser a period of 12 years within which to bring a suit to set aside incumbrances. No question of estoppel appears to have been raised in the case, and under the circumstances, I am unable to give effect to the above contentions.

We have next to deal with the questions covered by the 3rd and 4th issues, *viz.*, "Did or did not Moni Lal Banerjee, claimant No. 5, as agent of Prince Kamar Kader purchase the portion of the land in suit from Gopi Krishna Mandal and others? Who is entitled to the compensation therefor? Whether Prince Kamar Kader or Moni Lal Banerjee?" The questions were decided by the Court below against the claimant No. 5 and he has appealed to this Court in Appeal from Original Decree No. 44 of 1910.

The quantity of land purchased from the Mandals has been found by the Court below to be approximately 12 *bighas* and that finding has been accepted by the parties. We have, therefore, to determine in Appeal No. 44 whether Prince Kamar Kader or Roy Moni Lall Banerjee Bahadur was the owner of the said 12 *bighas* of land.

It appears that the Prince formerly used to be friendly with Roy Moni Lall Banerjee Bahadur and his brother Nani Lal Banerjee and had confidence in them. They were close neighbours. The story of the Prince is that on the 5th June, 1900, the Banerjees proposed to him that he should buy property which was going to be sold very cheap. As it was the time of the *Moharrum* when Muhammadans do not transact business, he was at first unwilling to buy, but the Banerjees

having told him that they would buy the property in their own name if he made the payment for it, and that when the time became auspicious the conveyance would be executed in his favour, the Prince thereupon agreed and made over Rs. 3,000 to the Banerjees, which was paid to the Mandals from whom a hand-note was taken for the amount and it was agreed that the balance Rs. 600 would be paid by the Prince at the time of execution of the conveyance. Subsequently the Prince paid the Banerjees the balance of Rs. 600. Later on the Prince repeatedly requested the Banerjees to make over the property to him, but they refused to do so. Thereupon he instituted a criminal case against the brothers which, however, was dismissed. Moni Lall thereafter brought a suit against the Prince for malicious prosecution which was eventually withdrawn. The case of Moni Lall is that he borrowed Rs. 3,000 from the mother of the Prince for purchasing the property himself, that the Mandals executed the *bynapatra* in his favour and put him in possession of the property. But as the Mandals refused to execute a conveyance he instituted a suit for specific performance and obtained a decree on 15th April, 1904 and paid into Court the balance of Rs. 650, and eventually the conveyance was executed in favour of Moni Lall in June 1908 and registered on the 28th June, 1909.

Now as to the advance of Rs. 3,000 by the Prince there can be no doubt upon the evidence that it was advanced by him, and this is not denied in this Court. The fact that the Prince paid Rs. 600 in February 1901 was admitted in a written statement filed by the Banerjees in the criminal case, and is also proved by the Prince in his deposition. The purchase-money, therefore, was supplied by the Prince.

The letter written by the Banerjees to the Prince go to show that the former acted as agent of the latter in the matter of the purchase. For instance in his letter dated the 1st May, 1902, Moni Lall wrote to the Prince that the Durgapur sale-deed will be ready next week. In the letter, Exhibit 37, he wrote: "the Durgapur land will be all right very shortly. If you do not want the land I can get you the money any moment." And in Exhibit 38 he informed the Prince that "The Mamenpore and Durgapur documents are ready for signature." On the 20th June, 1903, he wrote, "I have this day filed the case against the Mandals and I am glad to say that I have saved the money from being barred by limitation with the greatest difficulty." These letters could have been written only on the footing that the Prince was the purchaser.

The decree for specific performance was passed on the 8th April, 1904, conditional on payment of Rs. 650 to the Mandals within 1½ months. The money was deposited accordingly by Moni Lall.

Nothing was done until 1908 when the conveyance was executed in favour of Moni Lall.

It is contended on behalf of Moni Lall that he was never the agent of the Prince and that although the Prince might at one time have been inclined to buy the property, he subsequently changed his mind. It is pointed out that the Banerjees informed the Prince of the difficulty about money for instituting the suit for specific performance, that he did not give any reply to the letter nor give any reply to the other letters, that he never thereafter expressed his willingness to buy the property and that he did nothing until it became known that the property was going to be acquired.

The letters, however, up to June 1903 show that up to that time the Prince was treated as if he was the purchaser. Mr. Braunfield's letter dated the.....and his deposition show that in May 1904 the Prince was treated as the purchaser and on the 22nd November, 1905 there was a letter of demand from the prince's Pleader to Moni Lall. Then again when Moni Lall applied for execution of the decree, the Prince applied to the Court praying that the conveyance should be executed in his favour.

It is true the Prince did not reply to any of the letters written by the Banerjees nor apparently take any interest in the suit for specific performance nor find the money for conducting the suit. It appears, however, that the Prince is a close neighbour of the Banerjees and the letters might have been replied verbally. Apparently he is not a man of business and left everything to the Banerjees and as for money, it appears that Noni Lall, the brother of Moni Lall, had moneys of the Prince, and the two

brothers lived joint : under the circumstances no inference can be drawn adverse to the Prince from the facts relied on as stated above.

As for the delivery of possession to the Banerjees the Court below held that such delivery of possession was not proved, that the statements of Jahuruddi who spoke to an *amalnama* was not trustworthy and that even if they were in possession they must be considered to have been holding the property in trust for the Prince, and I agree with the Court below in the view it has taken.

Certain statements made by the Prince in his cross-examination in the criminal case are relied upon, on behalf of the Banerjees. But they are not sufficient to lead to the conclusion that he did not authorise Moni Lall to purchase the property for him. The learned District Judge says : " In any case I should not be disposed to attach much weight to them, as the language ordinarily spoken by the Prince appears to be a peculiar dialect of Hindustani and it was difficult even in this Court to find anyone who could translate accurately into English replies which he gave to some of the questions put to him."

It is to be remarked that although the Prince examined himself, neither Moni Lall nor his brother came to the witness-box.

On a consideration of the evidence as a whole I agree with the Court below in holding that the purchase made by the Banerjees was on behalf of the Prince, that the latter is the true owner of the property, and is entitled to such compensation as may be paid for the 12 *bighas*.

It was contended on behalf of Moni Lall that as the conveyance stood in his name and as he was in possession, the Prince could not claim any compensation in the present proceedings so long as he did not establish his title by a regular suit. But the Court in a Land Acquisition case can go into the question of title for the purpose of determining which of the contending parties is entitled to the compensation. If his contention were well founded, the jurisdiction of the Land Acquisition Court may be ousted merely by raising a question of title: we are accordingly of opinion that this contention must be overruled.

The result is that the first portion of the first issue, *viz.*, " Does any portion of the land in suit fall within *Taluk* No. 167, and if so, which, " is decided in favour of the claimant No. 2 in accordance with the finding of Mr. Cuming and the finding of the Pleader Commissioner Babu Dwijendra Nath Mukherjee, and with the exception of the second part of the first issue and the second, fifth and eighth issues, the findings arrived at by Mr. Goodeve are confirmed. The case will, therefore, go back to the Court below for decision only of the second portion of the 1st issue, *viz.*, " As regards such lands is the interest of Mr. Braunfield or Prince Kamar Kadar protected under S. 37 of Act XI of 1859, " in other words, whether the lands were *mal* lands of *Taluk* No. 167 or were *lakhiraj* at the time of the Permanent Settlement, and for decision of the second, fifth and eighth issues, *viz.*, " If so, who is entitled to the compensation for such land? For what land is Mr. Braunfield entitled to receive compensation" and " How should the compensation money be apportioned among the claimants," in so far as they depend upon the result of the enquiry on the 2nd part of the first issue as stated above. The parties will be entitled to adduce evidence on the 2nd part of the first issue, it being understood that the claimant No. 2 will be entitled to prove and adduce in evidence any of the documents which were tendered and rejected, provided of course, that they are relevant.

Appeal No. 44 of 1910 is dismissed with costs, 10 gold *mohurs* to be paid to Prince Kamar Kader. Costs in Appeal No. 534 of 1909 as between the other parties including costs incurred in the Court below will abide the result, the hearing-fee of this Court for the three hearings being assessed at Rs. 500.

Having regard to all the circumstances surrounding the previous trials, we are of opinion that this case should be tried by Mr. Chotzner or his successor-in-office at Alipore (other than Mr. Cuming or Mr. Duval) and the Local Government may be moved to vest him with the powers necessary for trying the particular case.

Roe, J.—The main facts of this case and the claims and issues involved have been clearly set forth by my learned brother.

The *first* point for consideration is whether the claimant Kalyani Dasi has

successfully demonstrated that the lands in dispute fall within the lands measured in the *thak* map of 1851 as lands of *Touzi* No. 167. Before discussing this point in detail it is necessary to consider the probative force of *thak* maps and field-books. For this purpose it is necessary to consider the accuracy with which the theodolite can be worked. This first process in taking a bearing by a theodolite is to set your needle to the north as taken by the *Thak* Surveyor. Having ascertained the degree at which the compass needle is to be set, the first thing to be done is to get the compass needle to point exactly to this degree. Any one conversant with the use of the theodolite is aware that with an ordinary instrument it is extremely difficult to set the compass needle with exact accuracy. The *thak* survey before us does not attempt to deal with angles more accurately measured than to half a degree. An error of a quarter of a degree will clearly throw the station many feet out of the line at the end of a long distance. The first distance dealt with by the map relied on in this suit is 221 feet and the third is 475 feet. We may expect at the end of lines of this length errors of 2 or 3 feet, even in a bearing taken with the greatest accuracy possible. For this reason it is necessary in making a map to effect what is called the closing of the circuit, and instructions as to the closing of the circuit are given in the High Court rules for surveys by Pleader Commissioners. The present Pleader Commissioner Babu D. M. Mukerjee has made in closing his circuit allowance amounting in some cases to 5 feet, and it follows that even on a survey as accurate as that made by the present Commissioner the line drawn by him may well fall 5 feet on either side of the true line at the end of the first circuit from the trijunction point and there may be further errors of 5 feet for every circuit that is closed.

Comparing the maps of Babu Chandra Kumar Das Gupta and Babu Dwijendra Mohon Mukerjee, it will be observed that many of the stations have been fixed by each at a spot considerably distant from that fixed by the other. We must not look for greater accuracy in the relaying of the *thak* survey than 5 or 10 feet in the earlier stages of the survey and as each subsequent error, unless it accidentally corrects itself, accentuates the inaccuracy of the line, the farther we get from the first trijunction point the greater is the possible error in the relaying of the map. It is for this reason that Major Hirst says that it is impossible to relay a *thak* survey unless you have two trijunction points one at each corner of the map for the correction of the errors which must arise from the impossibility of taking the bearing with absolute accuracy.

The first process by which, in my view, these maps should be tested is—Do the stations found by the two Commissioners coincide with any degree of accuracy with the places in which on a general consideration we should expect to find them?

Taking first the *thak* map itself we know that many of the stations are at the corners of tanks. In each case in which on the *thak* map we should expect to find the station in a certain position relative to a tank or pond we find that station in that position in relation to an existing tank or pond.

Another point which as a coincidence appears to me of considerable importance is this, that Babu Chandra Kumar brings his station No. 44 exactly at the south-east corner of plot No. 36/6 of the Topographical survey of 1901 to 1906. Babu Dwijendra on an entirely independent measurement fixed his station No. 44 in almost the identical spot in which Babu Chandra Kumar fixed it; we have valuable evidence on the record to indicate that No. 36/6 of the Topographical Survey once belonged to Bistu Hazra. Turning to the *thak* map we see that station No. 44 is at the south-east corner of Bistu Hazra's *jote*.

The general accuracy of the relay may be tested also from the point of view of the existing drains and roads. We have before us a copy of the Topographical Survey of 1881. This is Exhibit 27. This map is on the same scale as the *thak* map, 16 inches to a mile. On a comparison between this map and the *thak* map we are at once struck with the extreme similarity of the shape of the *thak* boundary line to the shape of the angles formed by the roads and drains at the south-east corner of the angle made by the Shahpur and Diamond Harbour Roads in the Topographical Map of 1881. From the description given of the *thak* trijunction point 28 and its position relative to station No. 29 of the *Thak* Boundary Survey, we know for certain that *Mehal* No. 167 lies in this south-east corner. It does not require a long step in deduction to be satisfied that the drains

and roads existent in 1881 were existent in 1851 and that they were the boundaries of the plots depicted in the *thak* map.

Comparing again the Topographical Survey of 1881 and the *thak* map, it is obvious that station No. 35 must be half way up the west bank of the long narrow tank shown in the Topographical Survey in a Mahomedan graveyard. Babu Chandra Kumar and Babu Dwijendra both set station No. 35 exactly in the position in which we should expect to find it.

To sum up, we know from the evidence on the record that station No. 28 of the Boundary Survey is within 15 feet of the corner made by the Diamond Harbour Road and Shahpur Road. We know where station No. 35 of the plot survey ought to be. We know that station No. 44 is probably correctly found if it is placed at the corner of 36/6, Sonadanga Road. From these three points we can check the relay made by Babu Dwijendra Mohon Mukerjee.

After an exhaustive check of which I have been given the general result, I am completely satisfied that the relay made by that Commissioner may be relied upon with confidence as showing within a few feet the position of the boundaries of the plots comprising *Mehal* No. 167.

That confidence has in no way been shaken by the criticisms made upon the relay by Counsel and Vakils on behalf of those claiming adversely to Kalyani Dasi. These are all based upon the cross-examination of Babu Dwijendra Mohon Mukherjee before Mr. Chotzner. They relate to the exact position of Gopal Barik's shop—the exact change in the width of the Diamond Harbour Road between 1851 and the present day, the exact method of taking the bearing, the exact position of the holding of the chain. They all fail to impress me. They are based on the fallacy that before a *thak* relay can be accepted as evidence it must be shown to be absolutely exact. It cannot be more exact than to an error of five or even fifteen feet. That the relay under consideration is to that extent accurate I am satisfied.

From a comparison of the Topographical Survey of 1881 with the Topographical Survey of 1901-1905 it is clear that the boundaries of present-day holdings lie along the drains and roads existent in 1881.

I have already shown that these drains and roads must have been existent in 1851 and that they were the boundaries of the plots comprising *Taluk* No. 167. The relaid line lies very nearly along the boundaries shown in the Topographical Survey of 1901. These boundaries should in my view be taken, where they have not been destroyed by Mr. Braunfield, as the boundaries of *Taluk* No. 167.

The boundary of plot No. 6 of that *Taluk* follows the drains running from 64 to 63 and then westward. The whole of plot No. 36/4, 1, 2, 3, 4/1 and 4, (1) *a*, and a strip of land to the east of the tank in that plot form part of the old *Taluk* No. 167. The drains shown following stations Nos. 3 to 1, 1 to 18, and 18 to 13 is the boundary of plot No. 1 of the old *thak* map. 27 Diamond Harbour Road falls entirely within *Taluk* No. 167.

In dealing with plot No. 4 we have very little to go on in the nature of existing boundaries, inasmuch as the old drains have been filled in by Mr. Braunfield in the construction of his arrowroot fields. From the fact that station No. 35 is obviously in exactly its right position we may accept the conclusion of the Commissioner as to the extent of premises No. 30, Diamond Harbour Road, which fell in the *Taluk* No. 167.

The *next* question for consideration is whether Mr. Braunfield is protected in his plea that he holds rent-free lands within this *taluk*. We regret that we have been unable to follow Mr. Donough's arguments on this point. As far as we understand his argument, it is that he is a tenant without a landlord. This, of course, is a contradiction in terms. There can be no tenancy without the relationship of landlord and tenant, and to constitute the relation of landlord and tenant there must be one party landlord and the other party tenant. Mr. Donough, to use his own words, has another string to his bow. He contends that these lands are rent-free by virtue of some ancient grant dating back from before the Permanent Settlement. Mr. Remfry has developed this argument and we must apply the arguments advanced by Mr. Remfry for Prince Kader to the legal position of Mr. Braunfield, for the legal positions of the Prince and Mr. Braunfield are identical. The sole question here is on which side is the burden of proof. The case of *Harihar Mookerjee* v. *Madhab Chandra Babu* (1) has been quoted to us as indicating that the burden of proof is on the claimant Kalyani Dasi. Even supposing for the sake of argument that the burden of proof is primarily on those asserting that the lands

shown as now representing *Taluk* No. 167 are not *mal* lands, there is on the record evidence which it is urged would shift this burden.

Exhibit 26 (at page 74) shows that the *raiyati* land of the *taluk* measured, in 1190 B. S, 66 *bighas* 7 *cottas* carrying a rent of Rs 103, of which Rs. 24-4-10 consisted of *abwabs*. The assets of the estate in that year were Rs. 88-0-16 *gandas*. The revenue now payable for this estate as shown in Exhibit 16 at page 61 is Rs. 7-2. The question naturally arises what happened between 1190 B. S. (which is 1783 A. D.) and 1793 A. D. (which is the date of the Permanent Settlement) to reduce the assets of the estate from over Rs. 100 to under Rs. 10. In *William Graham* v. *Phanindra Nath Mitter* (5), we have it taken as well known that in Kidderpur, a suburb adjacent to the lands in dispute, roads were made at about this date by taking free of compensation a larger area than the land required for the road itself and restoring under rent-free grants the surplus lands. We are asked to presume that between 1783 and 1793 there must have been numerous rent-free grants of land bordering on the Diamond Harbour Road and a large reduction in the revenue in consequence of these grants.

We are next referred to Exhibit B, from which we see (pages 2, 3 and 4 to Book D) on the other side of the road in positions corresponding with the greater portion of the land now occupied by premises No. 27, Diamond Harbour Road, eight out of ten of the holdings measured in the *chittas* of village Shahpur as *brohmottar* or rent-free.

Further, we have the fact that never in the memory of man have the lands in dispute paid rent, and that all the various plots of land purchased by Mr. Braunfield were purchased as rent-free holdings save one plot of six *cottas* paying rent to Mehar Ali Khan, the proprietor of *Touzi* No. 53, which a comparison of the *thak map* with the Topographical Map of 1881 will show to be a plot of land covered by the letters of M a h of the words " Mahammedan graveyard " in the Topographical Map of 1881. On the probative value of these facts I do not now feel it necessary to express any opinion, for the reason that my learned brother is of opinion that there should be a remand for the purpose of giving the appellant an opportunity of showing that the lands are in fact *mal* lands. I agree that if indeed she is in a position to support this burden she should be given an opportunity of doing so, for both Mr. Goodeve and Mr. Chotzner declined to discuss the question and before Mr. Cuming it was not apparently rightly appreciated.

The interests claimed by the Prince and Mr. Braunfield could not possibly be interests protected under Act XI of 1859, and I cannot conceive why such an argument was ever seriously advanced. The land was held without payment of rent and without grant by lease from any proprietor, save in respect to the six *cottas* held in *Touzi* No. 53.

The occupiers were either trespassers or holders under a rent-free title. The Prince and Mr. Braunfield claimed rent-free titles. They now explain that by rent-free they meant revenue-free. In Bengali the terms rent-free and revenue-free are synonymous. In English the distinction between them is extremely small. Lands held rent-free before the Permanent Settlement were not assessed to revenue and so became by the Permanent Settlement revenue-free. The question in issue in this case was, in my view, from the outset, have the lands in dispute been held rent-free from the date of the Permanent Settlement? If so, they cannot have been assessed to revenue at the Permanent Settlement. If they were not assessed to revenue at the Permanent Settlement, they were not the *mal* lands of the *taluk*. If they were not *mal* lands of the *taluk*, title in them does not pass to an auction-purchaser at a sale for arrears of revenue.

The issue, in its true significance, has clearly not been appreciated, or determined. Therefore to my very great regret, I must agree that a further remand is necessary. Appeal No 534 should be remanded in the terms of my learned brother's judgment.

The claimant Kalyani Dasi is required to prove that the lands in suit were assessed to revenue in 1793. On the record as it now stands the burden of proof is on her to show that the lands in suit were not held rent-free in 1793.

She must be permitted to adduce any evidence relevant to the determination of this issue. All orders made by Mr. Goodeve. Mr. Chotzner and Mr. Cuming refusing to admit documents tendered in evidence on either side, are to be regarded as set aside, and each document now tendered

(5) (1915) 31 I. C. 41.

whether or not previously tendered and rejected, shall be, if relevant and admissible in evidence, admitted and considered.

As regards Moni Lall Banerjee's case, I am of opinion that it is absurd to accuse Braunfield and the Prince Kader of falsehood on the meticulous criticisms of their evidence made by the Vakil for the Banerjees. The Banerjees are obviously afraid to enter the witness-box in support of their case. Braunfield's evidence shows clearly that the Banerjees admitted up to 1904 that the Prince was the owner. There is nothing on the record to show that ownership changed between 1904 and 1906, the date of the acquisition.

I agree that the appeal of the Banerjees must be dismissed with costs to Prince Kamar Kader.

V.B./R.K.

Appeal No. 44 dismissed;
Appeal No. 534 remanded.

A. I. R. 1916 Calcutta 98

FLETCHER AND BEACHCROFT, JJ.

Hari Krishna—Accused—Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 634 of 1914, decided on 5th November, 1914, against the conviction and sentence of Sessions Judge, Cuttack.

Indian Penal Code (45 of 1860), Ss. 330 and 348—Conviction on testimony of untruthful witnesses without corroboration is bad—Criminal trial—Witnesses.

It is a dangerous precedent to convict a man on evidence of people who are found to be untruthful without any corroboration.

[P. 99, C. 1.]

Dasarathi Sanyal and *Debendra Narain Bhattacharya* for Appellant.

Sultan Ahmad for the Crown.

Fletcher, J.—The appellant before us Hare Krishna *alias* Hari Misra was tried along with three other persons before the learned Sessions Judge of Cuttack with the aid of Assessors for having committed certain offences under Ss. 348 and 330, Indian Penal Code. The Assessors came to the conclusion that none of the accused was guilty. The learned Judge, agreeing with the Assessors with regard to three of the accused, acquitted them, but disagreeing with the Assessors with regard to the appellant before us convicted him and sentenced him to undergo 18 months' rigorous imprisonment. This is the interpretation placed by the learned Judge on the opinion of the Assessors. It may, however, be said that in the opinion of one of the Assessors, as would appear from the record, all four accused were guilty of wrongful confinement. The appellant before us is a young man aged about 20 years, who is said to be a student apparently studying Sanskrit with a view ultimately to becoming a *pandit*.

The case is really an extraordinary one on the evidence, because the learned Judge has disbelieved all the witnesses in the case. In fact he described them as liars of varying degrees. But he has selected without any corroboration at all certain passages from the evidence which he believed to be the correct story; and on his own estimate as to whether that story is true or not he has convicted the appellant before us.

Now, in a case like this it is obvious that opinions of Assessors are entitled to considerable weight. They are gentlemen of the neighbourhood, knowing the language and habits of the people. Their opinion was that a portion of the case was not proved as against any of the accused. As regards the remainder of the case it may be that they differed in their opinions.

Now, the story itself is also an extraordinary one. Two of the accused, namely, Kunja and the appellant before us were uncle and nephew living together jointly. The two other accused, Radha Gobind and Kristo, were also members of a joint family. These two families were apparently on terms of intimate friendship, and the story told is that certain alterations, were being made in one of the rooms in the house of one of these two families and that the two complainants Narsing and Moni, were engaged in doing certain excavations, and on the 7th May last, it is alleged, Narsing, one of the complainants, found in the course of his work a small earthenware vessel which was believed by Hari to contain treasure. The men at midday are said to have been kept from going to take their usual bath and refreshment, and later on in the day they were alleged to have been tortured by having crowbars, which had been heated, placed against various parts of their skin. One of them is said to have been incapacitated for a certain length of time. That shortly is the nature of the complaint. The medical evidence certainly shows that there were some marks upon these two complainants. But the difficulty on the medical evidence is, again, that it does not altogether corroborate the story of the

witnesses whom the learned Judge has stated to be liars, because the medical evidence is that these injuries on the bodies of the two complainants had been caused not less than 72 hours before the time when the doctor saw them. As a matter of fact these injuries, if the story told is a true one, had been caused considerably less than 72 hours before they were seen by the doctor. Of course in an ordinary c.se one might not pay much attention to the opinion of a doctor on a matter like that. But when the direct evidence is disbelieved by the Judge, or rather when the witnesses who gave the direct evidence were disbelieved by the Judge, it is a matter of importance that the medical evidence tends further to throw doubt upon the story as told by the witnesses. The other witness, who is said to corroborate in part the story told by the complainant, is the wife of Moni Kamali. She again was believed not to be a truthful witness by the learned Judge. Personally, I do not remember ever having seen a man convicted on evidence of the nature of what the learned Judge describes as that of liars without any corroboration at all. It seems to me a dangerous precedent to convict a man on evidence of people who were found to be untruthful without any corroboration.

I think, under the circumstances, the case is much too doubtful for us to support the conviction passed solely on evidence of this nature and we ought to allow the appeal of the accused and set aside the conviction and sentence passed upon him.

Beachcroft, J.—I agree that the conviction based on the evidence of persons, the greater part of whose evidence has been found to be false by the learned Judge, cannot be sustained, especially in view of the great delay in lodging information, a delay for which no adequate explanation has been given.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 99

CHATTERJEE AND NEWBOULD, JJ.

Tomejuddi—Plaintiff—Appellant.

v.

Mulai Chowkidar and *others*—Defendants and Plaintiffs—Respondents.

Appeal No. 3546 of 1911, decided on 20th June, 1916, from the appellate decree of Sub-Judge, Barisal, dated 12th September, 1911.

Co-sharer—Possession—Adverse—Possession by one co-owner is for another unless there is ouster or abandonment by him.

One co-owner is entitled to treat the possession of another as his own, unless and until by open assertion and exercise of hostile title the latter acquires an indefeasible title.

[P. 99, C. 2.]

But a co-sharer, who has abandoned the land, cannot say that his co-sharers, who have since the abandonment been in actual and exclusive possession, did all this on his behalf.

[P. 100, C. 1.]

Abinash Chandra Guha—for Appellant.

Gunada Charan Sen—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of possession on the allegation of dispossession within 12 years. The plaintiffs said that they were 6-annas owners of a *kursa* holding of which the defendants were the 10 annas owners, and that the defendants having gradually encroached on their share of land, ultimately dispossessed them of this land entirely in 1313.

The first Court decreed the suit of the plaintiff for joint possession. The Court of Appeal has dismissed it. In so dismissing it the learned Judge says that the plaintiff has failed to prove possession and dispossession as alleged, by him. The dispossession as alleged, was within 12 years. In dealing with this matter, the learned Judge says that "they (the plaintiffs) either abandoned the land or were forcibly dispossessed of it, as stated by the plaintiffs' side, at some period of time within twelve years from the date of the institution of the suit" and then further on, he finds: "the plaintiffs' story of their dispossession by force by the defendants, therefore, appears, to my mind, to be wholly false." The dispossession within 12 years was found to be false. This would ordinarily be a complete finding for the purpose of throwing out the suit of the plaintiff.

It is contended, however, that there is a difference in this case because the defendants were the co-owners and that therefore the plaintiffs were entitled to treat the possession of the defendants as their own possession, unless and until the defendants prove that by open assertion and exercise of hostile title they have acquired an indefeasible title to the property. That also is a correct proposition of law and would have stood in favour of the appellant but for another finding of the learned Judge that, upon the evidence, the plaintiff must

have abandoned the land for more than 12 years before suit.

If there was an abandonment, then the possession of the co-sharer cannot be treated as possession in respect of which the defendant can be taken by the plaintiff as a co-tenant. The fact of the abandonment shows that they have no longer any intention to treat this land as in their possession. They cannot now say that their co-sharers, who have since the abandonment been in actual and exclusive possession of the property, did all this on their behalf.

In this view of the case, we think that the finding of the learned Judge that the plaintiffs have failed to prove possession and dispossession within 12 years is correct. This sufficiently disposes of the suit. The appeal is, therefore, dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 100

CHATTERJEE AND NEWBOULD, JJ.

Shyama Sundari Ghose and *others*—Plaintiffs—Appellants.

v.

Aswini Kumar Chakravarti and *others*—Defendants—Respondents.

Appeal No. 3291 of 1914, decided on 21st June, 1916, from the Appellate Decree of Sub-Judge, 1st Court, Dacca, dated 12th August, 1914.

Civil P. C. (5 of 1908), S. 100 and O. 6, R. 17—Amendment of plaint in second appeal involving change of nature is not allowed.

The High Court in second appeal refused to allow a plaintiff to amend his plaint and to litigate the suit as a suit for rectification of a decree founded on a mistake, where the original suit which was to set aside the decree as based on fraud was dismissed by the first Appellate Court on the ground that no fraud was committed by the defendant but that errors in the decree were due to mistakes of both parties.

[P. 101, C. 1.]

Ram Chandra Majumdar and *Panchanan Ghose*—for Appellants.

Gunada Chandra Sen and *Biraj Mohan Mozumdar* for *Deputy Registrar*—for Respondents.

Judgment.—In a previous partition suit between the parties, the preliminary decree was prepared by consent. A Civil Court *amin* made the final partition according to the preliminary decree and there was an appeal against the final decree by some of the appellants, if not all. In that appeal, none of the grounds that are urged in this case, were raised and the final decree was confirmed on appeal.

The plaintiffs now bring this suit on the ground that the local investigation by the *amin* was superintended by defendant No. 1 that they left the whole matter to the superintendence of defendant No. 1 as he was acquainted with the property and as they had confidence in him but that the defendant No. 1 in collusion with the *amin* had made a wrong partition by excluding portions of the property under partition and including in the partition, lands that belonged to other properties. On these grounds, they sue for a declaration that the final decree in the partition suit was null and void.

The first Court gave a decree to the plaintiff. The second Court has found that there was no fraud by defendant No. 1 or by the Civil Court *amin* as found by the Court of first instance but that there were certain errors which must have been introduced by mistakes of both parties. These errors were that two plots Nos 7 and 17 not belonging to the property were included in the partition. The learned Subordinate Judge has held that as regards the properties excluded from the partition, the plaintiff is entitled to sue for a fresh partition as they still remain parts of the joint property. As regards the two plots that are included in the partition without belonging to the property, the learned Judge's finding is that the plaintiffs have suffered no injury by the erroneous inclusion of other lands not belonging to the *mahal*. It is necessary to explain this; it arose in this way. In the previous partition the *amin* wrongly included plots Nos. 17 and 7, plots Nos. 17, 13 and 14 were treated as of disputed possession and divided amongst the several co-sharers. The plaintiffs obtained a very small part of plot No. 17. As regards Chak No. 7 it is not allotted to the plaintiff so that even if it belongs to other parties, it does not in any way hurt the plaintiff that it has been considered a part of the *mahal* and divided As regards plot No. 17, we have further to remark that at the previous partition it was known to the parties that either the title to, or possession of, this property, and plots Nos. 18 and 19 were disputed and notwithstanding that the plaintiffs were satisfied with a share in the

same and they took the risk of the title being disputed by the neighbouring proprietors with the chance of their being able to succeed against them. They were disabused, however, in the survey proceedings; the matter has been allowed to rest for several years and the parties have been in possession of their shares. They want now to set aside the partition and to have a new partition.

'We think that, under the circumstances the Subordinate Judge was right in dismissing their suit, specially as the main object, namely, that of setting aside the decree as based on fraud, fails according to his finding. That being so, it would perhaps be straining the law a bit if we were to allow him to amend the plaint at this stage and litigate the suit as a suit for rectification of a decree founded on a mistake. We decline to do so on the ground first that the inclusion of No. 7 does not hurt the plaintiff and it will not be right to allow him to re-open the whole proceedings. As regards the three properties which have not been divided and which are found to belong to the *mahal* in dispute, he has the right to have a partition if he likes according to his share.

The appeal is, therefore, dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 101

WOODROFFE AND NEWBOULD, JJ.

Akhil Chandra Sen and *others*—Defendants—Appellants.

v.

Tripura Charan Chowdhury and *another*—Plaintiffs—Respondents.

Second Appeal No. 847 of 1913, decided on 26th May, 1915, against the decree of Sub. Judge, first Court, Chittagong dated 6th August, 1912.

(a) Landlord and tenant—Occupancy—Occupancy if not acquired before permanent grant cannot be acquired afterwards.

If at the date of the grant of a permanent interest there was no occupancy right which had matured, an occupancy right cannot be acquired after the date of the grant. [P. 101, C. 2.]

(b) Bengal Tenancy Act (8 of 1885)—Eviction of occupancy *raiyat* and not any *raiyat* is protected.

It is not every *raiyat* who is protected from eviction but only an occupancy *raiyat*, under the Bengal Tenancy Act, VIII of 1885. 2 I. C. 405, ref to. [P. 101, C. 2.]

Mohini Mohan Chakravarthi and *Khitish Chandra Sen*—for Appellants.

Dhirendra Lal Kastgir—for Respondents.

Judgment.—This appeal is concerned with certain *dags*, which I may classify as group I and group II. The argument as regards group I is that the appellants must be taken to be occupancy *raiyats* in the estate sold to the plaintiffs, and they claim a protected interest in the *dags* covered by this group as against the plaintiffs, who as auction-purchasers of the *taraf* were entitled to cancel all the encumbrances. We have been referred on this point to the *pattah* granted in the year 1848, set out in the paper-book at page 13. From this it appears that what was given was a permanent *raiyati* interest described as *istemrari kaimi raiyat* and *istemrari daimi kaimi pattah*. If this was the grant of a permanent interest, and if, as is admitted, at the date of this grant there was no occupancy right which had matured, then it seems to me not possible that an occupancy right could be acquired after the date of the grant. But if we read this document in reference to this permanency as relating solely to the fixity of rent, then I think the argument of the learned Pleader for the respondents avails, that the appellants would in that case be in the position of *raiyats* at fixed rates. It is not every *raiyat* who is protected, but only an occupancy *raiyat*, and I think the distinction on which he has relied and which is that set out in the Bengal Tenancy Act, distinguishing occupancy *raiyats* from *raiyats* at fixed rates and non-occupancy *raiyats*, must be borne in mind, and on this point he has referred to the case, *Pachi Dasi* v. *Bala Das* (1). I must hold, therefore, that the appellants were not occupancy *raiyats*. They were, therefore, not protected from eviction in respect of the *dags* covered by group 1. It seems that less can be said as regards the *dags* of group II because the *khatian* records that the *raiyati* belonged to one Guru Das. The argument of the appellant has been that as the lands are recorded as being *raiyati* (though of some third party), he is entitled to reap the benefit of that record and to be protected. But he is in no way connected with Guru

(1) (1909) 2 I. C. 405.

Das. Whatever answer Guru Das, as a *raiyat*, if he be such, may have against the plaintiff, it is not a matter which seems to me to concern the appellants, who have stated that there was a *dur-raiyati* under the *raiyati* of one Mohesh.

The result is that this appeal fails and is dismissed with costs.

V.B./R.K

Appeal dismissed.

A. I. R. 1916 Calcutta 102 (1)

JENKINS, C. J. AND HOLMWOOD, J.

Hansman Jha and *another*—Defendants—Petitioners.

v.

Bahuji Jha — Plaintiff — Opposite Party.

Appln. No. 6 of 1914, decided on 2nd August, 1915, for leave to Privy Council.

Civil P. C. (5 of 1908), O. 45, R. 5—Investigation as to amount or value of subject-matter of suit must be carried out by Court ordered for—Power cannot be delegated.

The Court of first instance, to which a reference is made under O. 45, R. 5, Civil Procedure Code, for the purpose of settling a dispute as to the amount or value of the subject-matter of the suit, has no power to remit the investigation to some other officer: it must be carried out by that Court itself. [P. 102, C. 1.]

Dwarka Nath Mitra and *Rishindra Nath Sarcor* - for Petitioners.

B. Chakravarthi and *Chandra Shekhar Banerji*—for Opposite Party.

Judgment.—In this case a reference has been made to the Court of first instance under R. 5, O. 45 of the Code of Civil Procedure for the purpose of settling a dispute as to the amount or value of the subject-matter of the suit in the Court of first instance. The Subordinate Judge has sent back his report but he has not proceeded as the rule requires. The rule does not empower the Court of first instance to remit the investigation to some other officer, it must be carried out by that Court.

The result in this case has been very unsatisfactory because the Subordinate Judge purports to have acted on an admission, the precise character of which we do not know except that it seems to be an admission made for the purpose of meeting the difficulty as to the value of the appeal and no more.

The case must go back to the Subordinate Judge in order that he may himself make the enquiry as is required by R. 5, O. 45, and submit his report on the evidence produced before him.

V.B./R.K.

Case remanded.

A. I. R. 1916 Calcutta 102 (2)

WOODROFFE, AND CHAUDHURI, JJ.

Natabar Sarkar—Plaintiff—Appellant.

v.

Natabar Mandal and *others*—Defendants—Respondents.

Appeal No. 3106 of 1913, decided on 9th March, 1916, from the Appellate Decree of Dist. Judge, Bankura, dated 15th July, 1913.

Mortgage—Suit on—Mortgage of non-transferable occupancy holding—Landlord mortgagee cannot displace title of prior mortgagee—Landlord and tenant—Occupancy holding.

A landlord of an occupancy-holding, not transferable without his consent, suing to enforce a mortgage of the holding, cannot displace the prior title of a previous mortgagee of a part of the holding on the ground that the prior mortgage, having been effected without his consent, was not valid as against him. 42 Cal. 172 (F. B.), ref. to and expl. [P. 103, C. 1.]

Karnamoy Bose and *Panchanan Ghosh*—for Appellant.

Biraj Mohan Majumdar for *Deputy Registrar*—for Respondents.

Woodroffe, J.—The plaint does not seek for any declaration against the prior mortgagees but asks payment by the mortgagors, and in default sale of the mortgaged property. The 10th paragraph of the plaint, however, does state the plaintiff's intention to displace the alleged prior title of the previous mortgagees to the lands mortgaged to the plaintiff. This question was argued in both the lower Courts Both those Courts have dealt with the question adversely to the appellant before us, and I think quite rightly. We are not here concerned with the rights, whatever they may be, of the plaintiff as a landlord, that is not the capacity in which he appears in this suit. Here he sues as a mortgagee and he would not be in such a position to sue unless, of course, he had taken a mortgage from his own tenants. There can be no question but that the mortgagor could not have been heard to say that the property

which he had mortgaged was non-transferable and that though he purported to effect a transfer of it and received money in respect of such transfer, notwithstanding nothing passed and his mortgage was invalid. If the mortgagor could not say that, it seems to me perfectly clear that the plaintiff, who is a subsequent mortgagee and as mortgagee derived his title from the mortgagor, is in no better position. If this were not so, as was pointed out in the course of the argument, it might lead to fraud and injustice, because it would be quite open in such a case for the tenant to mortgage his property to various parties and then for the landlord to come in after having taken a mortgage from the tenant, and to claim to set aside all the previous mortgages on the ground that they had been effected without his permission.

There has been no case cited in the arguments the learned Pleader has addressed to us, which supports the proposition which has been urged before us, but he has submitted to us that it is to be derived from the examination of the Full Bench decision in *Dayamoy* v. *Ananda Mohan Roy* (1). That case, however, is not an authority for the proposition before us. What that decision does decide is that so far as the landlord is concerned, it is only in the case of a transfer of the whole of the holding that a right of entry is given to him, unless there has been relinquishment or abandonment. It may also be that the transfer of a part without consent is not binding, but that decision does not give a remedy in such case or say that the transferee of a part of a holding by way of prior mortgage cannot resist the landlord when he attempts to enforce a subsequent mortgage taken by him from the same tenant. Nor does any case which has been cited to us establish that proposition.

The judgment, therefore, of the lower Appellate Court in affirmance of the first Court appears to me to be correct, and the appeal is dismissed with costs.

As I have stated, I have dealt with the position of the plaintiff in the capacity in which he sues, namely, as mortgagee. With his rights, whatever they may be, as a landlord, we are not here concerned.

Chaudhuri, J.—I concur.

V.B./R.K.

Appeal dismissed.

(1) (1915) 42 Cal. 172=27 I. C. 61.

A. I. R. 1916 Calcutta 103

CHAUDHURI, J.

Budhu Lal and *another*—Plaintiffs—Opposite Parties.

v.

Chattu Gope and *others*—Defendants—Petitioners.

Appln. No. 15292 of 1913, decided on 6th December, 1915.

(a) Criminal Pro. Code (5 of 1898), S. 195—High Court is superior Court to Presidency Small Cause Court under S. 195.

Under S. 195 of the Criminal Procedure Code, a High Court is the superior Court of a Presidency Small Cause Court and has power to deal with the order of that Court refusing to grant sanction for prosecution. [P. 104, C. 1.]

(b) Criminal Pro. Code (5 of 1898), S. 195—Judicial proceedings—Application for leave to sue is such step—Presidency Small Cause Court—Power to administer oath—Oath administered in leave to sue is one in judicial proceedings.

Where leave to sue is necessary to give a Court jurisdiction an application for such leave is a stage in a judicial proceeding. [P. 104, C. 1.]

A Presidency Small Cause Court has ample jurisdiction to administer oath to a party when he makes an application for leave to sue and such oath, when administered, is an oath taken in the course of a judicial proceeding. [P. 104, C. 1.]

(c) Criminal Pro. Code (5 of 1898), S. 195—Sanction to Crown to prosecute—Delay explained—No prejudice—Sanction is proper.

If on an application made to a Presidency Small Cause Court for sanction to prosecute persons who obtained leave to sue, it is found by the Court that leave was improperly obtained on false allegations, sanction should be given to the Crown to prosecute the persons concerned, even though there has been considerable delay in making the application, when such delay is explained and when by such delay those persons are not likely to be prejudiced. [P. 104, C. 2.]

B. C. Mitter and *N. N. Gupta*—for Petitioners.

Eardley Norton and *H. G. Pearson*—for the Opposite Parties.

Judgment.—In these matters, I issued Rules on the plaintiffs in the above suits to show cause why the order refusing sanction to prosecute them should not be set aside, or why an enquiry should not be directed in order to grant such sanction. The application was headed "In the matter of S. 115 of the Code of Civil Procedure," but when it was made, it appeared to me to be more appropriate to head it under the Criminal Procedure Code, and in fact the learned Standing Counsel treated it as such an application. It has been argued that it does not come

under S. 115 of the Code of Civil Procedure. This is not necessary to consider. Under S. 195 of the Code of Criminal Procedure this Court is the superior Court of the Presidency Small Cause Court and has power to deal with the order which was made by that Court. This has not been seriously contested by learned Counsel who appeared for the plaintiffs. Formal amendment of the heading will, if necessary, be made. So far as the verification of the application before me is concerned, it is undoubtedly faulty; but inasmuch as I think that this is a fit case for an enquiry before sanction is granted, I do not think that such faulty verification much matters. The learned Judge who dealt with the application in the Small Cause Court does not appear to me to have taken a correct view of the nature of an application for leave to sue. He has held that such an application is not a stage in a judicial proceeding. It seems to me that it is, where such leave is necessary to give the Court jurisdiction. R. 87 of the Small Cause Court requires an application for leave to sue to be verified as a plaint. It requires the party making such an application to be present with such evidence as may be required by the Court in support of the applicant's allegations. The practice in the Small Cause Court has apparently been to take the oath of the party when he makes such an application. There is ample jurisdiction in the Court to administer an oath at that stage, and such oath, when administered, is an oath taken in the course of a judicial proceeding. I do not think it necessary in the view I take to deal with the cases which have been cited on this point. Learned Counsel, Mr. Norton, has rightly contended there has been considerable delay in this matter. The delay has been explained in the affidavits before me. No doubt there was no explanation of the delay before the learned Judge, before whom the application was originally made; and although Mr. Pearson, who appeared for the plaintiffs, asked for such explanation, no explanation was given. It has, however, been given now. It would undoubtedly have been better if such explanation had been then given; but there is no reason to doubt the facts which have now been placed before me. In the circumstances some of the delay was unavoidable especially, as references had to be made to the Bihar Government. The delay in this matter is not such as to lead me to think that there is any likelihood of the plaintiffs being prejudiced The prosecution has been taken up by the Crown. I direct that an enquiry be held by the learned Judge as to whether sanction should be given upon the materials placed before the Court. The Oaths Act, under which the suits were dismissed, has nothing to do with the matter. The merits of the cases were not decided, as upon a trial, but the result of the special oath was the dismissal of the suits. But the grounds, upon which the jurisdiction of the Court was invoked, when leave was asked for to institute the suits, are alleged to be false. Whether such grounds are true or untrue, are to be enquired into. I think these are fit cases for such an enquiry. If upon such enquiry it be found that the allegations were false and leave to sue was improperly obtained, sanction should be given to the Crown to prosecute the persons concerned. I make the Rules absolute. The matters being in the nature of criminal proceedings. I do not direct any costs.

V.B./R.K.

Rules made absolute.

A. I. R. 1916 Calcutta 104

CHATTERJEA AND NEWBOULD, JJ.

Kailash Chandra Saha and *another*—Plaintiffs—Appellants.

v.

Darbaria Sheikh and *others*—Defendants—Respondents.

Appeals Nos. 1965, 2216, 2217, 2218 and 2219 of 1913, decided on 10th December 1915, from the Appellate Decrees of Dist. Judge, Rangpur, dated 10th March, 1913.

(a) Landlord and tenant—Rent Portion of stipulated rent agreed to be deducted as *hajat*—Full rent payable after expiry of term—Agreement is not valid and does not contravene provision of Bengal Tenancy Act (1885).

An agreement of a non-occupancy *raiy t* contained in his *kabuliyat* that for the term of the lease a portion of the stipulated rent will be deducted as *hajat* (kept in suspense) and after the expiry of the term, if he chooses to occupy the land full rent will be payable, does not contravene the provisions of the Bengal Tenancy Act and is not invalid. A. I. R. (1914) Cal. 64, dist. [P. 105, C. 1 & 2.]

(b) Landlord and tenant—Rent—Landlord realising rent at reduced rate for few years on expiry of lease—He is not deprived of right to claim rent at stipulated rate.

The mere fact that the landlord on the expiry of the term of a written lease realised rent at a reduced rate for a few years, is not sufficient to deprive him of his right to claim rent at the rate stipulated in the lease. 37 Cal. 293; 41 Cal. 493 and 14 I. C. 817, appl. [P. 105, C. 2.]

(c) Evidence Act (1872), S. 92—Written lease registered—Evidence of subsequent agreement for purpose of varying stipulated rent is inadmissible.

Where a written lease is registered, evidence of any subsequent agreement or evidence of conduct is inadmissible for the purpose of varying the stipulated rent. [P. 105, C. 2.]

(d) Evidence Act (1872), S. 92—Evidence that rent was always paid at lower rate than that stipulated in *kabuliyat* is admissible to show intention that *kabuliyat* was not to be acted upon or waiver of strict terms of lease.

Evidence that since the execution of a *kabuiyat* the tenant has been paying rent at a lower rate than that stated in the *kabuliyat*, is admissible to show that from the very first the intention of the parties was that the *kabuliyat* should not be acted upon or that there has been a waiver of the strict terms of the lease. 6 C. W. N. 242, appl. [P. 106, C. 1.]

Surrendra Chandra Sen—for Appellant.

D. N. Bagchi—for Respondent.

Judgment.—These appeals arise out of suits for rent based upon certain *kabuliyats*. The *kabuliyats* in three of the cases were for the term of one year and the *kabuliyats* in the remaining two cases were for three years each. Certain rent was settled in each case, but a portion was deducted as *hajat* (kept in suspense) and the balance was stated to be the rent payable for the term. It was stipulated, however, in the *kabuliyat* that on the expiry of the term the tenant would take a fresh settlement and if he continued in occupation without taking any fresh settlement, the amount of *hajat* would not be allowed. The plaintiff in these suits has claimed rent at the full rate. The Court of first instance gave a decree for rent at the full rate, but on appeal the learned District Judge held that plaintiff was entitled to recover rent only at the reduced rate. The plaintiff has appealed to this Court.

Now the defendant is not an occupancy *raiyat*. The case of *Srimati Mohamaya Kar* v. *Kishore Chang* (1), upon which reliance was placed on behalf of the respondent, related to an agreement made by an occupancy *raiyat* and the agreement contravened the provisions of S. 29 of the Bengal Tenancy Act, and, therefore, cannot govern the present cases. The agreement contained in the *kabuliyat* in these cases as to payment at the full rate after the expiry of the term if the tenant chose to occupy the land does not contravene the provisions of the Act relating to non-occupancy *raiyats*, and is not invalid.

The learned District Judge, however, has held that even after the expiry of the term, the plaintiff did not realise rent at the full rate, but realised rent at the reduced rate. Although there is evidence to show that rent was not realised at the full rate, there is no evidence that rent was realized at the reduced rate, and the finding of the Court below on the latter point, therefore, is not based upon any evidence. It does not appear at what rate rent was actually realised since the expiry of the term. Assuming, however, that rent was realised at the reduced rate for a few years before suit, we do not think that that fact by itself is sufficient to deprive the landlord of his right to claim rent at the rate stipulated in the *kabuliyat*. The contract as to the rent payable after the expiry of the term is contained in the *kabuliyat*. The mere fact that the rent for some years has been received at a reduced rate does not bind the lessor to accept rent at that rate, in future, because that is consistent with the reduction being a mere temporary abatement and as an indulgence on the part of the lessor. See *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (2), *Durga Prasad Singh* v. *Rajendra Narayan Singh* (3) and *Baijnath Prosad Sahu* v. *Raghunath Rai* (4). The learned Judge has practically held that the landlord by accepting rent at the reduced rate after the expiry of the term of the leases has varied the rent by putting an end to the agreement to pay rent at the full rate. No such case, however, was made by the defendant, and in four of the cases in which the leases were registered evidence of any subsequent agreement or evidence of conduct is inadmissible.

(1) A.I.R. (1914) Cal. 64=21 I. C. 948.

(2) (1910) 37 Cal. 293=4 I. C. 713.

(3) 1914) 41 Cal. 493=21 I. C. 750=40 I. A. 223 (P. C.).

(4) (1912) 14 I. C. 817.

We are accordingly of opinion that the plaintiff accepting rent at the reduced rate is not precluded from claiming rent at the rate agreed upon in the *kabuliyat*.

The defendant, however, pleaded in his written statement that the stipulation in the *kabuliyat* that the amount of *hajat* would not be allowed on the expiry of the term of the lease was inserted as a mere matter of form, in other words, that it was never intended to be acted upon. We think that this question should be gone into. In the case of *Beni Madhub Gorani* v. *Lalmoti Dassi* (5), this Court held that evidence that since the execution of the *kabuliyat* the tenant paid rent at a lower rate than that stated in the *kabuliyat*, is admissible to show that the intention of the parties was that the *kabuliyat* from the very first was not intended to be acted upon or that there had been a waiver of the strict term of the lease. We agree with the above view and we think the lower Appellate Court should come to a decision whether it was the intention of the parties from the beginning that the *kabuliyats* were not to be acted upon or in the alternative whether there was a waiver of the terms. The decrees of the Court below are accordingly set aside and the cases remanded to that Court for disposal after a decision of the question indicated above. It will be open to both parties to adduce further evidence on the point. Costs to abide the result.

V.B. R.K.

Decree set aside; Case ramanded.

(5) (1902) 6 C. W. N. 242.

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JENKINS, C. J. AND TEUNON, J.

Emperor—Appellant.

v.

Surath and *others*—Accused.

Criminal Ref. No. 174 of 1914, decided on 9th September, 1914.

Criminal P C (5 of 1898), Ss. 208 and 438—Application for calling further witnesses made on the day the order of commitment was passed does not show that S. 208 was not followed.

In an inquiry before a Magistrate preliminary to commitment to Sessions, the fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses, introduces no conditions which show that the provisions of S. 208 of the Code of Criminal Procedure have not been observed. [P. 106, C. 2.]

K. N. Chaudhuri and *Manmatha Nath Mukherji*—for Accused.

Jenkins, C. J.—This is a reference to the High Court by the Sessions Judge of Purnea, under S. 438 of the Criminal Procedure Code, and the suggestion is that the law as prescribed in S. 208 of the Criminal Procedure Code has not been observed. That view has been supported before us by Mr. Chaudhuri, who has cited in support of it a decision in *Emperor* v. *Muhammad Hadi* (1). That case does not purport to go beyond the decision on which it is based, that is to say, the decision in *Queen-Empress* v. *Ahmadi* (2). But in fact it does enlarge the rule laid down in that case, in so far as it applies the rule in the earlier case, which was limited to witnesses produced, to witnesses whom the accused might be prepared to produce, and this enlargement is in conflict with the express terms of S. 208. I cannot myself see that the Magistrate has in any way failed to observe the provisions of that section. It is not suggested that he did not hear all the evidence produced before him and that is all that is required by the first paragraph. The fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses, appears to me to introduce no conditions which show that the provisions of that section had not been observed. It is important to notice that what was sought was that the Magistrate should allow reasonable time for filing documents and summoning witnesses. On that the Magistrate made the order that "the accused are committed to the Court of Sessions to-day; no further adjournment can be allowed." The application, therefore, was obviously too late, for the commitment had been made. More than that, I think, in the circumstances of this case, that the accused is not deserving of any great sympathy because an application could have been made at once to this Court under S. 215, for the quashing of the commitment if the circumstances permitted it. But instead of doing that the accused waited until the case was called on at the Sessions and took this point a month after the event. In my opinion, we ought not to uphold this

(1) (1903) 26 All. 177.
(2) (1898) 20 All. 264.

reference, and we direct the Sessions Judge to proceed with the trial of the accused.

Teunon, J.—I agree.

V. B./R. K.

Reference not accepted.

A. I. R. 1916 Calcutta 107

FLETCHER AND RICHARDSON, JJ.

Rashbehary Lal Mandar—Defendant—Appellant.

v.

Anand Ram and *others*—Plaintiffs—Respondents.

Appeal No. 450 of 1912, decided on 15th June, 1915, from the Original Decree of Sub-Judge, Bhagalpur, dated 30th September, 1912.

(a) Bengal Court of Wards Act (9 of 1879) S. 19—Acknowledgment of debt by Court of Wards not invalid.

A Court of Wards has power to give an acknowledgment under S. 19 of the Limitation Act so as to give a fresh start for the computation of limitation. 17 All. 198 (P C.); 30 All. 422 (F. B.); 34 Mad. 221 and (1888) A. W. N. 187, ref. to. [P. 108, C. 1.]

(b) Bengal Court of Wards Act (9 of (1879) S. 18—Power of Court of Wards to give acknowledgment of debt and execute pro-notes.

Semble.—It may be doubted whether a Court of Wards has under the terms of S. 18 of the Court of Wards Act power to direct the execution of a promissory note. [P. 108, C. 1.]

But a promissory note executed under its direction may in any event be used as an acknowledgment of a pre-existing debt. [P. 108, C. 1.]

Dwarkanath Mitter and *Naresh Chandra Singha*—for Appellant.

Umakali Mukerji and *Gurudas Singha*—for Respondents.

Fletcher, J.—This is an appeal by the defendant from the judgment of the learned Subordinate Judge of Bhagalpur, dated the 30th of September, 1912. The plaintiffs brought the suit to recover from the defendant the sum of Rs. 11,541-2-0 for principal and interest due on a promissory note dated the 2nd December, 1909.

The plaintiffs have two firms, one at Bhagalpur and the other at Calcutta. Admittedly, the defendant had dealings with both these firms.

The transactions with the Bhagalpur firm of the plaintiffs were adjusted and on the 30th of *Bhadra*, 1314 *F. S.*, corresponding with the 21st of September, 1907, the defendant executed in favour of the plaintiffs a promissory note payable on demand for Rs. 2,542 with interest at 12 annas per cent. per mensem.

The defendant states that after the execution of this promissory note he made a payment of Rs. 900. There seems to be no truth in this statement.

The goods taken from the Calcutta shop of the plaintiffs were as follows:—On the 10th of September, 1906, goods of the value of Rs. 5,213-6-6. On the 12th of September, 1906, goods of the value of Rs. 1,202-9-5. On the 30th of January, 1907, goods of the value of Rs. 1,685-14-6, and on the 3rd of February, 1907, goods of the value of Rs. 1,114-7-0. The plaintiffs also prove that there was an agreement to pay interest on the balance due to the Calcutta shop at the rate of 12 annas per cent. per mensem. I reject the defendant's story as to his dealings with the Calcutta shop of the plaintiffs and also as to his having paid their account in full. The payments made by the defendant on account of the moneys due to the Calcutta shop are as follows:—On the 14th November, 1906, the sum of Rs. 1,000; on the 26th January, 1907, the sum of Rs. 1,950; on the 2nd of February, 1907, Rs. 600; on the 30th of April, 1907, Rs. 600, and on the 2nd of May, 1907, the sum of Rs. 400. On the 11th November, 1908, the Court of Wards took charge of the defendant's estate. The Court then issued the usual notice calling on persons claiming to be creditors of the disqualified proprietor (the defendant) to prove their debts. The plaintiffs duly appeared and produced their accounts and satisfied the Court as to the amount due to them. Accordingly, under the directions of the Court of Wards, the Manager on the 2nd of December, 1909, executed the promissory note that is now sued upon.

The defendant has contended on this appeal that the Court had no power to execute a promissory note in respect of any of his debts and that the promissory note, so far as it relates to a portion of the defendant's dues to the Calcutta shop, was in respect of debts that were barred by limitation.

The Court of Wards Act (Beng. IX of 1879) does not contain any express power authorising the Court to execute promissory notes. S. 18 provides that the Court "may direct the doing of all such other acts as it may judge to be most

for the benefit of the property and the advantage of the ward."

It may be doubted whether the Court had under the terms of S. 18 power to direct the execution of a promissory note. But there can no doubt on the authorities that the Court has power to give an acknowledgment, so as to give a new period of limitation under S. 19 of the Indian Limitation Act.

In the case of *Beti Maharani* v. *Collector of Etawah* (1), the Privy Council observed with reference to such an acknowledgment, "It must be taken that the Court's act would bind the ward."

In the course of his judgment in the case of *Ram Charan Das* v. *Gaya Prasad* (2) Banerji, J., remarked: "This Court has held in *Kamla Kuar* v. *Har Sahai* (3) that an acknowledgment by the Court of Wards gives a fresh start for the computation of limitation." The same view was adopted by the Madras High Court in the case of *Kondamodalu Linga Reddi* v. *Alluri Sarvarayudu* (4). The report of the Deputy Collector of the 20th July, 1909, (Exhibit 10), the letter from the Board of Revenue of the 24th of August, 1909, (Exhibit 20), the letter from the Collector of the 18th of September, 1909, (Exhibit 14), and the promissory note sued on (Exhibit 6), are all clear acknowledgments of the debts due to the plaintiffs. At the date of those acknowledgments the promissory note of the 21st September, 1907, with respect to dealings with the Bhagalpur firm, was clearly not barred by limitation. The earliest dealing with the Calcutta shop was the 10th September, 1906. The acknowledgment by the Board of Revenue in their letter (Exhibit 20) of the 24th of August, 1909, was within 3 years from the date of the debts. This suit was, therefore, in my opinion, brought within time. The present appeal, therefore, fails and must be dismissed with costs. Let the record be sent down at once.

Richardson, J.—I agree.

V.B/R.K.

Appeal dismissed.

(1) (1895) 17 All. 198=22 I. A. 31 (P. C.).
(2) (1908) 30 All. 422 (F. B.).
(3) (1888) A. W. N. 187.
(4) (1911) 34 Mad. 221=6 I. C. 407.

A. I. R. 1916 Calcutta 108

FLETCHER AND ROE, JJ.

Behary Lal Nandi and *others*—Plaintiffs—Petitioners.

v.

Kedar Nath Nebu and *others*—Defendants—Opposite Parties.

Civil Rule No. 1132 of 1915, decided on 3rd May, 1915, from the judgment of Munsif, Amta.

Co-sharer—Suit—Damages—One co-sharer's suit for damages for removal of fish, by another co-sharer if it is under an arrangement existing is not tenable.

Where the plaintiff sues one of the co-sharers for damages for the wrongful removal of fish from a tank and it is found that there was an arrangement by which the defendant was put in possession of the tank with the right to take fish from it:

Held, that the arrangement or lease could not be void even under the Transfer of Property Act, because the act that was done in removing the fish was a past act and at that time, if under an arrangement, lease or license, whatever it may be called, the right was in existence, the defendant was justly exercising his right in fishing in the tank, and damages could not be claimed against him. [P. 108, C. 2 & P. 109, C. 1.]

Baidya Nath Dutt, Gour Mohan Dutt and *Presh Chunder Dutt* — for Petitioners.

Monmotha Nath Ganguli—for Opposite Parties.

Fletcher, J.—This is a Rule calling upon the opposite parties to show cause, why the decree of the Small Cause Court complained of should not be set aside. The plaintiffs are the petitioners in this Rule. The plaintiffs brought the suit against the defendant No. 10 and others, claiming damages for the wrongful removal of fish from a tank. The defendant No. 10 is a co-sharer of the plaintiffs and the other defendants. He set up the plea that, by means of an arrangement arrived at between him and the other sharers, he had been put in possession of the tank with the rights of fishery therein for a period of nine years and that he removed the fish under such authorization. It is said that that lease is void having regard to the provisions of the Transfer of Property Act. That makes no difference in a suit like this, because the act that was done in removing the fish is a past act and at that time, if under an arrangement, lease or license, whatever it may be called, the right was

in existence, the defendant No. 10 was justly exercising his right in fishing in the tank and damages cannot be claimed against him. I see no reason to differ from the conclusion arrived at by the learned Judge of the Small Cause Court that there was an arrangement by which the defendant No. 10 had been put in possession of the tank with the right to take fish from it. The view that the learned Judge has taken is that, owing to the large accession of fish in the tank that arose from the flood last year, the plaintiffs required further rent from the defendant No. 10 and it was only when the defendant No. 10 refused to pay the increased rent that the present suit was lodged against him. That seems to be amply sufficient to dispose of the present Rule without considering whether, if the lease is not proved, the defendant No. 10 as a co-sharer had the right to remove the fish without being liable to account to his co-sharers. The present Rule, therefore, fails and must be discharged with costs two gold *mohurs*.

Roe, J.—I agree.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 109

STEPHEN AND MULLICK, JJ.

Kali Charan Mahato — Plaintiff—Appellant.

v.

Gouri Sankar Singh and *others*—Defendants—Respondents.

Second Appeal No. 655 of 1908, decided on 13th July, 1914, against the order of Dist. Judge, Patna, dated 28th November, 1908.

Civil P. C. (5 of 1908), S. 47—Auction-purchaser of portion of non-transferable holding in execution is representative of judgment-debtor—Question of setting aside sale whether under O. 21, R. 89, or under S. 173, Bengal Tenancy Act, falls under S. 47, Civil P. C.—Order is appealable.

A purchaser of a portion of a non-transferable occupancy-holding sold in execution of a decree for rent is a representative of the judgment-debtor within the meaning of S. 244 of the Civil P. C. of 1882, and therefore, the question whether the sale should be set aside on application of the purchaser on the ground of fraud or under the provisions of S. 173, Bengal Tenancy Act, is a question between the parties to the suit or their representatives, and against the decision of such question there is both an appeal and a second appeal.

[P. 109, C. 2 & P. 110, C. 1.]

Surendra Nath Ghoshal—for Appellant.

Muhammad Mustafa Khan—for Respondents.

Judgment.—The appellant is the purchaser of a portion of an occupancy-holding. The lower Appellate Court appears to have taken it for granted that the holding is not one transferable by custom, and we conclude that he has come to a finding of fact upon this point with which we cannot interfere in second appeal.

It appears that the holding was sold in execution of a decree for rent on the 20th March, 1908 and purchased by one Gouri Sankar Singh. On the 31st March, 1908 the appellant made an application to have the sale set aside. The Munsif, who heard the application in the first instance, came to the conclusion that the auction-purchaser was not a *benamidar* for the judgment-debtor and that, therefore, S. 173, Bengal Tenancy Act, did not apply. He accordingly dismissed the application. The District Judge, to whom the applicant appealed, held that there was no appeal against an order under S. 173 and declined to interfere.

It is brought to our notice by the learned Pleader for the appellant that in his application of the 31st March, 1908, the appellant sought relief not only under S. 173 of the Bengal Tenancy Act, but also under S. 174, Bengal Tenancy Act, and Ss. 310-A, and 244 of the Civil Procedure Code of 1882. Now it is clear that S. 174 does not apply, because the application has not been made by the judgment-debtor. As regards S. 173, the Munsif has found that the auction-purchaser is not a *benamidar* for the judgment-debtor. This being so, S. 173 does not apply unless S. 244, Civil Procedure Code, can be called to its assistance.

S. 310-A, Civil Procedure Code, is no longer applicable to execution proceedings under the Tenancy Act by virtue of S. 170, Bengal Tenancy Act, as amended by Bengal Act I of 1907.

There remains, therefore, only S. 244 of the Code of 1882, which is the Code applicable to the case. Now the applicant as a purchaser of a portion of a non-transferable occupancy-holding is a representative of the judgment-debtor within the meaning of S. 244 [*Sreemathy Daya-*

moyi v. *Ananda Mohan Roy Chowdhry* (1)]. This being so, the question whether the sale should be set aside on the ground of fraud or under the provisions of S. 173, Bengal Tenancy Act, is a question between the parties to the suit or their representatives. Therefore, there is both an appeal and a second appeal. The case, therefore, must be remanded to the Court of first instance for an investigation into the charges of fraud. The result is that the appeal is decreed with costs which are assessed at Rs. 16, and the order of the lower Appellate Court set aside with the direction that he will remit the case to the Court of first instance for disposal in accordance with the directions herein contained.

The Rule is consequently discharged without costs.

V.B./R.K.

Rule discharged.

(1) A. I. R. (1915) Cal. 242=27 I. C. 61.

A. I. R. 1916 Calcutta 110

MOOKERJEE AND BEACHCROFT, JJ.

Upendra Nath Nag Chowdhury and *others* – Defendants—Appellants.

v.

Bhupendra Nath Nag Chowdhury and *others*—Plaintiffs—Respondents.

Appeal No. 418 of 1911, decided on 27th July, 1915, against the Original Decree of Sub Judge, 3rd Court, 24 Parganas, dated 16th June, 1911.

(a) Will—Executor—Two persons appointed successive executors—Second executor is not liable for accounts of predecessors or his wrongful acts—He must however call upon representatives of predecessors to render account.

Where a testator appoints two persons successive executors of his will, the second executor as such is not liable for the accounts of his predecessor or for his wrongful acts, but it is incumbent upon him to call upon the representatives of his predecessor to render an account and respond in damagss for *devastavit*, mismanagement or breach of duty whereby any property of the deceased testator is diverted from a due course of administration.

[P. 112, C. 1 & 2.]

(b) Deed—Construction—Conveyance—Question whether person in whose name conveyance is taken is beneficial owner or mere name lender—Determination of surrounding circumstances, position of parties and motives governing the action should be considered.

In order to determine whether a person in whose name a conveyance is taken is intended to be the beneficial owner or a mere name lender, reliance must be placed not only upon the surrounding circumstances and the position of the parties and their relations to one another, but also upon the motives which could govern their actions and their subsequent conduct. 26 Cal. 227 (P. C.) and 30 All. 258 (P. C.), ref. to.

[P. 114. C. 2.]

(c) Deed — Construction — Testator's house mortgaged by him sold in execution of mortgagee s decree—Lease by purchaser to testator's family—House subsequently conveyed to testator's daughter-in-law for consideration not proved to be her separate property—Held house was purchased for estate in name of daughter-in-law.

Where, therefore, a certain house belonging to a testator was mortgaged by him and having been sold in execution of the mortgagee's decree, the purchaser gave out leases to the testator's family who continued to live there and sometime afterwards conveyed the house to the testator's daughter-in-law for consideration which was not proved to be her separate property:

Held, (1) that applying the two principal tests of *benami*, namely, the source of the purchase-money and possession of the property the inference could legitimately be drawn that the house was purchased for the benefit of the estate in the name of the daughter-in-law.

(2) that the subsequent conduct of the parties also showed that the purchase in the name of the daughter-in-law was not for her benefit and that the house was allowed to form part of the estate of the testator.

[P. 114, C. 2.]

(d) Evidence Act (1872), S. 145—Previous statements of witness cannot be used except to contradict him—Particular matter must be placed before witness for explanation.

Previous statements, unless used to contradict or discount the evidence of a witness given in a suit, cannot be legitimately used and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered. A. I. R. (1915) P. C. 7, (P. C.) ref. to.

[P. 115, C. 1 & 2.]

(e) Will—Executor—Estate in state of considerable embarrassment—Executor obliged to sell portion to meet liabilities—Failure to raise money on interest does not necessariiy amount to dereliction of duty unless damage is proved to have resulted from sale.

Where an executor, on coming into possession of the estate of a testator, finds it in a condition of considerable embarrassment and has to sell a portion of it in order to meet certain liabilities his failure to raise money on interest with a view to save the property from sale does not necessarily amount to a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale.

[P. 116, C. 2.]

(f) Will Executor—Appointment of debtor of testator as executor—Debt due from him is considered to have been paid to him by himself.

Where a debtor of a testator is appointed executor, the debt due from him is considered to have been paid to him by himself and he is accountable for the amount of his debt as assets.

[P. 117, C. 1.]

(g) Will—Construction—Directions in respect of marriage of grand children are valid.

Directions given by a testator in respect of the marriage expenses of his grand children are valid in law. 7 I. C. 921 and 39 Cal. 87, fol.

[P. 118, C. 1.]

(h) Will—Construction - Suit for—Costs must be paid out of estate.

In a suit for the construction of a will and for administration of the estate of a testator, the costs of all Courts must be paid out of the estate. *In re Love, Hill* v. *Spurgeon*, 29 Ch. D. 348, foll.

[P. 118, C. 2.]

Nilmadhab Bose, Shib Chandra Palit, Biraj Mohan Mozumdar, Satendra Nath Mukerjee and *Bankim Chandra Mukerjee* —for Appellants.

N. Sirkar, Tarkeshwar Pal Chowdhury, Charu Chandra Biswas and *Harendra Nath Mukerjee*—for Respondents.

Judgment.—This appeal, which has been preferred by some of the defendants in the Court below, is directed against the preliminary decree in a suit for construction of the will of one Raj Mohan Nag Chowdhury, for administration of the estate left by him, for settlement of the accounts of the executor, for partition of such properties as may be left after payment of the debts, and for other incidental reliefs. The position of the parties will be clear from the annexed genealogy:—

RAJ MOHAN NAG CHOWDHURY,
died 4th July, 1880,
widow Ambica Moni, died November 1893.

- Preonath Nag Chowdhury, died before 1880, widow Kali Kamini Dasi, defendant No. 3.
- Chandra Nath Nag Chowdhury, died 28th July, 1907, widow Nishadini Dasi, defendant No. 4.
  - Upendra Nath Nag Chowdhury, defendant No. 1.
  - Surendra Nath Nag Chowdhury, defendant No. 2.
  - Bhupendra Nath Nag Chowdhury, plaintiff No. 1.
  - Purendra Nath Nag Chowdhury, plaintiff No. 2.
  - Sailendra Nath Nag Chowdhury, defendant No. 8.
  - Khagendra Nath Nag Chowdhury, plaintiff No. 3.
- Kali Nath Nag Chowdhury, widow Kumudini Dasi, defendant No. 5.
  - Son Satish.
  - Daughter Krishnamoyi Dasi, defendant No. 7.
- Kristo Nath Nag Chowdhury, died before 1880, widow Nagendra Nandini Dasi defendant No. 6.

Raj Mohan died on the 5th July 1880. On the day previous to his death, he had made a testamentary disposition of his properties and appointed his second son Chandra Nath and his eldest grandson Upendra Nath successive executors. Chandra Nath took out Probate of the Will of his father and administered the estate till his death, which took place on the 28th July, 1907. On the 18th May, 1908, Upendra Nath obtained Probate and continued to discharge his duties as executor till his removal on the 20th April, 1910. On the 30th August, 1909, Bhupendra, Purendra and Khagendra, three of the sons of Chandra Nath, instituted the present suit for the purposes already specified. They joined as defendants, their three brothers, their mother and also the other members of the family who were interested in the estate left by their grandfather as legatees or annuitants.

The suit was based on allegations of mismanagement which were repudiated by the executor. Various questions also arose in respect of the title to some of the properties claimed by the plaintiffs as part of the estate of the testator and alleged by some of the defendants to be the exclusive property of the widow of Chandra Nath. The Subordinate Judge, after a protracted trial, made a preliminary decree, which directed the executor to render accounts for the period subsequent to the death of Chandra Nath, that is, from the 29th July, 1907 to the 20th April, 1910. The latter date was fixed in view of the circumstance that from that date, by an order of the Court, Upendra Nath ceased to be executor and was appointed Receiver in charge of the estate during the pendency of the litigation. The preliminary decree also decided the disputed question of title and gave directions for the administration

of the estate. Both parties were dissatisfied with this decree, three of the defendants, inclusive of the executor Receiver, have preferred this appeal, while the plaintiffs-respondents have preferred a cross-appeal. After a careful scrutiny of the grounds selected by the appellants and the respondents for presentation to the Court, the following points emerge for consideration. *First*, did the Panchannagram properties form part of the estate of Raj Mohan or have they passed into the hands of Nishadini as beneficial owner; *secondly*, did the Calcutta house form part of the estate of Raj Mohan at the time of the sale, on the 9th November, 1908, when it admittedly passed into the hands of a stranger; *thirdly*, did the *ganti* tenures, some of which have been found by the Subordinate Judge to belong to Nishadini, the widow of Chandra Nath, and the others to the estate of Raj Mohan, still form part of that estate; *fourthly*, are the *debutter* properties capable of partition and is the executor liable to submit an account of their income; *fifthly*, is the executor liable for the sale of the Calcutta house in execution of the decree of the mortgagee; if so, what is the extent of his liability; *sixthly*, was there a real sale, by Sailendra Nath, of his interest in the estate of his grandfather to his mother Nishadini, on the 16th December, 1896; *seventhly*, what direction, if any, should be given with regard to the provisions in the eleventh paragraph of the will of Raj Mohan, for the marriage expenses of his great-grandsons and great-grand-daughters; *eighthly*, what direction should be given for the costs of the suit in the Court below and of the appeal in this Court.

It is necessary to explain, before we deal with these questions in the order stated, that all the parties are now agreed that the executor should be called upon to render accounts, only from the 29th July, 1907 to the 20th April, 1910. They have intimated to us that they abandon the claim for accounts for the period of the executorship of Chandra Nath. The reason for this attitude is obvious. As ruled by this Court in the case of *Baroda Prosad Banerji* v. *Gajendra Nath* (1), the second executor is as such not liable for the accounts of his predecessor or for his wrongful acts, but it is incumbent upon him to call upon the representatives of his predecessor to render an account and respond in damages for *devastavit*, mismanagement or breach of duty whereby any property of the deceased testator was diverted from a due course of administration. Consequently, it would be the duty of Upendra Nath to realise from himself and his five brothers whatever might be found due to the estate of their grandfather on an examination of the accounts of their father as executor. Such an investigation is obviously not beneficial to the parties and although they are by no means friendly to each other, they are united upon one point, namely, that the accounts of their father as executor should not be taken. A different attitude, we may add, was adopted in the Court below, and some of the sons of Chandra Nath sought to fasten a special liability upon the others on the allegation that they were the trusted advisers of their father during the period of his executorship, and shared his responsibility for due administration of the estate. This endeavour was not successful, and, as we have said, in this Court all the parties by common consent have agreed that the accounts are not to be investigated for the period antecedent to the 28th July, 1907 when Chandra Nath died.

The *first* ground raises the question of title to the lands known as Panchannagram properties. They originally formed part of the estate of Raj Mohan and are still included therein, if it is not established that they have passed into the hands of a stranger. On the 25th June, 1885, Chandra Nath, for an alleged consideration of Rs. 1,000, executed a conveyance in respect of these properties, which comprise 25 *bighas* of land and are situated in the neighbourhood of Calcutta, in favour of one Srinath Bose who was his intimate friend. Subsequently, on the 13th June, 1895, the purchaser executed a conveyance in favour of Nishadini, the wife of Chandra Nath, for a consideration of Rs. 500 only. The plaintiffs contend that these transactions were fictitious and that the properties never ceased to form part of the estate of Raj Mohan. The Subordinate Judge has found that Srinath did not get himself registered in the Collectorate and did not take possession of the properties, though he continued to be the ostensible owner for a period of

(1) (1909) 1 I. C. 289.

eight years. During this interval he never paid rent to the Collector, and although tenants are said to have attorned to him, no documentary evidence has been produced in that behalf. There is also no reliable evidence to prove that Nishadini was ever in possession of these properties. No account papers have been produced to show that the profits of these properties were realized and spent by her. Against all this, it is urged by the appellants that the Court is bound to give effect to the ostensible title and should not base its decision on mere suspicion. But the obvious answer is that, except the recital in the conveyance, there is no trustworthy evidence that any consideration was paid by Srinath. (If consideration had been paid, the money would have been credited to the estate, and an entry to that effect would have found a place in the account books presumably kept by Chandra Nath. No account books, however, have been produced, nor is it alleged that Chandra Nath did not keep regular accounts of the estate whereof he was the executor. The inference is that the account books have not been produced, because they do not favour the contention of the appellants. We feel no doubt whatever that the Subordinate Judge is correct in his conclusion that the conveyances by Chandra Nath in favour of Srinath and by Srinath in favour of Nishadini were both fictitious transactions.

The *second* ground raises the question of title to the Calcutta house. It is the common case of all the parties that the house belonged to Raj Mohan, and on 12th May, 1874 was mortgaged by him to Mary Ratter. After the death of Raj Mohan, Mary Ratter sued to enforce her security and obtained a decree on the 1st September, 1884. The house was sold in execution of this decree on the 20th June, 1885 and was purchased for Rs. 8,700 by one Shama Charan Ballabh, a friend of Raj Mohan. The family of Raj Mohan, notwithstanding this sale, continued in occupation of the house as they took leases from the purchaser on the 5th August, 1885 and 5th December, 1886. On the 30th April, 1887, Shama Charan conveyed the house to Nishadini, the wife of Chandra Nath, for a consideration of Rs. 11,000. The question in controversy is, whether this transfer to Nishadini was for the benefit of the estate of Raj Mohan or whether by this transaction the house, became her private property. According to Nishadini she had Rs. 3,000 with her at the time of the purchase of the house, and she borrowed Rs. 8,000 from her daughter to make up the requisite amount of purchase-money. There is no documentary evidence to support the alleged advance by her daughter, and the statements made by Upendra Nath on this point are, as the Subordinate Judge has pointed out, not self-consistent. It is quite improbable that Nishadini could borrow this money without security and without even a written instrument. We may also refer to the subsequent conduct of the parties which, as the Judicial Committee have said, affords valuable evidence as to whether the person in whose name the conveyance is taken is intended to be the beneficial owner or a mere name lender [*Ram Narain* v. *Muhammad Hadi* (2), *Thakro* v. *Ganga Prasad* (3) and *Dalip Singh* v. *Nawal Kunwar* (4)]. Thus, there is the significant circumstance that when the house was mortgaged to Harendra Lal Roy on the 20th September 1887, the document was executed, not by Nishadini alone, but also by Chandra Nath and Upendra Nath. This is consistent with the view that the house at the time was deemed to form part of the estate of Raj Mohan in the hands of Chandra Nath as executor. This mortgage also militates against the theory put forward by Nishadini that she re-paid the advance from her daughter out of the sum received from the mortgagee. The mortgage-bond clearly shows that the security was given on account of advances made to Upendra Nath to enable him to carry on a *banianship* business. We have also the significant fact that when the property was subsequently mortgaged to Twidale to raise money to pay off Harendra Lal Roy, the document was executed, not by Nishadini alone but by Nishadini and Chandra Nath. Here, again, the property was treated as if it still formed part of the estate of Raj Mohan. The same inference is deducible from the fact that on the 27th February, 1904, the property was mortgaged to Sib Charan Laha by Nishadini and Chandra Nath (the ostensible owner and the

(2) (1899) 26 Cal. 227=26 I A. 38 (P. C.).
(3) (1888) 10 All. 197=15 I. A. 29 (P. C).
(4) (1908) 30 All. 258=35 I. A. 104 (P. C.).

executor to the estate of Raj Mohan) jointly to satisfy the dues of Twidale. It is consequently plain that there is no trustworthy evidence to prove that the purchase-money for the house was paid by Nishadini from her own funds or from sums borrowed by her. This by itself is sufficient to justify the inference that the purchase in her name was not for her benefit. This conclusion does not rest on mere suspicion, which, as their Lordships of the Judicial Committee have repeatedly held [*Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (5), *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (6), *Faez Buksh* v. *Fukeer-ood-deen Mohomed Ahassun Chowdry* (7), *Uman Parshad* v. *Gandharp Singh* (8), *Suleiman Kadr Bahadur* v. *Nawab Mehndi Begum* (9) and *Nirmal Chunder Banerjee* v. *Mahomed Siddik* (10)] cannot be made the foundation for a judgment in cases of this description. But the plaintiffs have been able to carry the matter further. They have established that on the 31st March, 1886, Chandra Nath obtained the sanction of the District Judge with a view to raise a loan of Rs. 16,000 for the purpose of re-purchasing the Calcutta house. This purpose, indeed, was said to have been abandoned in subsequent applications to the District Judge for his sanction to raise loans. But it has been suggested, not without good grounds, that this was a mere blind, as subsequent events show. On the 29th March, 1887, Chandra Nath entered into an agreement with Shama Charan Ballabh for the purchase of the Calcutta house. On that very day, he barrowed Rs. 20,000 by execution of two mortgages in favour of Shama Sundaree and Dakshyani, two relatives of Shama Charan Ballabh. This money was taken from the firm of Shaw and Company whereof Shama Charan himself was a partner. It is proved that on the day following, that is, the 30th March, 1887, Chandra Nath received from the firm Rs. 12,800 ; this is significant when we remember that the price for the house had been fixed approximately in the agreement at Rs. 12,451. Much stress has been laid on behalf of Nishadini upon the circumstance that the serial numbers of the currency notes as entered in the conveyance are not identical with the serial numbers of the currency notes received by Chandra Nath from Shaw and Company. But, as has been pointed out by the Subordinate Judge, the notes could easily be changed so as to render difficult a future investigation into the true nature of the transaction. We have also the important circumstance that the allegations of necessity made in the applications of Chandra Nath to the District Judge for sanction of the loan are demonstrably untrue in material particulars. One of the purposes mentioned was the satisfaction of a debt due to Bharat Chandra Ray, who, it has been conclusively established, was at the time not a creditor of the estate. We have, consequently, on the one hand, incontestible proof that Chandra Nath intended to re-purchase the house, that he raised money ostensibly for other purposes which had no real existence, and, that no explanation is available as to the mode in which the sum borrowed was actually applied. We have, on the other hand, the fact that Nishadini is not proved to have had funds requisite for the purchase of the house nor was she ever in possession of the property. When, therefore, we apply the two principal tests of *benami*, namely, the source of the purchase-money [*Dhurm Das Pandey* v. *Shama Sondri Debiah* (11), *Gopeekrist Gosain* v. *Gungapersaud Gosain* (12)] and possession of the property [*Imambandi Begum* v. *Kamaleswari Pershad* (13)] we find that the inference may legitimately be drawn that the house was purchased by Chandra Nath for the benefit of the estate in the name of his wife Nishadini. We must also remember that there were strong motives for a step of this description ; as Sir Arthur Wilson said in *Dalip Singh* v. *Nawal Kunwar* (4) reliance must be largely placed, not only upon the surrounding circumstances and the position of the parties and their relations to one another, but also upon the motives which could govern their actions and their subsequent conduct. Kalinath, the brother

(5) (1867) 7 W. R. 10=11 M. I. A. 28 (P. C.).
(6) (1870) 14 W. R. 14=13 M. I. A. 395 (P. C.).
(7) (1872) 9 Beng. L. R. 456=14 M. I. A. 234 (P. C.).
(8) (1888) 15 Cal. 20=14 I. A. 27 (P. C.).
(9) (1898) 25 Cal. 473=23 I. A. 15 (P. C.).
(10) (1899) 26 Cal. 11=25 I. A. 225.

(11) (1866) 6 W. R. 43=3 M. I. A. 229= (P.C.).
(12) (1865) 4 W. R. 46=6 M. I. A. 53= (P.C.).
(13) (1887) 14 Cal. 109=13 I. A. 160 (P.C.)

of Chandra Nath, had under the will of his father, a right of residence in this house, a right which he subsequently sought to enforce by litigation. It is not improbable that Chandra Nath would allow the house to be sold in execution of the decree of Mary Ratter with a view to defeat the claim of his brother. It is also not improbable that he would entertain a wish to purchase the ancestral family dwelling house, and, if he accomplished his project, it would be obviously desirable to place the property in the name of his wife, not only to defeat the claim of Kali Nath but also to save the property from the creditors to whom the estate was heavily indebted. Against all this, reliance has been placed upon statements made on the 10th November, 1905 by five of the sons of Chandra Nath in the plaint in a suit instituted by them against the executrix to the estate of Kali Nath. Reference has also been made to the deposition of Purendra in that suit given on the 24th April, 1907, to a letter from Bhupendra to Upendra written on the 27th November, 1908, and to the terms of settlement, dated the 5th December, 1894 in the suit instituted by Kalinath against Chandra Nath for the establishment of his right of residence. The last document is of no real assistance in the solution of the question raised before us, and does not justify the inference that the house was the private property of Nishadini; on the other hand, it tends to show that Kali Nath, though he admitted that the house belonged to Nishadini, practically released his right of residence to Chandra Nath for a sum of Rs. 3,800 to be paid out of the estate of Raj Mohan. The other statements are admissions by parties to the present suit and might have been used to contradict their testimony in this case under S. 145 of the Indian Evidence Act. They were, however, not so used. The specific statements were not put to the parties sought to be contradicted. Consequently, as pointed out by the Judicial Committee in the case of *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (14), they cannot be used in evidence. Previous statements, unless used to contradict or discount the evidence of a witness given in the suit, cannot be legitimately used, and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered. Apart from this circumstance, it is plain that no reliance can be placed upon the previous statements mentioned. It is no serious disparagement to the parties to this litigation to state that they have not been particularly scrupulous in their dealings, and assertions appears to have been made from time to time just as the needs of the moment required. We feel no doubt, on the whole, that the Subordinate Judge has correctly held that the transfer of the Calcutta house by Shama Charan Ballabh to Nishadini on the 29th April, 1887 was for the benefit of the estate of Raj Mohan and that the ostensible transferee did not acquire any beneficial interest thereunder.

The *third* ground raises the question of title to the *ganti* tenures which stand in the name of Nishadini, either because they were created by Chandra Nath in her favour or were acquired in her name. According to the plaintiffs, all these tenures are fictitious and have no real existence. According to Nishadini and such of her sons as have taken her side, the tenures are real and are binding on the estate of Raj Mohan. The Subordinate Judge has decided partly in favour of the plaintiffs and partly in favour of the defendants. His decision is consequently assailed by both sides. After some discussion at the Bar, it was agreed that these *ganti* tenures should be deemed to hold good during the life-time of Nishadini and should terminate on her death, so that the lands will then revert unencumbered to the estate of Raj Mohan. This arrangement is, in our opinion, eminently satisfactory, and we sanction it; our approval is necessary, as one of the plaintiffs, Bhupendra, has died during the pendency of the litigation and has been succeeded by his infant son. The decree of the Subordinate Judge will be varied in this respect and a declaration as stated will be inserted therein by consent of parties. On behalf of Nishadini, an undertaking has been given that no encumbrances have been created by her or with her assent on these *ganti* tenures, nor have any permanent under-tenures been created by her. A description of the *ganti* tenures is appended to this

(14) A.I.R. (1915) P. C. 7=39 Bom. 441=29 I. C. 639 (P.C.).

judgment and will be annexed to the decree.*

The *fourth* ground raises the question of the nature of the parcels of land described as *debutter* properties (schedule *ka* Nos. 26 and 27). The controversy between the parties is, whether these lands constitute *debutter* or *shebattar*. The determination of this question is immaterial for the purposes of the present suit. Whatever the nature of the dedication, they are endowed properties and cannot consequently be partitioned. But if Upendra has enjoyed their income, he must account therefor.

The *fifth* ground raises the question of the liability of Upendra for the sale of the Calcutta house. The Subordinate Judge has imposed a liability on Upendra on the ground that the sale was held in satisfaction of a debt originally incurred by Chandra Nath for the benefit of Upendra. This view has been attacked by the appellants and has not met with unqualified support from the respondents. In this connection, four alternative points of view have been placed before us for acceptance by one or other of the contesting parties, and each of them requires careful examination.

In the *first* place, it has been contended that Upendra as executor should have saved the property from sale and that his failure to do so amounts to a grave dereliction of duty. In our opinion, this position has not been established. The suit was instituted by the mortgagee, Shib Charan Laha, against Chandra Nath who had mortgaged the property to him. Upon the death of Chandra Nath during the pendency of the litigation the mortgagee brought on the record all his six sons. The sons other than Upendra apparently took no objection to this course. They did not contend that the mortgage had been executed by Chandra Nath in his capacity as executor and that consequently his successor in that office alone was liable to be placed on the record. The result was that a decree was obtained against the six sons, and in execution thereof the property was put up to sale. There is nothing to show that the price obtained at the sale was inadequate, consequently it cannot be contended that the sale of the house and its conversion into money have been prejudicial to the estate, nor is there any evidence to show that, at the time, Upendra had funds of the estate in his hands which might have been applied to avert the sale. The estate, which had come into his hands, only a few months before, was admittedly in a condition of considerable embarrassment, and failure to raise money on interest with a view to save the property from sale was not necessarily a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale. Consequently Upendra cannot be held liable merely on the ground that he did not prevent the sale of the house at the instance of the mortgagee.

In the *second* place, the view has been put forward that Upendra is liable, as the sale was occasioned by a debt ultimately traceable to loans incurred by Chandra Nath for the benefit of Upendra himself. This position is clearly unsustainable. The parties have agreed that accounts are not to be taken in respect of the period of executorship of Chandra Nath, the reason for this attitude has already been explained. Now, let us assume that the mortgage in favour of Shib Charan Laha was created to pay the mortgage of Twidale, which, in its turn, had been effected to satisfy the security given to Harendralal Rai in respect of money received by Chandra Nath for payment to Upendra Nath. It is plain that Chandra Nath may be liable to the estate of Raj Mohan for all sums raised by him in hiscapacity as executor and not applied for the benefit of the estate. Consequently, the personal representatives of Chandra Nath, that is, his six sons, are responsible, to the extent of the assets, if any, of their father in their hands, to indemnify the estate of Raj Mohan for losses sustained by unwarrantable acts of their father. This matter, in all its bearings, they have declined, by common consent, to submit for investigation by the Court. Five of the brothers cannot clearly be permitted to single out one transaction of Chandra Nath and to hold Upendra liable in respect thereof. There is considerable force in the contention that if, all the accounts of the period of executorship of Chandra Nath were taken, it might transpire that he had made advances to his other sons in respect whereof each of them on the same

* This is omitted from the judgment, as *it* is not material for the report.—*Ed.*

principle might be held responsible to the estate. We are of opinion that as the parties have agreed not to investigate the accounts of the period of executorship of Chandra Nath, they cannot impose a liability on Upendra Nath on the ground that the money raised by this particular transaction was applied by the then executor for the benefit of one of his sons.

In the *third* place, the contention has been put forward that as the money raised by Chandra Nath from Harendralal Rai was applied for the benefit of Upendra, the transaction was in essence a loan to Upendra, and that inasmuch as Upendra subsequently succeeded Chandra Nath as executor, he is liable to recoup the estate to the extent of the benefit received by him therefrom. In support of this view, reference has been made to the well-established principle that the effect of the appointment of a debtor to the office of executor is that the debt due from the debtor executor is considered to have been paid to him by himself and that the executor is accountable for the amount of his debt as assets: *Freakley* v. *Fox* (15), *Ingle* v. *Richards* (16), *Carey* v. *Goodinge* (17); *Berry* v. *Usher* (18), *Tomlin* v. *Tomlin* (19) and *Administrator-General of Bengal* v. *Kristo Kamini Dassee* (20). This doctrine is of no assistance to the respondents. On this theory, the money must be deemed to have been advanced by Chandra Nath to Upendra on or before the 20th September, 1887, at any rate, not later than the 1st April, 1888, if we accept the statement by Harendralal Rai in his plaint in mortgage suit dated the 27th January, 1889. But Upendra did not succeed as executor till the 28th July, 1907. There are no materials on the record to show that as between Upendra and the estate of Raj Mohan, the debt was kept alive during all these years. *Prima facie*, there was no enforceable claim against Upendra when he succeeded to the office of executor, and consequently, the principle that a debtor executor is accountable for the amount of his debt as assets cannot be applied. We are not unmindful that when an executor obtains probate, the grant operates retrospectively from the date of the death of the testator. But that principle is of no avail here, because there was an intermediate executor who created the debt, it is on his act that Upendra is sought to be made liable, and Upendra cannot by a fiction be deemed to have been an executor at a time when there was another executor lawfully in possession of the estate. The decision in *Ingle* v. *Richards* (16) is consequently distinguishable and does not assist the respondents.

In the *fourth* place, it has been contended on behalf of the appellants that the true view of all the facts is that the money was advanced by Chandra Nath to Upendra Nath, not in his personal capacity but as a member of a joint Hindu family composed of himself and his sons. From this point of view, all the six sons of Chandra Nath would be responsible for the repayment of the loan to the estate of Raj Mohan. The Subordinate Judge has held that the money was paid by Chandra Nath to Upendra to enable him to carry on a *banianship* business; from the surrounding circumstances, there is no room for reasonable doubt that the loan was to Upendra as a member of a joint Hindu family, and that, if he had been successful in his business, a share of the profits could have been rightly claimed by his brothers. From this point of view, Upendra would not be liable for the whole debt. After an anxious consideration of the possible aspects of the case, we are of opinion that the sums advanced to Upendra and secured by the mortgage of Harendralal Rai must be deemed to have been advanced to him in his character as a member of a joint Hindu family and that in this suit he cannot be held responsible for the whole of that sum at the instance of his brothers. The question of the liability of Upendra for the sale of the Calcutta house in execution of the mortgage decree of Shib Charan Laha must consequently be decided in his favour. The surplus sale-proceeds, however, shall be deemed part of the estate, as we have held that the house itself formed part of the estate of Raj Mohan, though it had been transferred by Shama Charan Ballabh ostensibly to Nishadini.

The *sixth* ground raises the question of genuineness of the transfer made by Sailendra, of his interest in the estate of his

(15) 9 B. & C. 130.
(16) (1860) 28 Beav. 366.
(17) (1790) 3 Bro. C. C. 110.
(18) 11 Ves. 87 = 32 E. R. 1021.
(19) (1841) 1 Hare. 236.
(20) (1904) 31 Cal. 519.

grandfather, to his mother Nishadini. The question was raised in the Court below by the plaintiffs, and they obtained an adjudication that the conveyance represented a *benami* transaction. In the present appeal, that conclusion has been assailed by Nishadini. But the plaintiffs have taken up the position that they are not interested in the decision of this matter. Consequently the dispute reduces to a controversy between the two co-defendants. In this view, the parties have agreed, and in, our opinion, very properly, that the decision of the Subordinate Judge on this point should be set aside and that the matter should be left open for determination in a subsequent suit but that in the meanwhile the decree in this suit should be made on the assumption that the appellant represents the real state of things. We, therefore, allow the appeal on this point, set aside the decree of the Subordinate Judge, and direct that allotments be made on the footing that the conveyance of the 16th December, 1896 was intended to be a genuine and operative transaction. But liberty is reserved to Sailendra to institute a separate suit for declaration against his mother that the transaction was *benami* and that he himself is beneficially interested in the allotments made to her.

The *seventh* ground raises the question of the marriage expenses of the great-grandsons and great-granddaughters of the testator. The Subordinate Judge has held, on the authority of the decisions in *Nafar Chandra Kundu* v. *Ratnamala Debi* (21) and *Dinesh Chandra Roy Chowdhury* v. *Biraj Kamani Dasi* (22), that the directions given by the testator in respect of this matter are valid in law. This view has been accepted by both sides. Consequently the Subordinate Judge will give directions, so that sums may be set apart from the annual income from time to time to be applied to meet the marriage expenses as occasion might arise. It has been suggested that the most satisfactory arrangement would be to set apart a portion of the *patni* rent, but we cannot give at this stage definite instructions on the subject.

The *eighth* ground raises the question of costs. The Subordinate Judge has directed that costs already incurred be borne by the parties and that costs subsequent be borne by the estate. The respondents contend that costs should be paid out of the estate, and they rely upon the decision in *Fenton* v. *Wills* (23) We are of opinion that no grounds have been established in favour of a departure from the ordinary rule and that costs in the Court below as also the costs of this Court must be paid out of the estate [*In re Love*, *Hill* v. *Spurgeon* (24)].

There is one other matter which requires a brief notice. The Subordinate Judge directed that immovable properties of the estate should be sold to satisfy the debts due therefrom. We have already held in our judgment, dated the 28th August, 1914, that it would be more beneficial to the estate to grant permanent leases rather than to effect a sale of valuable properties. This order has been carried out and a *patni* has been granted. We directed at the same time that the decree of the Subordinate Judge should be modified so as to authorise the Receiver not merely to sell but also to dispose of by lease or other mode of alienation a part of the estate as might be found most advantageous. The decree of the Subordinate Judge will consequently be modified in this respect.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified in respect of the matters mentioned. A self-contained decree will be drawn up in this Court so as to avoid future dispute.

V.B./R.K.

Appeal partly allowed.

(21) (1910) 7 I. C. 921.
(22) (1912) 39 Cal. 87 = 11 I. C. 67.
(23) (1878) 7 Ch. D. 33.
(24) (1885) 29 Ch. D. 348.

A. I. R. 1916 Calcutta 118

MOOKERJEE AND ROE, JJ.

Brojabasi Koer—Plaintiff—Appellant.

v.

Ram Sankar Das and *another*—Defendants—Respondents.

Second Appeal No. 759 of 1914, decided on 28th May, 1915, against the decree of Addl. Dist. Judge, Sylhet, dated 11th December, 1913.

(a) Assam Land and Rent Regulation (1 of 1886), S. 71—Scope of S. 71—Purchaser cannot eject or enhance rent otherwise than as provided.

S. 71 of the Assam Land Revenue Regulation does not entitle a purchaser to eject any tenant having a right of occupancy under the rent law for the time being in force. or to enhance the rent of any such tenant, otherwise than in the manner prescribed by that law. [P. 119, C. 2.]

(b) Assam Land and Rent Regulation (1 of 1886), S. 6—Lease of large tract for more than 12 years—Portion used for grazing—Held defendants were *raiyats* and grazing gives occupancy rights—Test of occupancy — Portion of land under jungle and not cultivated does not oust operation of S. 6—Occupation under landlord having no title if for more than 12 years confers occupancy rights under S. 6 of Act 19 of 1859.

Where the defendants are found to be cultivators holding the entire tract for a period of more than 12 years, and a portion has been used for grazing purposes while the remainder is still covered by jungle :

Held, that the defendants are *raiyats* within the meaning of S. 6 of the Assam Land and Revenue Regulation and that the use of the land for grazing purposes entitles them to claim a right of occupancy. 20 I. C. 332, foll. [P 119, C. 2.]

that the true test is to determine whether the user of the land has been for an agricultural purposes ; [P. 120, C. 1.]

that the mere fact that a part of the land is still covered by jungle and has not been actually brought under village does not take the case out of the operation of S. 6, which applies to land "cultivated or held." [P. 120, C. 1.]

A *raiyat*, who has occupied and cultivated land for more than 12 years under a landlord who had no title to the land, nevertheless acquires a right of occupancy under S. 6 of Act X of 1859 or Act VIII of 1869, B C. 3 Cal. 560; 19 W. R. 338 and 8 B. L. R. 165, ref. to. [P. 120, C. 1.]

Gopal Chandra Das—for Appellant.

Hemendra Kumar Das—for Respondents.

Judgment.—This is an appeal in an action in ejectment by the plaintiff, who holds a *putni* from a purchaser at a sale, for arrears of revenue of the residuary share of an estate under the Assam Land and Revenue Regulation, 1886, and seeks to evict the defendants as trespassers. The defendants resist the claim on a two-fold ground, namely, *first*, that the lands are included within, not the residuary estate purchased by the grantor of the plaintiff, but a separate account which has not been sold, and *secondly*, that they are, in any event, occupancy *raiyats* as they have been in possession as cultivators for more than twelve years. The Courts below have concurrently found that the disputed lands lie within the residuary estate, but while the trial Court held that the plaintiff was entitled to a decree for ejectment, the Subordinate Judge has taken a contrary view. On the present appeal, the decree of the lower Appellate Court has been assailed substantially on two grounds, *first*, that as the land has been used for grazing purposes, the defendants are not occupancy *raiyats*, and *secondly*, that as the defendants claimed to hold the land under the proprietor of the separate account, they cannot set up a right of occupancy within the residuary estate. In our opinion, there is no foundation for either of these contentions.

As regards the first ground, we observe that S. 71 of the Assam Land and Revenue Regulation provides that property sold under S. 70 for arrears of revenue, shall be sold free of all incumbrances previously created therein by any other person than the purchaser. But this rule is not to apply to entitle a purchaser to eject any tenant having a right of occupancy under the rent law for the time being in force or to enhance the rent of any such tenant, otherwise than in the manner prescribed by that law. The rent law in force in the district where the land is situated is contained in Act VIII of 1869 (B. C.). S. 6 provides that every *raiyat* who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under *pattah* or not, so long as he pays the rent payable on account of the same. In the present case, it has been found that the defendants are cultivators : they are consequently *raiyats* within the meaning of S. 6. It has also been found that they have held the entire tract for a period of more than twelve years, a portion has been used for grazing purposes while the remainder is still covered by jungle. The question thus arises, whether the use of the land for grazing purposes entitles the defendant to claim a right of occupancy under S. 6. The answer must be in favour of the defendants, on the principle explained in *Hedayet Ali* v. *Kamalanand Singh* (1) where reference is made to the earlier decisions in *Fitzpatric* v. *Wallace* (2) and

(1) (1913) 20 I. C. 332.

(2) (1869) 11 W. R. 231 = 2 Beng. L. R. A. C. 317.

Latifar Rahaman v. *Forbes* (3). The true test is to determine whether the user of the land has been for an agricultural purpose. The land may have been used for the grazing of cattle required for an agricultural pursuits, or it may have been used for the grazing of cattle required for avocations totally unconnected with agriculture. In the former contingency, but not in the latter, the holding has been used for an agricultural purpose and a right of occupancy has been acquired therein. The mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage does not take the case out of the operation of S. 6, which applies to land "cultivated or held." The first ground assigned to support the contention that a right of occupancy has not been acquired in the land cannot consequently prevail.

As regards the second ground, we find that the defendants have been in occupation of the land from at least 1876. Since 1900, when the separate account was opened the defendants have, it appears, on some occasions, paid rent to the proprietor of the separate account under the mistaken notion that the land was comprised in that account and not in the residuary estate. This, however, does not affect their position, because as was pointed out in *Zoolfun Bibee* v. *Radhica Prosonno Chunder* (4), *Ameer Hossein* v. *Sheo Suhæ* (5) and *Sheo Prokash Misser* v. *Ram Sahoy Singh* (6) a *raiyat* who has occupied and cultivated land for more than twelve years under a landlord who had no title to the land, nevertheless acquires a right of occupancy under S. 6 of Act X of 1859 or Act VIII of 1869, B. C. Consequently the defendants have acquired the status of occupancy *raiyats*.

The plaintiff-appellant has finally asked that a declaration may be appended to the decree to the effect that as proprietor he is entitled to realize rent from the defendants. The defendants do not object to this prayer. We direct accordingly that a declaration to this effect be added to the decree. Subject to this addition, the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(3) (1910) 5 I. C. 783.
(4) (1877-78) 3 Cal. 560.
(5) (1873) 19 W. R. 338.
(6) (1872) 8 Beng. L. R. 165=17 W. R. 62.

A. I. R. 1916 Calcutta 120

MOOKERJEE AND BEACHCROFT, JJ.

Bansiram—Defendant—Appellant.

v.

Secretary of State and *others*—Respondents.

Appeal No. 64 of 1911, decided on 26th June, 1914, from the Original Decree of Sub-Judge, 3rd Court, Patna, dated 30th November, 1910.

(a) Civil P. C. (5 of 1908), O. 6, R. 4—Fraud must be clearly stated.

A plaintiff impeaching a transaction on the ground of fraud should distinctly, accurately and specifically set forth in the plaint the facts constituting the alleged fraud, case-law discussed. [P. 122, C. 2]

(b) Civil P. C. ((5 of 1908), O. 6, R. 4—One kind of fraud pleaded—Another cannot be allowed to be substituted.

The proof of fraud must be consistent with the case set out in the pleadings. When one kind of fraud is charged, another kind of fraud cannot. on failure of proof, be substituted for it. 11 Bom 620 (P. C.) *Wilde* v. *Gibson*, (1848) 1 H. L. C. 605 and *Hickson* v. *Lombard*, (1866) L. R. 1 H. L. 324, ref. to. [P. 123, C. 1.]

(c) Vendor and purchaser—Consideration not paid—Sale is not invalidated.

Non-payment of any part of the consideration for a conveyance will not, by itself, invalidate the sale. The vendor's right, in such a case, is to recover the unpaid balance of purchase-money. [P. 122, C. 2.]

(d) Civil P. C. (5 of 1908), O. 6, R 4—Fraud—Plaintiff seeking to avoid statute of limitation must state time when fraud was committed.

A plaintiff seeking to avoid the Statute of Limitation on the ground of fraud must, besides setting forth the facts constituting the fraud, state the time when the fraud was discovered, to enable the defendant to meet it and the Court to see whether the discovery might not have been made earlier. *Gibbs* v. *Guild*, (1882) 9 Q. B. D. 59 and 24 Mad. 387 (P. C.). ref. to. [P. 123, C. 1 & 2.]

(e) Civil P. C. (5 of 1908), O. 6, R. 4—Burden of proof.

Where the plaintiff has once established fraud the defendant is bound to show that the plaintiff had had clear and definite knowledge of the facts constituting the particular fraud earlier than the date of the alleged discovery and for more than the period prescribed for the suit. 17 Bom. 341 (P. C.). ref. to. [P. 123, C. 2.]

(f) Hindu Law—Widow—Dismissal of suit for cancellation of conveyance on ground of

fraud brought by widow does not affect reversioners.

The dismissal of a suit for cancellation of a conveyance by a widow on the ground that it was fraudulently brought about will not affect the reversioners, who are entitled to impeach it as not binding on, the inheritance in their hands. [P. 123, C. 2.]

(g) Hindu Law—Widow—Suit for cancellation of conveyance executed by her on ground of fraud—Two distinct theories of fraud set up in plaint—Plaintiff cannot succeed—Civil P. C. (1908), O. 6, R. 4.

The plaintiff, a Hindu widow, sued for cancellation of a conveyance executed by her to the defendant, on the allegation that the document was not read out and explained to her. There was, however, a distinct acknowledgment by her in the document that the recitals were correct. At trial, she said that her signature was taken on blank sheets which were subsequently filled in without her knowledge and that no part of the consideration was paid to her :

Held, (1) that the burden of proving that the recitals in the document were untrue lay on plaintiff ; [P. 123, C. 1.]

(2) that as two distinct theories of fraud were set up in the plaint and at trial, plaintiff was nol entitled to relief prayed. [P. 123, C. 1.]

Karunamoy Bose—for Appellant.

Ram Charan Mitter and *Sris Chandra Chowdhury*—for Secretary of State.

Judgment.—The plaintiff instituted the suit, which has culminated in this appeal, for cancellation of a conveyance executed by her in favour of the defendant on the 20th April, 1900, for recovery of possession of the property covered thereby, and for incidental reliefs. The suit was decreed by the Subordinate Judge on the 30th November, 1910. The present appeal was lodged in this Court by the defendant on the 7th March, 1911. The plaintiff, who was the sole respondent, died on the 10th April, 1911. As the property in suit originally belonged to the husband of the plaintiff, an application was made by the appellant to bring on the record her daughter, who, upon her death, had succeeded to the estate as the reversionary heir. The daughter, who was an infant, was brought on the record, but died before a guardian *ad litem* could be appointed. An application was then made to bring on the record one Mukund Lal, who claimed to be an agnate of the husband of the original plaintiff, and the order for substitution was made in due course. It subsequently transpired that the title of Mukund Lal as reversionary heir had been repudiated in a proceeding in the Court below between him and one Moni Lal, the husband of the daughter of the original plaintiff, in the course of which the opinion had been expressed that neither of the claimants was entitled to the estate. The appellant, by way of caution, next applied that the Secretary of State for India in Council might be brought on the record, on the allegation that the property had probably vested in the Crown by escheat. This Court thereupon directed that the Secretary of State be added as a party respondent. We have thus at the present moment two respondents in this appeal, namely, Mukand Lal who has not entered appearance, though he claimed to be the reversionary heir of the husband of the original plaintiff, and the Secretary of State, who is represented by the Government Pleader. In our opinion, the Secretary of State should be discharged from this appeal. We do not know whether the property has actually passed by escheat to the Crown. The appellant has invited our attention to portions of the evidence which, if reliable, would indicate that he himself is one of the possible heirs of the husband of the plaintiff. There has also been no final adjudication upon the question, whether the claim put forward by Mukand Lal is well founded. Besides this, if the Secretary of State has taken the property by escheat, he may possibly be entitled to impeach the transaction on grounds not available to the original plaintiff. In these circumstances, it would not be right to draw the Secretary of State into this litigation and he is accordingly discharged from this appeal. He will in no way be bound by our decision in this appeal, which will now proceed as an appeal with Mukand Lal as the sole respondent on the record.

The property in dispute belonged admittedly to Gopinath Das who died on the 6th July, 1895, leaving a widow, Panchami Dasi, the plaintiff in this suit, and a daughter by her, Mrigasira, who died on the 4th August, 1911. It is alleged that he also left a son, Jadunath Das, who died in 1896. He had a maternal uncle, Balgobind, whose son Mukandram is the second defendant in this litigation and whose grandson Bansi by another son Kanhai is the 1st defendant. On the 20th April, 1900 the plaintiff executed a conveyance in favour of the first

defendant ; the consideration consisted of the money due on a mortgage-bond given by her to the purchaser on the 25th February, 1897, and an additional sum paid at the time of the sale ; instituted this suit on the 11th October, 1909 for cancellation of the conveyance on the ground of fraud. Her case may be stated in the words used by her in the fourteenth paragraph of the plaint: "Both the defendants were agents of the plaintiff, and as such they used to do her work and, as such they got the bond, dated the 25th February, 1897, and the deed of sale, dated the 28th April, 1900, signed by her, without making her aware of the contents thereof. The contents of the said deed of sale were not read out and explained to the plaintiff. As the plaintiff did not get any independent legal advice in connection therewith and as she did not get any consideration or execute the bond mentioned in the deed of sale, so the same is not binding on her, nor have the defendants acquired any right thereunder." The plaintiff was subsequently examined in support of her claim and she made statements which not only do not bear out her allegation, but are self-contradictory and cannot be reconciled. She alleged in one part of her deposition that she had put her signature on blank sheets, which had subsequently been filled up without her knowledge or consent by the defendants, and turned on one occasion into a mortgage-deed, and, on another occasion, into a conveyance. This is plainly inconsistent with the case made in the plaint, which undoubtedly implies that she had executed a conveyance though the document was not read over or explained to her and though she had no independent advice in the transaction [*Mahomed Buksh Khan* v. *Hosseini Bibi* (1)]. But this theory is weakened, if not negatived, by her signatures on the mortgage-bond and the conveyance, which show that she must have been acquainted with their nature and contents. On the mortgage-bond she wrote with her own hand "this bond for Rs. 1,975 executed by me is correct," and then signed her name ; similarly, on the conveyance she wrote "this deed of sale which I have executed for Rs. 5,000 is true and correct and is admitted and ratified by me," and then affixed her signature. As there is no doubt whatever about the genuineness of these signatures, the position of the plaintiff was clearly one of grave embarrassment. She was consequently constrained to have recourse to the theory that the defendants were in possession of blank sheets which bore her signature, and which they fraudulently filled up as a mortgage-deed and as a conveyance. But the obvious answer is that this was not the specific fraud she alleged in the plaint. In another part of her deposition she asserted that she had not received any part of the consideration mentioned in the mortgage-deed or conveyance, but this by itself would not invalidate the sale ; for if her allegation was true, she might sue to recover the unpaid balance of purchase-money. The plaintiff, it seems, was not able to make up her mind as to the precise ground for cancellation of the conveyance. It is obvious that relief might have been sought on one of three hypotheses, namely, *first*, that she had signed blank papers, relying on the representation of the defendants, who subsequently filled them up and turned them into a mortgage-deed and a conveyance respectively ; *secondly*, that she had put her signatures after the documents had been engrossed but had acted in reliance on a misrepresentation of their true nature by the defendants ; *thirdly*, that though the documents were genuine, no consideration was ever paid for either of them. It is unfortunate for the plaintiff that she does not make a consistent case in the plaint, much less does she adhere to the case of fraud indicated therein ; her case does not thus fulfil the conditions essential for success. Two principles, it is well settled, are applicable in these circumstances. In the *first* place, as pointed out by the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram* (2), where reliance was placed upon the observations of Selborne, L. C., in *Wallingford* v. *Mutual Society* (3), when a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated ; *Gilbert* v. *Lewis* (4) ; for, in the language of Fry, J., in *Red-*

(1) (1888) 15 Cal. 684=15 I. A. 81 (P. C.).

(2) (1888) 15 Cal. 533=15 I. A. 119 (P. C.)

(3) (1880) 5 App. Cas. 685.

(4) (1862) 1 De G. J. & Sm. 38.

grave v. *Hurd* (5), it is only fair-play between man and man that the defendant should know what is charged against him [*Clysdale Bank* v. *Paton* (6) and *Lawrance* v. *Norreys* (7). In the *second* place, a charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it [*Abdool Hoossein* v. *Turner* (8)]; the rule that the Court will grant only such relief as the plaintiff is entitled to upon the case made by his pleadings, is strictly enforced when the plaintiff relies upon fraud [*Wilde* v. *Gibson* (9) and *Hickson* v. *Lombard* (10)]. Tested in the light of these principles, the case presents grave difficulties. The plaint does not specify with clearness and certainty the grounds on which the plaintiff seeks to cancel her own deed; and matters are not improved by any means by her deposition. It cannot be disputed that as the documents bear her signature, the burden is upon her to establish that the recitals contained therein are untrue [*Fulli Bibi* v. *Bassirudi Midha* (11); *Ali Khan Bahadur* v. *Indar Parshad* (12)]. But before the plaintiff can succeed, she is bound to make out a consistent case for cancellation of the documents; this she has not done. We may add that her omission to give details has created a serious difficulty in connection with the question of limitation. If the conveyance is not her deed, it does not require to be cancelled and she is entitled to sue for recovery of possession of the land within 12 years from the date of dispossession. If, on the other hand, the conveyance was executed under circumstances which made it not void but only voidable, she must avoid it within the period prescribed by Article 91 of the First Schedule to the Indian Limitation Act, that is, within three years from the date of discovery of the alleged fraud. The plaintiff must consequently specify the facts in connection with, not merely the commission but also the discovery of the fraud. When a party seeks to avoid the Statute of Limitation on the ground of fraud, the statement of claim should set forth specifically the particular acts which constitute the fraud as well as the time when it was discovered, in order to enable the defendant to meet the fraud, and the alleged time of its discovery, so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made before [*Gibbs* v. *Guild* (13); and *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Mahapatrulu Garu* (14)]. This is all the more necessary for protection of the defendant who, according to the rule laid down by the Judicial Committee in *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (15), is bound to show that the plaintiff had had clear and definite knowledge of the facts constituting the particular fraud earlier than the date of the alleged discovery and for more than the period prescribed for the suit. In the case before us, the plaintiff stated in the plaint that she became aware of the fraud on the 1st May, 1909; but no details are furnished as to the circumstances which led to the discovery of the fraud. On the other hand, the facts make it plain that she must have been aware of the fraud, if there was any fraud, at least as early as 1904. Consequently, if the deed is taken to be not void but voidable, this suit brought in 1909 is obviously barred by limitation. It is thus plain that the original plaintiff could not possibly obtain any relief in the suit as framed.

It may be added that although the conveyance is not set aside in this suit, the reversionary heirs, if any, to the estate of Gopinath Das would not be necessarily bound thereby, for if we assume that conveyance was genuine and for consideration and consequently not liable to be set aside at the instance of the executant, the reversioners would be entitled to contend that it was granted under circumstances which did not make it binding on the inheritance in their hands. This is a question which could not be raised by the executant in the present litigation and it must be left open for consideration in a suit properly framed for the purpose, if the occasion should ever arise.

(5) (1881) 20 Ch. D. 1.
(6) (1896) A. C. 381.
(7) (1890) 15 A. C. 210.
(8) (1887) 11 Bom. 620=14 I. A. 111 (P. C.).
(9) (1848) 1 H. L. C. 605.
(10) (1866) L. R. 1 H. L. 324.
(11) (1870) 4 B. L. R. 54 (F. B.).
(12) (1896) 23 Cal. 950=23 I. A. 92 (P. C.).
(13) (1882) 9 Q. B. D. 59.
(14) (1901) 24 Mad. 387=28 I. A. 81 (P. C.).
(15) (1893) 17 Bom. 341=20 I. A. 1 (P. C.).

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The suit will stand dismissed, but there will be no order for costs in either Court.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 124 (1)

CHITTY AND WALMSLEY, JJ.

Rahiman Bibi—Complainant.

v.

Mobarak Mondal and *another*—Accused.

Criminal Ref. No. 30 of 1916, decided on 17th March, 1916, made by Sessn. Judge, Birbhum, dated 28th February, 1916.

Criminal P. C. (5 of 1898), S. 234—Theft of same person's property on two successive days by two persons—Offences are not triable together in one trial.

Two persons, accused of offence under Ss. 379 and 380, Indian Penal Code, for committing theft of the complainant's property in a building and of his paddy in a field on two successive days, cannot be charged with and tried at one trial for both the offences under S. 234, Criminal Procedure Code. [P. 124, C. 1.]

Jitendra Lal Banerjee—for Accused.

Judgment.—This is a reference in the matter of two persons Mobarak Mondal and Sabak Mondal. They were tried summarily by the Magistrate on two charges—theft in a building (under S. 380, Indian Penal Code) committed on 13th November, 1915, and theft of paddy in a field (under S. 379, Indian Penal Code) committed on 14th November, 1915,—the property in the building and the paddy belonging to one and the same complainant. The Judge points out that the trial on these two charges of the two persons was illegal within the meaning of the sections in the Criminal Procedure Code relating to joinder of charges. Technically speaking, the Judge is correct. S. 234, Criminal Procedure Code, has been held to apply only to one person and the offences are also technically not of the same kind. It is difficult to see how the accused could have been prejudiced, as it appears from the Magistrate's order that the charge of theft in the building, which was for the removal of some doors, was not seriously pressed. The trial proceeded mainly on the question of taking of the paddy from the field. However, as the accused press for a fresh trial and technically speaking, the recommendation of the learned Sessions Judge is correct, we set aside the conviction and sentence and direct that the accused be re-tried on the charge of theft of paddy from the field committed on 14th November, 1915.

V.B./R.K.

Re-trial ordered.

A. I. R. 1916 Calcutta 124 (2)

CHATTERJEA AND RICHARDSON, JJ.

Salimullah Bahadur and *others*—Plaintiffs—Appellants.

v.

Provat Chandra Sen and *others*—Defendants—Respondents.

Appeals Nos. 1495, 1656 and 1657 of 1913, decided on 28th February, 1916, from the Appellate Decrees of Dist. Judge, Tipperah, dated 6th February, 1913.

Partition—Suit for—Lessees of shares in estate under leases purporting to be permanent are entitled to decree for partition.

Lessees of shares of an estate, who have been in joint possession with the owners of the other shares under leases which purport to be permanent leases granted to them under an arrangement sanctioned by the Court and whose right is not challenged by the only person (a Hindu female) who has present interest as the holder of a Hindu woman's estate in those shares, are entitled to a decree for partition of the estate as against the owners of the other shares, even though there is the possibility of the leases being set aside by the reversioners after the death of the female owner.

[P. 125, C. 2 & P. 126, C. 1.]

B. Chakravarty and *Surendra Nath Guha*—for Appellants.

Jogesh Chandra Roy and *Jatindra Nath Bose* and *Khitish Chandra Neogi*—for Respondents.

Judgment.—These appeals arise out of suits for partition, and the Courts below have dismissed the suits upon a preliminary point, namely, that the plaintiffs had not acquired any such interest in the properties as to entitle them to maintain a suit for partition. It appears that one Madhusudan Das left four sons, Mohini Mohan Das, Radhika Mohan Das, Lal Mohan Das and Khettra Mohan Das. Khettra Mohan's interest devolved upon Mohini Mohan, Radhika Mohan's interest devolved upon his widow Gobinda Rani and Lal Mohan's interest was inherited by his widow Priya Moyee. Mohini Mohun Das obtained a loan of Rs. 2,50,000 from the Eastern Mortgage

and Agency Company under a deed of mortgage dated the 27th September, 1890. One of the conditions upon which and subject to which the said Company agreed to grant the said loan was that the mortgaged properties should be managed entirely and without any interference from the said mortgagor by Mr. Garth and Mr. Weatherall and Mohini Mohan executed a power-of-attorney in their favour. Mohini Mohan died on the 28th December, 1896, and Letters of Administration of his estate were granted to one Sashi Bhusun Guha on the 29th January, 1897. The mortgagee, it appears, subsequently found that there were difficulties in the way of management of the estate and in the conduct of law suits which could be avoided if the properties were vested in trustees. An indenture transferring the mortgaged properties to Messrs. Garth and Weatherall as trustees with powers to manage them which included the power to grant perpetual leases was accordingly drawn up and submitted by the Administrator to the District Judge of Dacca, who sanctioned it on the 1st May, 1897. On the 3rd April, 1897 the indenture was executed between the Administrator, Sashi Bhusan Guha, representing the estate of the mortgagor Mohini Mohan Das, the Eastern Mortgage and Agency Company the mortgagees and Messrs. Garth and Weatherall the trustees, transferring the properties to the latter as *am-mukhtars*, managers and trustees. Priya Moyee executed an usufructuary mortgage in respect of her share in favour of the said Messrs. Garth and Weatherall for a term of years and also a trust deed with similar powers. These trustees granted certain permanent leases, *dar shikmi* tenures in two of the cases and a *patni taluk* in the third, in favour of the plaintiffs in 1903 in respect of certain shares in some properties and the plaintiffs remained in joint possession of those shares with the other co-owners since 1903 ; and in September 1910 the plaintiffs brought these suits for partition against those other co-sharers.

It may be mentioned here that on the death of Mohini Mohan and Priya Moyee, their estate devolved upon Sham Peari.

The Court of Appeal below held that S. 90 of the Probate and Administration Act does not empower an Administrator appointed under the Act to delegate his powers to others ; that even if the trust deed was valid, Sashi Bhusan being dead his administration ceased many years ago, and the "Sub-trustee" could not grant leases after their own trusteeship ceased ; and that in any case they had no right to grant permanent leases it being nowhere provided that their possession was to be permanent.

As regards Priya Moyee the Court below observes that it was not the case of the plaintiffs that she executed the leases for legal necessity, and she having died, any permanent leases granted in respect of her share by the said trustees are voidable.

That Court accordingly held that the leases set up by the plaintiffs were voidable and that "it is clearly then undesirable that a partition should be effected until it is definite that such leases are not so voidable".

It is unnecessary to consider in the present cases whether the leases obtained by the plaintiffs from Messrs. Garth and Weatherall are valid or voidable at the instance of the reversioner after the death of Sham Peari. The plaintiffs are in joint possession of the shares with the defendants as co-sharers under leases which purport to be permanent leases granted to them under an arrangement sanctioned by the Court. The only person at present interested in challenging their right is Sham Peari who is a party to the suit. and she does not contest the suit. The contending defendants have no interest whatever either present or future in the shares in respect of which the plaintiffs claim to be lessees and the plaintiffs have been in possession jointly with them ever since 1903 without any objection on the part of the defendants. In fact in some rent suits these defendants made the present plaintiffs parties defendants as co-sharer landlords. We think that under the circumstances the principle laid down in the case of *Sundar* v. *Parbati* (1) applies. In that case two Hindu widows were in lawful possession of properties of their deceased husband and one of them brought a suit for partition against the other. There was a question in that case whether there had been a valid adoption made by the deceased husband and

(1) (1890) 12 All. 51=16 I. A. 186 (P. C.).

whether the estate had been given to the said adopted son by a will of the deceased. The Judicial Committee held that apart from those questions, the fact of joint possession by the two widows of the estate which belonged to the testator ever since the death of the adopted son appeared to them sufficient for disposing of the suit in favour of the plaintiff. Referring to the possession of the widows, their Lordships observe: "Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Prem Sukh (the adopted son) or of Baldeo Sahai (the deceased husband), one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have, therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them."

The same consideration applies to this case.

It is contended on behalf of the respondents that the Court ought to take into consideration the fact that on the death of Sham Peari, the reversioner may bring a suit for setting aside these alienations, and, if he succeeds in doing so that the partition would have to be set aside. That we think is not a sufficient ground for refusing the plaintiffs the right to partition which they have at present in respect of their possession. In the case of *Bhagwat Sahai* v. *Bipin Behary Mitter* (2) it was held by this Court that the *mokararidars* (the plaintiffs in that case for partition) had not such a permanent interest as to ensure that any partition then effected would be of enduring effect, on the ground that the *mokararidars* in that case might incur forfeiture in certain contingencies mentioned in the lease. Their Lordships in overruling the decision observed as follows:—

"But those learned Judges held that the right of partition, which would otherwise have belonged to the appellants, the *mokararidars* was lost by reason of the fact that their *mokarrari* is liable to forfeiture in certain contingencies and, therefore, is lacking in the permanence of interest necessary to support a claim for partition. Their Lordships are of opintion that the distinction thus introduced cannot be supported.

"The title of the appellants is a permanent title, though liable to forfeiture in events which have not occurred, and the rights incidental to that title must, in their Lordships' opinion, be those which attach to it as it exists, without reference to what might be lost in future under changed circumstances."

Having regard to the circumstances already stated and to the fact that the only person who is now interested in challenging the title of the plaintiffs has not contested the suit at all, we think the Courts below are wrong in dismissing the suit upon the preliminary ground mentioned above.

The decrees of the Courts below are accordingly set aside and the cases sent back to the Court of first instance in order that they may be tried on the merits.

Costs of these appeals will abide the result.

V.B./R.K.

Decrees set aside; Cases remanded.

(2) (1910) 37 Cal. 918=7 I. C. 549=37 I. A. 198 (P. C.).

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SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Kali Dassee and *others*—Plaintiffs—Appellants.

v.

Nobokumari Dassee and *others*—Defendants—Respondents.

Appeal No. 52 of 1915, decided on 6th April, 1916, from the Original Decree of Imam, J., dated 31st March, 1915.

(a) Specific Relief Act (1 of 1877), S. 26—Contract of sale perfected but subsequently made subject to vendor's obtaining Letters of Administration and sanction for sale—On Courts refusal to sanction at price fixed, but at higher price another purchaser, with notice of purchaser—On suit under S. 26 or damages—Held there was no breach and plaintiff was not entitled to any damages.

After a contract for the sale of certain houses was completely made, the parties entered into a verbal agreement whereby the vendors, who were Hindu widows, were to apply for Letters of Administration and obtain the sanction of Court to the intended alienation under S. 90 of the Probate and Administration Act. On the application being made the Court granted Letters of Administration but declined to sanction the sale at the agreed price. It sanctioned a sale, however, at a higher price to some other persons, who then purchased the property with notice of the contract for sale. Thereupon the intending purchasers brought a suit for specific performance of the contract and in the alternative for damages for breach thereof :

Held, that by the subsequent agreement of the parties the original contract was transformed into a contingent one, dependent upon the consent of the Court being obtained to the sale, and as the contingency had not happened, the plaintiffs were not entitled to specific performance, nor to damages for breach of contract, since there had been no breach of the modified contract. 12 Cal. 152 and 5 I. C. 236, ref. to.

[P. 134, C. 2 & P. 135, C. 1.]

(b) Civil P. C. (5 of 1903), S. 34—Costs—Appeal—Appellate Court would not interfere unless order is manifestly wrong or unjust.

The Trial Court's order for costs, even where it is of questionable propriety, should not be interfered with by the Appellate Court, unless it is manifestly erroneous or unjust.

[P. 135, C. 1.]

B. C. Mitter, A. N. Chaudhury and *M. N. Kanjilal*—for Appellants.

S. P. Sinha, N. C. Sinha, A. N. Mitter, B. L. Mitter and *M. N Mitter* – for Respondents.

Sanderson, C. J.—This is an appeal by the plaintiffs, who are the executrix and executors of the estate of one Bhubar. Chunder Bhur deceased, and the claim is in respect of an agreement for sale dated the 23rd of January, 1910, which was made between the first and the second defendants and Bhuban Chunder Bhur, which related to the shares of those defendants in certain premises known as Nos. 10, 12 and 13 Darmahatta street. The defendants, other than the first and the second, who may be called the Nandi defendants, were the purchasers of the shares of the first and the second defendants in the premises, under circumstances to which I will refer later in more detail.

The claim is for specific performance, and in the alternative, damages.

The first defendant is the widow of Hari Charan Sett, and the second defendant is the widow of Sattya Charan Sett. These two men were the owners in equal shares of premises No. 10, and between them they owned a share in Nos. 12 and 13, which is said to have been about 5/6ths. In 1907 Hari Charan Sett died intestate, and the first defendant, his widow, is his heiress. In 1908, Sattya Charan Sett died, leaving behind him his widow, the second defendant, and his son Punchanon Sett who shortly afterwards died while an infant, and, therefore, the mother, the second defendant, succeeded to the estate of her late husband.

It appears that Bhuban Chunder Bhur and the Nandi defendants were rival traders carrying on their business in different parts of the premises in question which were leased to them, and it appears then when the property came into the market, Bhuban Chunder Bhur and his sons negotiated the transactions to which I shall make reference directly. Both the plaintiffs and the Nandis were anxious to buy the premises. Bhuban Chunder Bhur got into communication with the first and the second defendants through two men who are called Gajendra Kundu and Tulsi Charan Kundu, who had been acting as agents for the first and the second defendants for the purpose of collecting rents of their property : and, it appears that on the 11th of January 1910, the draft agreement was settled. Then arose a question about an agreement which, it was alleged, the two deceased men, Hari Charan Sett and Satya Charan Sett, had entered into with a man called Ram Lal Pachasia, with regard to the lease of these premises, and it was stated that the ladies desired some provision being inserted in the agreement with reference to this matter. It was discussed and the decision was postponed until the date which apparently had been fixed for the completion of the contract, namely, the 23rd of January, 1910. Before I deal with the agreement of the 23rd of January, 1910, it is necessary for me to refer to one or two other dates : On the 15th of January, four days after the draft agreement had been settled or partially settled a contract was made between the Nundis and a lady whose name was Barodamoyi and who owned 1/6th share of Nos. 12 and 13 ; and, by that agreement the Nundis agreed to buy the 1/6th share of Barodamoyi, and the price which was agreed worked out at about Rs. 9,000 per *cottah*. On the 23rd January, as I have already mentioned, the agreement in question was executed. I shall have to

refer to the terms of it directly. On the 5th of February the conveyance of the share of Barodamoyi to the Nundis was executed. In the meantime, on the 2nd of February, another contract had been entered into by the Nundis with a lady called Aghoremoni who alleged that she was the owner of 1/9th share of premises Nos. 12 and 13. It is perhaps right to remark in passing that the plaintiffs alleged that this lady had no share in the property. But I do not think that it is material to consider whether that allegation was made out or not. On the 7th of February the conveyance in pursuance of the contract of the 2nd of February by Aghoremoni to the Nundis was executed. On the 5th of February a suit was instituted by Ram Lal Pachasia against the first and the second defendants claiming specific performance of his agreement with the two deceased men for a lease of the premises. On the 7th of February an event occurred which had a material effect upon the subsequent history of this case. On that date a suit was brought by Norendra Nath Samanta, who was the son-in-law of the first defendant, on behalf of three infant daughters of the first defendant against the first defendant to restrain her from making an absolute alienation of the premises, alleging that *first* of all there was no legal necessity for her to sell the property, and *secondly*, that the price which was mentioned in the contract of the 23rd of January, 1910 was a gross undervalue: and, on the same date a letter was written (to be found at page 64 of the paper-book) by Messrs. Fox and Mandal, Solicitors acting on behalf of the plaintiff in that suit, to Bhuban Chunder Bhur to this effect:

"We are instructed by Babu Norendra Nath Samanta to inform you that he has to-day filed a suit in the High Court as the next friend of Srimutty Sabitry Dassi and others, infant daughters of Hari Charan Sett deceased, against Sreemutty Nobokumari Dassi, widow of the said Hari Charan Sett deceased, for an injunction restraining her from making an absolute alienation of the premises Nos. 10, 12 and 13, Durmahatta Street, Calcutta, for a declaration that there being no legal necessity the defendant Srimutty Nobokumari Dassi is not entitled to convey an absolute interest in the said premises and other reliefs.

"Our client is informed that you are negotiating for the purchase of a share in the said premises from the said Srimutty Nobokumari Dassi. We are instructed to warn you against purchasing the said share and to give you notice, which we hereby do, that there is no legal necessity for the said proposed sale and that our clients dispute the *bona fides* thereof." This suit and the notice of the suit raised a difficulty as between Bhur and the defendants Nos. 1 and 2, the widows; and, for this reason, that, as is well-known, a widow cannot alienate absolutely the whole of the property unless it can be shown that there is what is called legal necessity for the alienation, and as was pointed out by the learned Advocate-General in the course of his argument, that this question can be raised either at the time by the person who is interested in the estate, by bringing an action claiming a declaration that there is no legal necessity and getting an injunction, or it may be raised after the death of the widow by the reversioner, alleging that the widow had a mere right to alienate her life-estate and that there was no legal necessity which would justify her alienating the entire interest in the property. Consequently a purchaser from a widow runs a very considerable risk, and it is obvious that in some cases he may be called upon to prove the existence of legal or justified necessity at a time when it may be exceedingly difficult and perhaps impossible for the purchaser to bring forward the necessary evidence. On the other hand, if the widow could be persuaded to take out Letters of Administration and get herself appointed administratrix and obtain leave of the Court to alienate, then, of course, the property would vest in the administratrix and the purchaser would get very much better title or much more reliable title than he would have if he bought from the widow under the circumstances and with the risk to which I have just referred.

In consequence of this '*golmal*,' as it was called in the evidence, which as I understand means trouble or difficulty, the sons of Bhuban Chunder Bhur, who were looking after the business on behalf of their father, were advised by their attorney to ask the ladies to take out Letters of Administration, and I think it is desirable for me to refer to the

evidence upon that point, which is very short and is contained in a few pages.

At page 183 of the paper-book one of the sons said, "He" (that is, his attorney) "said," as the '*golmal*' was raised, it was better to ask the ladies to take out Letters of Administration. He said nothing else. I asked the ladies to take out Letters of Administration. On Tulsi and Gajen calling at my shop, I told them to ask the ladies to take out Letters of Administration. Gajen and Tulsi said three or four days after that occasion, 'Yes, the ladies are willing to take out Letters of Administration but they have no money,' and asked me to advance money to meet the expenses for taking out Letters of Administration, and the money so advanced would be deducted from the consideration when the purchase would be completed." At page 189, when the same witness was being cross-examined by Mr. Sircar, a question was put as follows :—

"*Q.*—I believe it is your case that the defendants Nos. 1 and 2, through Gajen and Tulsi, agreed that they would take out Letters of Administration and obtain leave of the District Judge to sell and convey the property to you?

A.—After the 7th February after the letter of Norendra Samanta, these things were discussed.

Question repeated.

A.—Yes.

Q.—You understood that the sanction of the District Judge would be required for sale by the ladies after Letters of Administration had been taken out?"

(I think this is rather an important passage.)

"*A.*—On receipt of the letter dated 7th February, 1910, I understood that.

Q.—You understood that the sale to your father by the ladies was conditional on the sanction of the District Judge?

A.—There was no such condition.

Q.—Did you understand that the ladies would convey the properties to you on taking out Letters of Administration, even if the District Judge refused sanction to sell?

A.—I did not understand that."

Then at page 190, the same witness says :—

"On that day my brother-in-law got all the title-deeds. There was no need for my waiting for the title-deeds. Norendra Nath Samanta took out an injunction from the High Court and I got a letter to that effect. Thereupon I told the ladies that as there was all this '*golmal*,' I could not take the properties unless the ladies took out Letters of Administration." And then he gave a further answer to the Court, "I said I would not take the properties unless the ladies took out Letters of Administration —I would bring a suit to enforce the agreement." I think what he meant there was that he was under the impression that the agreement of the 23rd of January, 1910 gave his father a right to call upon the ladies to take out Letters of Administration. There is some evidence to which I will refer shortly that the attorney had advised him to that effect.

At page 205 the other brother gives evidence: He says, "On receipt of the letter dated 7th February, 1910 we were advised by our attorney to ask the ladies to take out Letters of Administration.

Q.—There was no difficulty in getting a conveyance from the ladies as widows and not as administratrixes.

A.—As Norendra obtained an injunction against them, our attorney's advise for our additional safety was to take the conveyance after Letters of Administration with leave to sell was obtained. By reason of our attorney's advice we waited for the Letters of Administration and the order to sell. It was our idea after the 7th February. I was waiting all these months, because after the 7th February I understood that the order of the Judge to sell was necessary. This was the only reason why I was waiting from the 23rd January to August." Then at page 161 is to be found the evidence of the attorney. He says: "I subsequently ascertained that they had asked the defendants Nos. 1 and 2 to take out Letters of Administration. They told me that the defendants Nos. 1 and 2 were agreeable to take out Letters of Administration, but the defendants Nos. 1 and 2 desired they, the Bhors, should furnish them with funds and deduct the same from the purchase-money to which the plaintiff had agreed. I saw Mritunjoy and Bhola in the middle of March. They told us that Gajen and Tulsi had told them that the Nundi defendants were trying to get hold of these properties, that Norendra Nath Samanta was instructed at the instigation of the Nundi defendants, that the Nundi defendants were defraying the expenses

of the suit, and so I advised them to advertise the fact of the agreement and I also sent a letter from our office giving notice of the agreement to the Nundi defendants." Then at page 167, he says: "My brother Kalimohan (that is, the attorney) suggested that Letters of Administration should be taken out by the ladies. I was then present. Before the receipt of the letters of the 7th February, there was no suggestion by anybody as to taking out Letters of Administration by the ladies. After the receipt of the letters of 7th February, I had a discussion with my brother. My brother (that is, the attorney) suggested that Letters of Administration should be taken for greater safety.

Q.—May I take it that you consider that the conveyance by a lady on the allegation of legal necessity was less safe?

A.—No. As all those disputes had arisen, we advised them for greater safety that the ladies should take out Letters of Administration.

Q.—What disputes?

A.—There was a suit filed by Norendra.

Q.—Because somebody was disputing the existence of legal necessity, the taking out of Letters of Administration would be safer?

A.—No, but because there would be difficulty owing to the change of circumstances of procuring witnesses.

The conveyance by an administratrix would dispense with the question of legal necessity. As a matter of fact the two ladies got Letters of Administration at the instance of my clients. My clients advanced the money and my clients were aware all along what was going on in the Letters of Administration proceedings. As an attorney of the case I went through the papers in connection with the cases Nos. 15 and 16 of the Hooghly Court." There is only one other passage at page 170, to which I need refer.

"*Q.*—Was it any time agreed between Bhuban and the ladies, or any of them, that the ladies should take out Letters of Administration and then convey the property to Bhuban?

A.—I was informed to that effect by the plaintiff.

Q.—Was the agreement between Bhuban and the ladies in writing?

A.—There was no writing to that effect.

Q.—Was it a verbal agreement?

A.—We told the plaintiff to tell the ladies to take out Letters of Administration with leave to sell, and this was in pursuance of a clause of the agreement that the ladies would conform to any requisition that may be necessary to complete the title.

Q.—Is it your evidence that whatever agreement there was for taking out Letters of Administration, it was in that agreement by virtue of that clause?

A.—Yes.

Beyond that clause there was no other agreement, written or oral, for taking out Letters of Administration. But pursuant to that clause we asked the ladies, and they agreed, to take out Letters of Administration."

This is all the evidence upon that point.

Now, the learned Judge on that point has found this, (page 378): "The idea of applying for Letters of Administration was not present in the mind of any of the parties at the time of the agreement, and it did not occur to any of them till they came to know of Sabitri's suit wherein legal necessity was challenged." There the learned Judge was perfectly justified in coming to that conclusion on the evidence—"I cannot hold that applying for Letters of Administration came within 'rectifying and clearing the title-deeds." The clause in the agreement to which the learned Judge was referring is to be found at page 27, and runs thus:

"The time for (your) purchasing our said share shall be a period of one month from the date of your attorney approving of the title-deeds. We shall at our own expenses do everything which your attorney shall consider necessary *for rectifying and clearing the title-deeds.*" I agree with the learned Judge that this question of taking out Letters of Administration was never contemplated by the parties at the time they made this agreement. In my opinion, the learned Judge was also right in coming to the conclusion that taking out Letters of Administration would not come within the phrase "do everything which your attorney shall consider necessary for rectifying and clearing the title-deeds." There undoubtedly was an agreement between the parties that the ladies should apply for Letters of Administration. It was to the effect that the

ladies should take out Letters of Administration and that the plaintiffs' father should supply the necessary funds for those proceedings, an agreement which, in my judgment, was made for good consideration and which was binding on the parties. But whether this agreement was done in pursuance of the original contract as the attorney thought it was—and which, I think, it was not—or whether the application for administration proceedings was made in pursuance of an additional verbal contract—which I think it was—in either case the agreement involved an application to the Court and the obtaining of the leave of the Court to the proposed sale. Furthermore, it was done at the instance of the plaintiffs' father and at his request, and by so doing, in my judgment, they subjected themselves to the risk that the Judge, when he heard the application, might not approve the sale for any good and valid reason which might be put forward: On that application he would have to consider several matters; amongst them, first of all, whether there was necessity for sale: *secondly*, whether the price which was offered by the intending purchaser was a proper price. The contract, in my judgment, was to this effect, namely that the widows were to clothe themselves with the character of administratrixes; and, further, they were to obtain the leave of the Court to sell the premises in question to the plaintiffs: In other words, the contract became a conditional one—conditional upon the performance of these two matters at all events. What happened then is as follows: On the 23rd of February, 1910, both the 1st and the 2nd defendants applied for Letters of Administration. With regard to the proceedings by the 1st defendant Norendra Nath Samanta objected, and there were several applications and interlocutory orders given by the learned Judge of the District Court, and the matter came to a climax, if I may use the word, as is shown by the proceedings at pages 134 and 135. At page 135 is a petition put in on behalf of the 1st defendant in which she says as follows: She first describes her share in the properties in question and says that "the price of the same has been settled with an intending purchaser at the rate of Rs. 8,000 per *cottah*:" and, then she goes on to say, "Mohendra Nath Samanta objected at the time of obtaining certificate and he is giving out that he can secure higher offers than the price fixed by this petitioner. It is, therefore, prayed that permission be granted for the sale of my own share in premises Nos. 10, 12 and 13, Darmahatta Street, at such higher price as Mohendra Nath Samanta might be able to secure and failing that at the price settled by this petitioner. Then the learned Judge passed an order on the 10th of August, 1900, to the effect "Let the grantee ascertain whether the persons named by the objector are willing to pay Rs. 10,000 per *cottah* for the property and report by the 18th instant." And, on the 18th of August he made the following order, "considered an application of the grantee for permission to sell the properties.....to Gopi Nath Nundi and Brothers who offer to pay Rs. 10,000 per *cottah*. The application is granted."

With regard to the proceedings by defendant No. 2, the material passages may be found at pages 122, 125, 123 and 124. In that case in the first instance the application of defendant No. 2 was granted, and then a rescission of that order was obtained by defendant No. 2 on a petition which is set out at page 123. She says in her petition: "The petitioner Srimutty Nabokumari Nandini Dassi begs to submit...I applied for permission to sell an 8 annas share,"—then she describes her share, and says—"at Rs. 8,000 per *cottah* and your Honour's Court gave the said sanction. At present Babu Gopi Lal Nondi and Brothers of Darmahatta Street, Calcutta, have made an offer for purchase at Rs. 10,000 per *cottah*." Then after stating that this petition was verified by an affidavit, she prays that "with a view to pay off the debts of my husband's estate, orders be passed for the sale of the said properties belonging to his estate to Gopi Lal Nundi and Brothers at Rs. 10,000 per *cottah* instead of Rs. 8,000 per *cottah*." Therefore, the result was that in each case, I mean in each of the administration proceedings by defendants Nos. 1 and 2, leave of Court was given to the proposed sale to the Nundis, and the consent of the Court to the proposed sale to Bhuban Chundur Bhur was not obtained. I am not sure that it is at all necessary to deal with the allegation which is put forward by the learned Counsel for the appellants, that the defendants did not really bring all the

facts relating to the transaction to the notice of the Court, but if it is necessary for me to consider that, I am not satisfied that they did conceal the facts. I have gone carefully through the different orders and the statements which were made in the different applications, and I am not satisfied that the applicants to the District Court failed to disclose the material facts relating to the matter: In any event, there is no doubt that the order of that Court stands. This is not an appeal from the order of that Court, and under that order as I have already mentioned, consent of the Court was given to the sale to the Nundis and it was not obtained by the two administratrixes for sale to Bhuban Chunder Bhur.

The first question I have to consider on these facts, is whether the plaintiffs can obtain a decree for specific performance of the contract against the first two defendants. In my opinion, the plaintiffs cannot succeed in obtaining this decree.

The case which was referred to by the learned Advocate-General, *Narain Pattra* v. *Aukhoy Narain Manna* (1), was to this effect: A certificated guardian of certain minors entered into an agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase-money was paid by the plaintiff. The Court sanctioned the sale but at a higher price than that agreed on between the plaintiff and the guardian, and the latter sold to a third party. The plaintiff, thereupon, sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement:—It was held that "the contract was not one which could be specifically enforced, and that S. 26 of the Specific Relief Act did not apply. The contract as it stood was never a complete contract at any time as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties." Having held, as I have, that there was a verbal agreement subsequent to the execution of the agreement of the 23rd of January, 1910, which constituted an agreement between the parties a conditional one, dependent upon the consent of the Court being obtained to the sale, I am of opinion that this case is governed by the principle laid down in the case to which I have just referred. Therefore, specific performance against defendants Nos. 1 and 2 cannot be obtained. Consequently, if the plaintiffs are not entitled to specific performance against defendants Nos. 1 and 2, it follows naturally and as a matter of course that they cannot obtain it against the Nundi defendants. Therefore, the question of notice to the Nundi defendants to the contract of the 23rd of January, 1910 does not arise. As regards these defendants, there can, be no claim for damages, as they were not parties to the contract.

Therefore, as against the Nundi defendants this appeal must be dismissed with costs.

As regards the claim for damages, which must be confined to defendants Nos. 1 and 2, here again, having decided that the agreement was varied by the consent of the parties and became conditional on the ladies changing their character and becoming administratrixes to the estates, and getting leave of the Court, that would bar the plaintiffs' claim for damages, because it must be pointed out that this action is not based upon the conditional contract, but it is based upon the original contract of the 23rd of January 1910 unvaried, and the breach is specified in paragraph 19 of the plaint. That alone would be a sufficient answer to the plaintiff's claim for damages. But I would like to add that even if the administration proceedings are to be considered as taken under the clause of the contract to which I have referred – though as I have already pointed out, I do not think they can have been—the administration proceedings were taken at the instance of the plaintiffs, and it was at the instance of the plaintiffs that the matter was made subject to an application being made and the sanction of the Court to sell being obtained; and, such a condition involved the risk that a higher offer might be forthcoming, which, if made, the administratrix would be bound to bring to the notice of the Court, and which the Court in the interests of all the parties concerned would have to consider as against the price which was mentioned in the original agreement of the 23rd of January. It is also to be noticed that in the Court below no attempt was made to prove the

(1) (1886) 12 Cal. 152.

damages which were stated in the plaint to be Rs. 20,000.

For these reasons, in my judgment, the plaintiffs are not entitled to damages against defendants Nos. 1 and 2.

As regards the question of costs, that is a matter for the discretion of the learned Judge. I am not sure that if I had been sitting as a Judge of first instance, I should have made quite the same order as to costs as the learned Judge did. But that is not the question. Costs are in the discretion of the learned Judge, and the question I have to consider is whether I am satisfied that sufficiently good cause has been shown for me to interfere with the discretion which the learned Judge has exercised. I am not so satisfied: I bear in mind that the learned Judge must have had all the facts before him at the time he made the order. Not only that: this question of costs was expressly raised and argued before him, and especially the question of the reserved costs of the commission was strenuously argued, as I was informed, by the parties before him: and, under those circumstances, I cannot go so far as to say that I am satisfied that this Court ought to interfere with the discretion which the learned Judge has exercised. I am, therefore, of opinion that this appeal ought to be dismissed with costs.

Woodroffe, J.—I am not satisfied that the ladies understood the consequence of, and were bound by, the alleged agreement of the 23rd January 1910. It is to be observed that the document was said to have been explained by the attorney of the purchaser. It apparently did not occur to him in dealing with the *pardanashin* ladies, who were said to be selling their property, to recommend that they should be represented by a separate solicitor. There was a solicitor of the estate Mr. Srimani, who had been the deceased's solicitor; and he was not consulted. It was apparently not explained to the ladies that in the event of the Marwari Pachasia getting a decree for damages the ladies would in that case have been liable therefor. Nor was it explained to them that, as contended in the trial, the provision as to clearing the title might be relied upon for the purpose of showing that there was a duty upon them to get out Letters of Administration to the estate and to incur the additional costs of such administration.

But the ladies were at one time bound by that agreement it was in my opinion, superseded by another according to which the sale was to be, not by the widows, but by administratrixes contingent on the Court's sanction being obtained. There can be under the circumstances no decree for specific performance as claimed either against the first or second defendant or the Nundi defendants. Nor as against these latter defendants any question of notice arises.

Then as regards the damages, they are claimed against the first and second defendants only. It is sufficient to say that the claim has been made in the plaint on the basis of the agreement of the 23rd January, 1910, which I hold has gone. I may further add with reference to the contention that the 1st and 2nd defendants were bound to do all they could to get sanction from the Court, that the grant of Letters of Administration altered the character of the vendors; and that the case of the plaintiffs is that Rs. 8,000 per *cottah* was the proper price of the premises. So according to them there was no loss except the alleged hypothetical loss said to be due to an alleged disturbance of their business, with regard to which there is nothing on the record to show that it is not too remote if it be held to exist at all, of which there is no evidence.

As regards the question of costs it is true that the plaintiffs succeeded in certain points in the first Court. But the learned Judge, though asked to take this into account in his order for costs, has not done so. Apart from the findings above mentioned in my judgment, I do not think that sufficient ground has been made out for interfering with the discretion of the Court in this respect.

I, therefore, agree with the order proposed by the learned Chief Justice.

Mookerjee, J.—I agree that the decree made by Mr. Justice Imam is substantially correct and should not be disturbed.

The facts material for the determination of the questions raised before us, as I gather them from the evidence, may be very briefly stated. The subject-matter of the litigation is house property in this city which was owned at one time by Hari Charan Sett and Panchanan Sett. The share of the former devolved upon his death on his widow, the 1st defendant, while the share of the latter passed on his death to his mother, the second defendant. The proprietors died heavily indebted, and the ladies found it necessary to sell the disputed land to

liquidate the debts. The Bhurs, the plaintiffs in this suit, as also the Nundis who form the last three defendants in this litigation, were in occupation of different portions of the property as tenants. They were rival traders and carried on business in hardware on the premises; they were consequently both naturally anxious to acquire the property. As the result of negotiations, on the 23rd January, 1910, the first two defendants executed in favour of the Bhurs a contract of sale and undertook to execute a conveyance on receipt of the price, which was fixed at Rs. 8,000 per *cottah*. Immediately after this, on the 7th February, 1910, a suit was instituted against the first defendant, on behalf of her infant daughters, (who were the reversionary heirs to the estate of her husband), to restrain her from making an absolute alienation of the premises. The claim was founded on the assertion that there was no legal necessity for the alienation and that the price fixed was wholly inadequate. The plaintiffs realised that a purchase of the premises in these circumstances was likely to involve them in serious trouble, and, with a view to fortify their position, they induced their vendors to apply for Letters of Administration in respect of the estates held by them and to obtain the sanction of the District Judge to the intended alienation under S. 90 of the Probate and Administration Act. The object of this device was obvious. If the plaintiffs took a conveyance from the ladies in their character as a Hindu widow and a Hindu mother, respectively, vested with qualified powers of alienation, their title would be liable to be challenged on the death of the ladies by the then actual reversioners, and the burden would be cast upon the plaintiffs to establish the existence of justifying legal necessity. On the other hand, if the ladies were clothed with the character of administratrixes and made the alienation with the sanction of the District Judge under S. 90 of the Probate and Administration Act, although the sale might not be operative precisely in the same way as a sale by order of the Court in administration proceedings, yet, as pointed out by Sir Richard Garth in *Sikher Chund* v. *Dulputty Singh* (2), the burden would lie heavily upon those that might impeach the validity of the transaction. The ladies accordingly applied for Letters of Administration at the instance of the plaintiffs, who also supplied the funds requisite for the conduct of the proceedings. But an unforeseen difficulty arose. The District Judge granted Letters of Administration, but ultimately declined to sanction the sale to the plaintiffs on the terms arranged. That the District Judge knew all the circumstances and was competent to make this order is indisputable. The Nundi defendants seized this opportunity, intervened, and offered Rs. 10,000 a *cottah* for the property, with the result that the District Judge sanctioned a sale at the higher price. Consequently, on the 15th July and 24th August, 1910, the ladies executed conveyances in favour of the Nundi defendants. On the 15th September following, the plaintiffs instituted the present suit for specific performance of the contract of the 23rd January, 1910, and, in the alternative, for damages for breach of contract. In my opinion, it is perfectly plain that the plaintiffs are not entitled to a decree for specific performance of the contract on which they rely. That contract was substantially varied when, at the instance of the plaintiffs, the ladies applied for letters of Administration. Both parties to the agreement must be deemed to have implied that the transaction should not be effected until after the ladies had been clothed with the character of administratrixes and had secured the requisite permission of the District Judge. The original contract, when so varied by mutual consent, became in substance a contingent contract. The contingency has not happened, and, consequently, the plaintiffs are not entitled to claim performance of the contract. See *Narain Pattra* v. *Aukhoy Narain Manna* (1); and *Sarbesh Chandra Basu* v. *Hari Deyal Singh* (3). In these circumstances, the observation of Lord Redesdale in *Harnett* v. *Yielding* (4) applies: "the plaintiff must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do, for if he does, a consequence is produced that quite passes the object of the Court in exercising the jurisdiction which is to do more complete justice." On behalf of the appellants, it has been argued, however, that this view may render possible an evasion of contractual obligation wherever an unscrupulous person enters into a contract and subsequently places himself under the jurisdiction of the Probate Court as an

(2) (1880) 5 Cal. 363.

(3) (1910) 5 I. C. 236.

(4) (1805) Sch. & Lef. 549.

administrator. There is, in my opinion, no real foundation for this apprehension. For the purposes of the present case, it is only necessary for me to hold that the original contract was by implication varied by mutual consent, when, at the instance of the intending purchasers, the vendors agreed to obtain Letters of Administration. In my opinion the original contract has been varied and has been transformed into a contingent contract. In the events which have happened, the plaintiffs cannot claim specific performance of that contingent contract. From this it further follows that as there has been no breach of the modified contract by the defendants, the plaintiffs are not entitled to damages. A decree has been made in their favour for refund of the earnest money and the costs of the Letters of Administration proceedings. No question has been raised in this Court as to the propriety of this order.

Finally, we have been asked to vary the order for costs made by Mr. Justice Imam as between the plaintiffs and the first two defendants. I am not satisfied that the order is so manifestly erroneous or unjust as to call for our interference. The decree must consequently be affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

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ROE, J.

Simrick Lal Bhakat—Defendant—Appellant.

v.

Radharaman Kalidaha and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 4164 of 1913, decided on 30th November, 1915, from the Appellate Decree of Dist. Judge, Murshidabad, dated 9th August, 1913.

Civil P. C. (5 of 1908), S. 64, O. 21, R. 54—Attachment—Order takes effect only from date of its actual promulgation.

An order of attachment of property under the Civil Procedure Code takes effect only from the date of its actual promulgation, and not from the date of the Court's order. [P. 135, C. 2.]

Bogendranath Chatterjee—for Appellant.

Ram Chandra Mozumdar and *Gouranga Nath Banerjee*—for Respondents.

Judgment.—The sole question of law involved in this case is, it being proved that a transfer of property was made to the prejudice of the decree-holder between the date of the order by a Munsif for an attachment of the property transferred and the date of the promulgation of that order, is that alienation void in so far as it affects the attaching decree-holder. I have no doubt that under S. 276 of the old Code (and this is admitted by the learned Vakil for the appellant) an attachment is not a good attachment unless it has been "duly intimated and made known." I am asked to hold that from S. 64 of the new Code of Civil Procedure, the words "duly intimated and made known" have been deliberately omitted and the law changed. I cannot believe that such a change could have been made in the law without some explanation of the change in the statement of objects and reasons. The law as it now stands is no less clear than it was in the old Code. S. 64 sets forth the effect of an attachment. In O. 21, R. 54, Civil Procedure Code, the method of making attachment is described.

For the appellant it is urged that clause 1 of R. 54 is complete in itself and that the attachment should come into effect from the date of the making of the order. For the respondent it is urged that R. 54 should be read as a whole, and that attachment cannot be said to have taken effect until the provisions of the section as a whole have been complied with. It is settled law that unless the whole of the provisions of R. 54 have been complied with, the attachment is not effective. I cannot conceive it possible that an attachment may be effective from the date of the Court's order if that order is in due course promulgated, and ineffective altogether if subsequent to the Court's order there is a failure to lawfully promulgate the order. I hold that inasmuch as the order of attachment is not effective until it has been duly promulgated, such an order takes effect only from the date of the actual promulgation. On this point the appeal must fail. It has been further urged that the lower Court has refused to consider the effect of certain proceedings taken in respect to another decree by a person named Prosanna. There is no mention whatever of any argument before the learned District Judge or of any suggestion in that Court that the proceedings in the case of Prosanna affected in any degree the merits of the present case. The learned Judge has distinctly said that two points only were urged before him. That statement is a statement behind which the appellant

cannot go. It was not in the lower Appellate Court argued that Prosanna's proceedings affected the present case. I cannot allow the point to be raised now before me.

The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 136

MOOKERJEE AND CHATTERJEA, JJ.

Mathura Mohan Saha and *others*—Appellants.

v.

Ramkumar Saha and *Chittagong District Board*—Respondents.

Appeals Nos. 1248 and 1979 to 1981 of 1912, decided on 24th November, 1915, from the Appellate Decrees of Dist. Judge, Chittagong, dated 9th February, 1912.

(a) Transfer of Property Act (4 of 1882), S. 54—Unregistered sale certificate and deed of release by President of District Board does not satisfy requirements of S. 54 and no title passes to purchaser—Held, also sale certificate even if held to be valid conveyance, the transfer is invalid under Bengal Local Self-Government Act (3 of 1885), S. 133 (d), R. 93—Held also it did not even constitute valid contract of sale as it contravened R. 103.

Where land being sold to the highest bidder for Rs. 1,280 by the District Board, a sale certificate (not registered) was issued to the purchaser, but the property not having been specifically described therein, the Chairman of the District Board executed in favour of the purchaser a registered deed of release which did not, however, purport to be a conveyance and was stamped as a release :

Held, (1) that by the documents no valid title passed to the purchaser, as the unregistered sale certificate could not operate as a conveyance and that the deed of release was inoperative to transfer title because title to land could not pass by a mere admission when the Statute required a deed ; [P. 141, C. 1.]

(2) that even if the release was construed as a conveyance as this document as well as the sale certificate, though sealed and signed by the Chairman, were not signed by two members of the Board, the sale was invalid, being in contravention of R. 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December, 1885, under S. 138 (*d*) of the Bengal Local Self-Government Act (III of 1885 B. C.). [P. 141, C. 2.]

(3) that these documents did not constitute even a valid contract for sale, as it was not sanctioned at a meeting of the Board, or executed in accordance with R. 103 of the District Board. [P. 144, C. 2.]

(b) Practice—Plaintiff must succeed on his allegation he cannot be given an opportunity to complete his title.

That the purchaser, who came into Court as plaintiff for recovery of possession of the land and declaration of title thereto, must succeed on proof of a valid title and was not entitled to a postponement to entitle him to complete his title by securing a duly executed instrument from the District Board. [P. 144, C. 2.]

(c) Bengal Local Self-Government Act (3 of 1885), S. 138 (d), Rr. 93 and 93—Not *ultra vires*—R. 93 is mandatory—Scope and effect of rules, pointed out.

Rr. 93 and 98 of the Statutory Rules made by the Lieutenant-Governor under S. 138 (*d*) of the Bengal Local Self-Government Act are not *ultra vires* and R. 98 is not merely directory but is mandatory, and must be read along with R. 93; the effect of these two rules is that no immovable property vested in a District Board can be sold except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board. [P. 141, C. 2.]

(d) Bengal Local Self-Government Act (3 of 1885), S. 138 (d)—Scope of power to make rules—Rules can be made for restricting alienation and providing formalities to be observed for such alienation—Rules can limit extent and mode of power of alienation.

S. 138 (*d*) of the Bengal Local Self-Government Act, which authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of regulating the powers of District Boards to transfer property, authorises him not only to frame rules which impose restrictions on alienations but also to frame rules which prescribe the formalities to be observed when alienations are made. [P. 141, C. 2 & P. 142, C. 1.]

A rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power, though it cannot prevent or prohibit the exercise of the power. [P. 142, C. 1.]

(e) Interpretation of Statute—Interpretation put upon by officers concerned though not conclusive is of great weight.

Courts in construing a Statute will give much weight to the interpretation put upon it at the time of its enactment and since, by those whose duty it has been to construe execute or apply it although such interpretation is not conclusive upon the Courts. [P. 142, C. 2.]

(f) Interpretation of Statute—No universal rule—Whole scope of statute must be seen—Intention of legislature must be found out.

No universal rule can be laid down for the construction of Statutes. As to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience ; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed. [P. 143, C. 1.]

(g) Interpretation of Statute—Rules where to be construed as mandatory and when directory explained and pointed out.

Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, a rigorous observance of them is regarded essential to the acquisition of the powers or rights. But where a public duty is imposed and the Statute requires that it shal

be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. [P. 143, C. 1 & 2.]

(h) Contract—Implied—Parol contracts by corporation if within scope of power and if not required to be made with formalities can be specifically enforced.

Where a Corporation is acting within the scope of the legitimate purposes of its institution, even a parol contract made by its authorised agents raises implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation; provided, the contract is not by Statute positively required to be under seal or it is not *ultra vires* in the sense that it is beyond the scope of the authority of the Corporation under any circumstances. [P. 145, C. 2.]

(i) Contract Act (9 of 1872), S. 23—Later contract between same parties inconsistent with former operates as rescission but not so when latter is unenforceable.

One contract is rescinded by another between the same parties, when the latter contract is inconsistent with, and renders impossible the performance of the former. But if it turns out that the later contract cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights under the former contract.

[P. 146, C. 2 & P. 147, C. 1.]

(j) Contract Act (9 of 1872), S. 23—Contract rescinded other party is not liable—Such rescission must be proved.

Where one party by acts and conduct, evinces an intention no longer to be bound by his contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. But such an abandonment of the contract must be made out by clear and precise evidence. [P. 147, C. 1 & 2.]

(k) Contract Act (9 of 1872), S. 23—Contract by Corporation invalid—It is bound to refund money received.

Where a Corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain it: either it must return it or make compensation for it. [P. 149, C. 1.]

(l) Civil P. C. (5 of 1903), O. 41, Rr. 22 (3) and 33—Cross objection against co-respondent can only under special circumstances be allowed.

A respondent in an appeal is not ordinarily entitled to urge cross-objections except as against the appellant, but under special circumstances of a case the Appellate Court can, under the provisions of O. 41, Rr. 22 (3) and 33, give effect to the cross-objections of one respondent against another. [P. 149, C. 2.]

Rash Behari Ghose and *Dhirendra Lal Kastgir*—for Appellants.

Mohendra Nath Ray and *Gunada Charan Sen*—for Respondent.

Kshitis Chunder Sen—for District Board.

Mookerjee, J.—The history of the litigations, which have culminated in these appeals, consists principally of matters of record, and has not formed the subject of controversy in the elaborate arguments addressed to this Court. In 1895, one Ram Kamal Saha made over a sum of money to the District Board of Chittagong for the acquisition of a tract of land, in order that a tank might be excavated thereon for the benefit of the inhabitants of the locality. On the 15th June, 1897, the usual declaration was published under the Land Acquisition Act; the land was, in due course, delivered to and became vested in the District Board on the 11th and 21st February, 1898. It subsequently transpired that Ram Kamal Saha, the donor, was not moved by motives of public philanthropy, but that his real object as also the object of Ramsundar Saha, now represented by the appellants, his three sons, was to spite his relation Ramkumar Saha (the respondent in these appeals), who was owner of a substantial portion of the property acquired. As Mr. Skrine, the then Commissioner of the Chittagong Division, observed, the country was honeycombed with tanks, and it was simply monstrous to wish to pull down godowns and buildings to excavate another tank. The result was that, on the 7th March, 1898, the District Board decided to abandon the project; but as possession of the land acquired had already been taken, the Government was not at liberty to withdraw from the acquisition under S. 48 (1) of Act I of 1894. The Bengal Government accordingly informed the Commissioner, on the 21st May, 1898, that the Government could not withdraw from the acquisition of the land at that stage, and forwarded the opinion of the Superintendent and Remembrancer of Legal Affairs, that if the Board did not want the land, they could arrange with the original owners or others to take the land off their hands at the price paid for its acquisition. On the 29th August, 1898, the Board intimated to Ramkumar Saha that as they had abandoned the project, it had become necessary to return the land to its original owner, and they enquired of him, whether he was willing to take back the land on payment of Rs. 25 as the expenses of acquisition. The owner, who was obviously anxious to get back the land, which he had lost by reason of what was essentially an unwarrantable misuse of the machinery provided

in the Land Acquisition Act, deposited the amount in the Treasury on the 6th September, 1898. The Land Acquisition Collector, apparently in ignorance of these proceedings, called upon Ramkumar Saha on the 16th December, 1898 to receive Rs. 538-5-6 as compensation for that portion of his land which had been acquired for the benefit of the District Board. On the 10th January, 1899, Ramkumar Saha wrote to the Land Acquisition Collector and refused to take the compensation money on the ground that he had already accepted and acted upon the offer of the Board to retransfer the land to him on payment of Rs. 25. The sum held in deposit by the Land Acquisition Collector as compensation was subsequently made over by him to the District Board. The District Board, however, did not execute a conveyance in favour of Ramkumar Saha, and, so far as we can gather, the latter also did not press for a regular deed. The reason, no doubt, was that notwithstanding the proceedings for acquisition, he continued in actual occupation of the land. More than two years latter, on the 27th November, 1900, the Land Acquisition Collector intimated to Ramkumar Saha that Rs. 957-11-1, had been spent for acquisition of the land, that Rs. 538-5-6, which at one time stood to his credit as owner of the land acquired, had been made over to the District Board, and that the land would be given to him on payment of the balance, Rs. 491-5-7. This offer, so far as can be made out from the record, covered not only the land of Ramkumar Saha which had been acquired for the District Board, but also other lands in the neighbourhood which had been acquired for the purposes of the same project of excavation of a tank. On the 4th December, 1900, Ramkumar Saha deposited in the Treasury the entire sum of Rs. 957-11-1; and on or about the same date, a draft conveyance in his favour was drawn up on a stamped paper purchased at his cost for Rs. 10. The conveyance, however, for some unexplained reason, was neither executed nor registered. About a year later, on the 2nd August, 1901, the Bengal Government intimated to the Commissioner of the Chittagong Division that the land should be offered to the original owners at cost price, and that if they declined, it should be sold by public auction. The letter added that in either case, the net sale-proceeds should be given to the donor or his personal representatives, who had paid the cost of acquisition. On the 24th February, 1902, the District Board issued a letter to Ramkumar Saha and informed him that if he did not, within thirty days, deposit Rs. 538-5-6 as price of the land and Rs. 13-9-6 as cost of acquisition (total Rs. 551-15-0) to take back his land, the land would be sold by public auction. Obviously, the District Board authorities overlooked that a much larger sum than what was demanded had already been deposited by Ramkumar Saha. The record does not show what reply was submitted by the latter. We know, however, that on the 20th October, 1902, the Land Acquisition Collector intimated to Ramkumar Saha and several other persons (some of them apparently his superior landlords and others his tenants) that they should, on payment of Rs 872-2-3 within 6th November, 1902, take back the land, and that, otherwise, it would be sold by public auction. The notice explained, on the face of it, that the sum demanded was obtained by deduction of Rs. 118-9-9, that is, 15 per cent. from Rs. 990-12-0 (which was the cost of acquisition of the land in four parcels under four declarations; the respective amounts were Rs. 50-8-3, 36-11-0, 62-8-10 and 841-10-0). The record does not show what followed upon this notice; but, it is plain, that the Land Acquisition Collector overlooked that a much larger sum than what he demanded had been deposited nearly two years before. The position now was that Ramkumar Saha did not get a title-deed for the whole land, although he had fully complied with the requisition of the District Board and of the Land Acquisition authorities. Meanwhile on the 17th May, 1903, the Commissioner of Chittagong had asked permission of the Board of Revenue to restore the acquired land to the original owners. Why this was done is not explained, because we know that on two previous occasions, namely, on the 21st May, 1898 and on the 2nd August, 1901, the Local Government had, expressly or impliedly, approved the proposal for re-transfer of the land to the original owners; it is useless to speculate whether the letter of the 17th May, 1903 was written because the previous correspondence and the orders contained therein were overlooked. The record shows that on the 29th May, 1903 the Board of Revenue held that their sanction was not necessary, and that as the land had vested in the District Board, the latter were competent to effect

the proposed re-transfer to the original owners What action was taken by the District Board on receipt of this reply does not transpire from the evidence on the record ; but we find that on the 24th March, 1904, Ramkumar Saha petitioned to the District Board for return of Rs. 992-11-1, which had been in deposit then for several years (the sum was made up of Rs. 25 paid on the 6th September, 1898, Rs. 10 paid on account of stamp on the 3rd December, 1900, and Rs. 957-11-1 deposited on the 4th December 1900). No notice was taken of this application by the District Board authorities. Ramkumar Saha waited for three years and renewed his application on the 9th June, 1907, but with no better result. He again renewed his application on the 12th August, 1907. Upon this application, the Chairman of the District Board, on the 26th December, 1907, directed that the sum might be refunded, because, in his opinion the land should be retained and the tank constructed ; he added in his note that the acceptance of the refund by Ramkumar Saha would estop the latter in any ; claim on the unexecuted conveyance ; and he specifically directed that the applicant might be asked to take the money. This instruction, however, was not carried out ; the order of the Chairman was not notified to Ramkumar Saha, nor was the money ever paid or tendered to him, though an attempt is made in the oral evidence to show that a clerk of the District Board Office verbally communicated the substance of the order of the Chairman to an officer of Ramkumar Saha. The fact remains that the money is even now in the hands of the District Board authorities. On the 22nd February, 1909, the District Board put up the land to auction. Ramkumar Saha, who was in occupation all this time, as soon as he was appraised of the intentions of the Board, appeared and objected to the sale, on the ground that the Board had already contracted to sell the property to him. The objection was summarily overruled and the property was sold to Ramsundar Saha as the highest bidder for Rs. 1,280. On the 14th May, 1909, what is called a sale certificate was issued to the purchaser ; as the property was not specifically described in this document, the Chairman of the District Board executed in favour of the purchaser a deed of release on the 12th July 1909. Symbolical possession of the property is said to have been delivered to the purchaser on the 17th August, 1909 ; but he was not able to obtain actual possession. The result was that on the 28th September, 1909, the purchaser instituted four suits in the Court of the Munsif of Chittagong for declaration of title by purchase and for recovery of possession from Ramkumar Saha ; the District Board of Chittagong was not joined as a party defendant to these suits. The purchaser instituted four different suits, apparently on the ground that the land had been acquired in four distinct parcels on the basis of four declarations under the Land Acquisition Act. On the 16th December 1909, Ramkumar Saha instituted a cross suit in the Court of the Subordinate Judge of Chittagong, against Ramsundar Saha, the purchaser, and the Chairman of the District Board. The suit relates only to that portion of the land which had originally belonged to Ramkumar Saha. The plaint formulates the relief claimed as follows : *first*, that the title of the plaintiff in *kaemi dartapa* right and right by adverse possession be declared; *secondly*, that the purchaser defendant be restrained in his attempt to take possession ; *thirdly*, that the District Board be made to execute a conveyance in his favour and that his possession be confirmed ; *fourthly*, that he be awarded a decree for damages for Rs. 1,957-11-1 with interest and costs ; *fifthly*, that he be granted such relief as the Court might think fit. Subsequently to the institution of this suit, the suits in the Court of the Munsif were transferred to the Court of the Subordinate Judge, and the five suits were tried together. The Subordinate Judge, in the suit of Ramkumar Saha, allowed him a decree for Rs. 992-11-1 against the District Board, with interest thereon from date of judgment until payment. In the suits by Ramsundar Saha, the Subordinate Judge gave him a decree for possession with mesne profits and costs against Ramkumar Saha. Four appeals were then preferred to the District Judge by Ramkumar Saha, namely, one appeal by him in his suit, and three appeals by him in three of the four other suits ; the lands comprised in these three suits were identical with what was comprised in his suit. Consequently, the subject-matter of the controversy before the District Judge was restricted to that portion of the land which originally belonged to Ramkumar Saha. The District Judge, in the suit of Ramkumar Saha, modified, to his detriment, the decree of the primary Court. He confirmed the decree in his favour for Rs. 992-11-1 ; but he made the recovery of

this sum from the District Board conditional on his making over possession of the land to the Board within 6 months. In the other three suits, brought by Ramsundar Saha, he allowed the appeals of Ramkumar Saha and dismissed the claim for possession on the ground that the sale of the 22nd February, 1909 was inoperative in law. The representatives of Ramsundar Saha, who had died in the interval, have perferred four appeals to this Court and have contended that the sale mentioned was valid and operative. Ramkumar Saha has preferred a memorandum of cross objections in the appeal which arises out of his suit and has argued that he had a good title to the land and was, at any rate, entitled to a decree for specific performance against the District Board. Notice of the memorandum of cross-objections was, however, served at first only on the appellants, and when this was brought to the notice of the Court, the hearing of the appeals was adjourned, at the request of the Counsel for the District Board, to enable him to consider the position and to receive adequate instructions; it was ultimately intimated to the Court that the District Board supported the contention of the appellants and opposed the cross-objections of their co-respondent, Ramkumar Saha. The appeals have been elaborately argued on both sides, and the points which emerge for consideration as also the facts whereon they are based may be briefly summarised.

The land now in dispute admittedly belonged originally to Ramkumar Saha. At the instance of Ramkamal Saha and Ramsundar Saha, the land was acquired under the Land Acquisition Act and was vested in the Chittagong District Board for the excavation of a tank. The project was subsequently abandoned, and the District Board, with the concurrence of the Local Government, decided to return the land to the original owner on payment of the actual expenses of the acquisition, as no compensation had been previously paid to him. The District Board, through their Vice-Chairman, then made an offer to Ramkumar Saha to return the land to him, if he paid Rs. 25 as the expenses of the acquisition. This offer was forthwith accepted, and the money was deposited in the Treasury. Though no formal conveyance was executed, Ramkumar Saha continued in occupation, presumably on the strength of this agreement. Two years later, a second offer was made to Ramkumar Saha by the Land Acquisition Collector, on behalf of the District Board, to transfer to him the whole of the land acquired (inclusive of the land covered by the previous agreement) if he would pay Rs. 957-11-1, which had been assessed as compensation. This offer also was accepted, and the amount demanded was forthwith deposited. A draft conveyance was prepared, but was not executed for some unexplained reason. More than a year later, the District Board, through their Chairman, offered to Ramkumar Saha to re-transfer to him his portion of the land on payment of Rs. 538-5-6, the amount assessed as compensation therefor, and Rs. 13-9-6, the proportionate amount of expenses of acquisition. A few months later, the land Acquisition Collector, on behalf of the District Board, offered to re-transfer the land to Ramkumar Saha, his landlords and his tenants, if Rs. 990-12-0 was paid. What took place on these offers, does not transpire from the record; but two years later, Ramkumar Saha petitioned for refund of his deposit; this was of no avail, and a renewed application three years later was equally fruitless. On a third application by him, some months later, the Chairman of the District Board directed a refund, but his order was neither communicated nor carried out. More than a year afterwards, notwithstanding protest by Ramkumar Saha, the District Board put up the land to auction, when it was purchased by Ramsundar Saha, who had, 11 years earlier, set the machinery of the Land Acquisition Act in motion to deprive his rival of the land in suit. The purchaser, however, was not able to obtain actual possession, and was obliged to sue for recovery of possession, with the result that a cross-suit was instituted by Ramkumar Saha with a view to perfect his own title or to recover damages from the District Board. The outstanding features of the case, then, are, that Ramkumar Saha has never been paid any compensation for his land, and has, on the other hand, paid to the District Board authorities, with a view to obtain a re-transfer thereof, a sum of Rs. 992-11-1, of which the Board had enjoyed the benefit for 9 years at the date of the institution of the suit. The only question is, what are the legal rights of the parties; for there is not much room for doubt as to where the ustice of the case lies. It is convenient to examine, at the outset, the position of Ramsundar Saha, who was

the first to come into Court and to launch these litigations.

There is no controversy that under S. 16 of Act 1 of 1894, the title vested absolutely in the District Board when possession of the land acquired was taken by the Collector on the 11th and 21st February 1898. The question arises, whether that title has been subsequently transferred to Ramsundar Saha. The District Judge has held that the answer must be in the negative. The purchaser relied upon the sale certificate granted to him on the 14th May, 1909 and the release executed in his favour on the 12th July, 1909 : the Court of appeal below has held that neither is of any avail. S. 54 of the Transfer of Property Act, provides that a sale of tangible immovable property of the value of Rs. 100 and upwards can be made, only by a registered instrument. The sale certificate was not registered and cannot consequently operate as a valid conveyance. The release was registered, but it does not purport to be a conveyance, and was stamped, not as a conveyance but as a release; as stated on the face of it, it was granted, because the property covered by the sale-certificate was not described with sufficient precision in that document. A release of this character cannot operate to transfer title, because, as has been repeatedly ruled in this Court, title to land cannot pass by a mere admission when the Statute requires a deed: *Jadu Nath Poddar* v. *Rup Lal Poddar* (1); *Dharam Chand Boid* v. *Mouji Shahu* (2) and *Narak Lal* v. *Thagoo Lal* (3). The decision in *Hemendra Nath Mukerji* v. *Kumar Nath Roy* (4) [which at an earlier stage is reported as *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (5)] is distinguishable; there this Court held upon a construction of all the terms of the particular instrument that though called a deed of disclaimer it operated as a deed of transfer; the Court did not formulate any general proposition of universal application that a deed of release has always the same operation as a conveyance. But, even if the release in this case could, by any stretch of language, be construed as a conveyance, there would be a fatal objection to its validity. Neither the release nor the sale certificate fulfils the requirements of R. 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December, 1885 under S. 138 (*d*) of Bengal Act III of 1885 B. C. (Bengal Local Self-Government Act). R. 98 is in these terms: "Every transfer of immovable property, vested in a Board, shall be made by an instrument under the common seal, signed by the Chairman and by two members of the Board, and, where these rules require the previous approval of the Commissioner of the Division, the fact that the transfer is signed with such approval shall be distinctly expressed." This rule must be read along with R. 93, which, so far as relevant to the present matter, provides that "no immovable property vested in a District Board shall, *except* with the previous approval of the Local Government and in such a manner and on such terms and conditions as that Government may approve, be transferred by the Board by way of sale." The effect of these two rules, consequently, is that no immovable property vested in a District Board can be sold, *except* with the previous approval of the Local Government and *except* by an instrument under the common seal signed by the Chairman and by two members of the Board. Neither the sale certificate nor the release fulfils this condition, as both the documents, though sealed and signed by the Chairman, were not signed by two members of the Board. The appellants have sought to escape from this difficulty by a twofold argument, namely, *first*, that Rr. 93 and 98 are *ultra vires*, and, *secondly*, that R. 98, if *intra vires*, is directory and not mandatory.

In support of the *first* contention, reference has been made to Ss. 20 and 138 (*d*) of Bengal Act III of 1885 B C. The former section defines a District Board as a body corporate with power to acquire and hold property, both movable and immovable. and, subject to any rules made by the Lieutenent-Governor under the Act, to transfer any such property held by it and to contract and do all other things necessary for the purposes of the Act. A District Board has, consequently, power to transfer property held by it, subject to any rules made by the Lieutenant-Governor under the Act. S. 138 (*d*) authorises the Lieutenant Governor to make rules consistent with the Act for the purpose of *regulating the powers* of District Boards to transfer property. The appellants have

(1) (1906) 33 Cal. 967.
(2) (1912) 16 I. C. 440.
(3) (1912) 13 I. C. 455.
(4) (1908) 12 C. W. N. 478.
(5) (1905) 32 Cal. 169.

argued that this authorises the Liutenant-Governor to frame rules which impose restrictions on alienations, but not to frame rules which prescribe the formalities to be observed when alienations are made. After careful consideration of the argument addressed to us, we are unable to accept this contention. The expression '*regulate the powers*,' when applied to a rule, appears to us to be comprehensive enough to include, not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. It is conceivable, for instance, that the rules may prescribe that a District Board may sell land for one purpose and not for another, or that the sale can be made only with the assent of the Local Government when the value of the land exceeds a prescribed limit, or that the conveyance is, in certain cases, to be executed by the Chairman alone, while, in other cases it is to be signed by the Chairman and a member of the Board. Rules framed in this behalf may, without undue stretch of language, be deemed to be rules regulating the powers of the District Board. The term 'regulate' is defined as follows in the Oxford Dictionary, Vol. VIII, page 379: "to control, govern or direct by rules or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings." Consequently, a rule to regulate a power may be a rule to restrict the exercise of the power as also a rule to guide the exercise of the power; though, as Lord Davey said in *Municipal Corporation of Toronto* v. *Virgo* (6), authority to regulate does not include a power to prevent or prohibit, because, in the language of Lord Watson in *Attorney-General (Ontario)* v. *Attorney-General (Dominion of Canada)* (7), a power to regulate assumes the conservation of the thing which is to be made the subject of regulation. Subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power. In our opinion, Rr. 93 and 98 are not *ultra vires*. In the interpretation of the scope of S. 138 (*d*), some stress may also be laid upon the circumstance that immediately after the enactment of the section by the Legislature, the construction now accepted by us was placed thereon by the authority charged with the duty of framing the rules. As was explained in *Baleshwar Bagarti* v. *Bhagirathi Dass* (8), it is a well-settled principle of interpretation that Courts in construing a Statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. We may add that if the contention of the appellants were to prevail, the object of the Legislature would obviously be defeated; instead of a simple and definite rule as to the mode in which transfers are to be effected, we would have here all the uncertainty which prevails in other systems of law as to the manner in which transfers may be validly effected by a corporate body.

In support of the *second* contention, namely, that R. 98, if not *ultra vires*, is merely directory and not mandatory, it has been argued that the rule does not, by the use of negative words, expressly provide that a valid transfer can be effected in no other way, and reference has in this connection been made to the decisions in *Liverpool Borough Bank* v. *Turner* (9) and *Cole* v. *Green* (10). In the first of these cases, it was ruled that although the Merchant Shipping Act, 1854, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, and an equitable mortgage is consequently invalid. In the second case, it was ruled that a contract within the scope of S. 151 of Statute 3 & 4, Will. IV, Ch. 68, is not void, though not signed "by the Commissioners, or by any three of them, or by their clerk," as prescribed by that section. In our opinion, the contention of the appellants is not well founded. R. 98 must be read along with R. 93, and the latter rule does use appropriate words to indicate that no immovable property vested in a District Board can be transferred by way of sale, *except* in such manner as the Local Government may approve. The intention is clearly manifest that a transfer shall not be made *except* in the manner pres-

(6) (1896) App. Cas. 88.
(7) (1896) App. Cas. 348.
(8) (1908) 35 Cal, 701.
(9) (1860) 1 Johns. & Hem. 159.
(10) (1843) 6 M. and G. 872.

cribed by R. 98. The whole aim and object of the law would plainly be defeated, if here the command to do the thing in a particular manner did not imply a prohibition to do it in any other; indeed, the language used in R. 93 leaves no room for doubt as to the intention: *Jolly* v. *Hancock* (11); *In re Dickinson, Ex parte Rosenthal* (12). The decisions relied upon by the appellants are clearly of no avail. The observations of Lord Campbell, L. C., in *Liverpool Borough Bank* v. *Turner* (9), show that a transfer in a mode other than that prescribed may be null and void, even though there are no negative words in the Statute declaring that all transfers in any other form shall be null and void. No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed: *Howard* v. *Bodington* (13). The decision in *Cole* v. *Green* (10) seems, at first sight to assist the contention of the appellants, but, on closer examination, turns out to be clearly distinguishable, as there the clause in question, according to strict grammatical construction, was held not to form part of the proviso; the judgment of Tindal, C. J., shows that if the latter part of the section could be treated as part of the proviso, it would have been deemed imperative and not directory only. Here, however, R. 98, when read with R. 93, shows that the requirement as to signature by two members of the Board is mandatory and not directory. This is shown also by an application of a useful test, namely, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power. It is well settled that where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred: *Caldow* v. *Pixell* (14). On the other hand, where a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The distinction between the two classes of cases is illustrated by the decisions in *Ward* v. *Beck* (15), *Stapleton* v. *Haymen* (16), *The Andalusian* (17), *Le Feuvre* v. *Miller* (18), *Cope* v. *Thamas Haven Dock Railway Company* (19), *Diggle* v. *London and Blackwall Railway Company* (20), *Frend* v. *Dennett* (21), *Cornwal Mining Company* v. *Bennett* (22), *Irish Peat Company* v. *Phillips* (23); *Alma Spinning Company, In re*, *Bottomley's* case (24) and *Gifford & Bury Town Council, In re* (25). These cases show that when a public body or a Company is established by Statute or incorporated for special purposes only, and is altogether the creature of Statute Law, the prescriptions for its acts and contracts are imperative and essential to their validity. The case of *Frend* v. *Dennett* (21) is specially instructive. The Public Health Act, 1848, enacted that contracts exceeding £ 10 in value should be sealed with the seal of the Board; that they should contain certain particulars; and that every contract so entered into shall be binding; provided always that before contracting for the execution of any work, the Board shall obtain from the surveyor a written estimate of the probable expense of executing it and keeping it in repair. The first of these requisites was decided to be imperative, and a contract unsealed was consequently held inoperative against the Board and the rates. But the provision which required an estimate, was held to be merely a direction or instruction for the guidance of the Board and not a condition precedent essential to the validity of the contract:

(11) (1852) 7 Ex. 820.
(12) (1882) 20 Ch. D. 315.
(13) (1877) 2 P. D. 203.
(14) (1877) 2 C. P. D. 562.
(15) (1863) 13 C. B. (N. S.) 668.
(16) (1864) 2 H. & C. 918.
(17) (1878) 3 P. D. 182.
(18) (1857) 8 El. & Bl. 321.
(19) (1849) 3 Exch. 841.
(20) (1850) 5 Exch. 442.
(21) (1858) 4 C. B. (N. S.) 576.
(22) (1860) 5 H. & N. 423.
(23) (1861) 1 B. & S. 598.
(24) (1880) 16 Ch. D. 681.
(25) (1888) 20 Q. B. D. 368.

Hunt v. *Wimbledon Local Board* (26), *Eaton* v. *Basker* (27), *Brooks* v. *Torquay Corporation* (28), *British Insulated Wire Company* v. *Prescot Urban District Council* (29), *Nowell* v. *Mayor of Worcester* (30) and *Boner* v. *Mitchell* (31). This meets completely the argument of the appellants that if any of the provisions of R. 98 be deemed mandatory, the same character must be imputed to all its provisions. The view we take is supported by the principles deducible from the decisions in *Ashbury Railway Carriage & Iron Company* v. *Riche* (32). *Chasteauneuf* v. *Capeyron* (33) and *Young* v. *Mayor of Lexington Corporation* (34). In the case last mentioned, the House of Lords ruled that S. 174 of the Public Health Act, 1875, which enacts that every contract made by an urban authority whereof the value or amount exceeds £ 50, shall be in writing and sealed with the common seal of such authority, is obligatory and not merely directory. Lord Bramwell observed: "The Legislature has made provisions for the protection of ratepayers, share-holders and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities, which involve deliberation and reflection. That is the importance of the seal. It is idle to say, there is no magic in a wafer. It continually happens that carelessness and indifference on the one side and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into.....The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement." A similar view has been taken in a long line of cases in the Courts of the United States, where the principle has been repeatedly affirmed that if the Charter or Constituent Act of a Corporation prescribes a particular mode in which the property of the Corporation shall be disposed of, that mode must be pursued: *Platter* v. *Elkhart County* (35), *Crow* v. *Warren County* (36) and *Shimen* v. *Phillipsberg* (37). The point was discussed with characteristic clearness and striking logical force in able and interesting opinions by Field, C. J., in what are known as the City Slip cases in California, where it was ruled that sales of real estate belonging to the city by its officers, under the authority of an ordinance not adopted in accordance with statutory requirements, were void and did not pass title to the purchasers: *McCraken* v. *San Francisco* 38), *Crogan* v. *San Francisco* (39) and *Pimental* v. *San Francisco* (40). There is thus no escape from the position that neither the sale certificate nor the release has operated to transfer title to the appellants.

It is further clear that they do not constitute even a valid contract for sale, because Rule 103 requires that every contract or agreement entered into by any District Board in respect of a sum or involving a value above Rs. 500 shall be sanctioned at a meeting, be in writing, be signed by the Chairman and two other members of the District Board and shall be sealed with the common seal of such District Board. The rule adds that unless so sanctioned and executed, such contract shall not be binding on the District Board. It has been finally argued that the objection to the title of the appellants should not have been allowed to prevail, as the sale was admitted [*Satyesh Chunder Sircar* v. *Dhunpul Singh* (41)] and that, at any rate, the trial should have been postponed to enable the appellants to complete their title by securing a duly executed instrument from the District Board [*Ganpat Pandurang* v. *Adarji Dadabhai* (42)]. There is no force in either of these contentions. The appellants came into Court as plaintiffs and must succeed on proof of a valid title. Their title was challenged by the defendants, and though the *factum* of the sale by auction was admitted, it was asserted that the title had not been transferred thereby. The appellants had ample opportunity to produce a properly executed conveyance from the District Board, if they could, but they have not done so. The case before us clearly does not fall within the class of decisions where it has

(26) (1871) 4 C. P. D. 48.
(27) (1881) 7 Q. B. D. 529.
(28) (1902) 1 K. B. 601.
(29) (1895) 2 Q. B. 463.
(30) (1854) 9 Exch. 457.
(31) (1850) 5 Exch. 415.
(32) (1875) 7 H. L. 653.
(33) (1882) 7 App. Cas. 127.
(34) (1883) 8 App. Cas. 517.
(35) (1885) 103 Ind. 360=2 N. E. 544.
(36) (1888) 118 Ind. 51=20 N. E. 642.
(37) (1896) 58 N. J. L. 506=33 Atl. 852.
(38) (1860) 16 Calf. 591.
(39) (1861) 18 Calf. 590.
(40) (1863) 21 Calf. 351.
(41) (1896) 24 Cal. 20.
(42) (1877-79) 3 Bom. 312.

been ruled that a suit need not be dismissed merely because the authority for its institution, such as a certificate under the Pensions Act, 1861, or S. 78 of the Land Registration Act, or, S. 60 of the Bengal Tenancy Act, or S. 4 of the Succession Certificate Act, is not produced with the plaint. The cases on this subject will be found reviewed in the judgment of this Court in *Sarat Chandra Banerjee* v. *Apurba Krishna Roy* (43) and need not be re-examined here. They are distinguishable, as the plaintiffs here had no title at all at the date of the institution of the suit. We hold accordingly that the District Judge has correctly found that Ramsundar Saha had no enforceable title at the date of the commencement of his suits, which must be deemed to have been rightly dismissed. The inference follows that the title to the land in dispute is still vested in the District Board, and, we must, consequently, examine the rights of Ramkumar Saha against that body, which form the subject of enquiry in his suit.

There is no controversy upon one fundamental point, namely, that after the land in dispute had become vested in the District Board, they abandoned the project to excavate a tank and obtained the sanction of the Local Government to re-transfer the land to the original owner. The question is, whether there is a valid contract for such transfer enforceable at the instance of Ramkumar Saha against the District Board. It cannot be disputed that there was an offer by the District Board to Ramkumar Saha on the 31st August, 1898, to re-convey the land to him upon payment of Rs. 25 as actual expenses of acquisition, and that the offer was accepted by him when he made the requisite deposit on the 6th September, 1898. This plainly constituted an enforceable contract. R. 102 of the Statutory Rules provides that every contract made by or on behalf of a Board in respect of a sum or involving a value exceeding Rs. 50 shall be in writing and shall be signed by the Chairman or Vice-Chairman of the Board. As the contract in this case was for re-transfer of the land for Rs. 25, neither R. 102 nor R. 103, which apply respectively to contracts in excess of sums of Rs. 50 and Rs. 500, has consequently any application; but we know that the offer of the 31st August, 1898 was, as a matter of fact, signed by the Vice-Chairman. It has not been proved that the Vice-Chairman had no authority to make this particular offer; no copy of the rules, if any, framed by the District Board under S. 32(*e*) of the Bengal Local Self-Government Act as to the powers to be exercised by the Chairman or Vice-Chairman, has been produced. We must assume that the Vice Chairman was competent to make the offer, specially, as his act has never been specifically repudiated in these proceedings. The document whereby the original offer was made, is apparently not in existence, and the draft copy kept in the office has been produced; it is consequently impossible to say, whether the original bore the seal of the District Board; but, if a seal is necessary, it is to be presumed, as Lord Denman says in *Doe* d. *Pennington* v. *Taniere* (44), against the Corporation that everything has been done that was necessary to make it a binding contract upon both parties. The Statutory Rules, however, do not expressly require that a contract of this description should be sealed. The omission to affix the seal would not, therefore, affect the validity of the contract. The strict rule of the ancient Common Law, no doubt, was that a Corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date and where a Corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation: 6 Vin. Abr. 267, 1 Wms. Saund. 615, 616; 1 Blackstone Com. 475; *Lawford* v. *Billericay Rural Council* (45); *Douglass* v. *Rhyl Urban Council* (46); *Melbourne Banking Corporation* v. *Brougham* (47); *Bank of Columbia* v. *Patteson* (48). This is borne out by the statement of Fry in his classical treatise on Specific Performance of Contracts, 1911, S. 648: "it appears to be clear that such part performance as will prevent an ordinary defendant from setting up the defence of the Statute of Frauds, will prevent the defendant Company from setting up

(43) (1911) 11 I. C. 187.

(44) (1848) 12 Q. B. 998.
(45) (1903) 1 K. B. 772.
(46) (1913) 2 Ch. 407.
(47) (1878) 4 A. C. 156.
(48) (1813) 7 Cranch 299.

either that defence or a defence grounded on the absence of the corporate seal or of the statutory formalities in accordance with which the Company may be enabled to contract. This was clearly laid down in the case of *Wilson* v. *West Hartlepool Harbour & Railway Company* (49) and there are other authorities leading to the same conclusion." Reference is then made to *Marshall* v. *Queen-borough Corporation* (50), *Maxwell* v. *Dulwich College* (51) mentioned in *Carter* v. *Ely (Dean)* (52), *London & Birmingham Railway Company* v. *Winter* (53), *Earl of Lindsey* v. *Great Northern Railway Company* (54), *Crook* v. *Corporation of Seaford* (55) and *Mayor of Drogheda* v. *Holmes* (56). Amongst more recent decisions, reference may usefully be made to the judgment of Neville, J., in *Howe* v. *Kingsbury Urban Council* (57), which shows that the exception based upon the doctrine of part performance cannot be applied where, as in *Frend* v. *Dennett* (21) and in *Young* v. *Mayor of Leamington Corporation* (34), the contract is, by Statute, positively required to be under seal: to hold otherwise would in effect be, as Lindley, L. J., said in *Young* v. *Corporation of Leamington* (58) to repeal the Act of Parliament and to deprive the ratepayers of that protection which Parliament intended to secure for them. In the case before us, however, the statutory rules do not render a seal necessary for the validity of this class of contracts, and the doctrine of part performance may well be applied; the District Board have had the benefit of the money paid by Ramkumar Saha and have allowed him to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract. It is worthy of note that the contract in this case is not *ultra vires* in the sense that it is beyond the scope of the authority of the District Board as a corporate body under any circumstances; such contract is not affected by the class of decisions, whereof *Ashbury Railway Carriage and Iron Company* v. *Riche* (32) may be taken as the type. We hold accordingly that there was an enforceable contract on the 6th September, 1898.

Two questions next require consideration, namely, *first*, has there been an implied rescission of this contract by a substituted agreement, and, *secondly*, has there been an implied rescission of the contract by abandonment. As regards the *first* point, we have to bear in mind that, subsequent to the agreement of the 6th September, 1898, an offer was made to Ramkumar Saha by the Collector on behalf of the District Board on the 27th November, 1900 to re-transfer the entire land to him (inclusive of the land acquired from him as also from others), if he would make the required deposit. He may be deemed to have accepted this offer on the 4th December, 1900, when he paid into the Treasury the amount demanded. What, then, was the legal effect of this transaction; did it amount to an implied rescission of the original agreement by a substituted agreement? The answer must be in the negative, first, because the second agreement was only more comprehensive than, but in no way inconsistent with, the first agreement, and, secondly, because, the second agreement was inoperative in law.

As regards the *first* point, it is well settled that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter, the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former that they cannot stand together: *Gilbert* v. *Hall* (59). The true principle is that one contract is rescinded by another between the same parties, when the latter is inconsistent with, and renders impossible the performance of, the former; but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless and until it is performed: *Hunt* v. *South Eastern Railway Company* (60), *Dodd* v. *Churton* (61), *Patmore* v. *Colburn* (62) and *Thornhill* v. *Neats* (63). The same view has been adopted in the Courts of the

(49) (1864) 34 Beav. 187.
(50) (1823) 1 Sim. & St. 520.
(51) (1783) 4 L. J. Ch. 138.
(52) (1853) 7 Sim. 211.
(53) (1840) Cr. & Ph. 57.
(54) (1853) 10 Hare. 664.
(55) (1870) 10 Eq. 678.
(56) (1855) 5 H. L. C. 460.
(57) (1912) 2 Ch. 452.
(58) (1882) 8 Q. B. D. 579.

(59) (1831) 1 L. J. Ch. 15.
(60) (1875) 45 L. J. C. P. 87.
(61) (1897) 1 Q. B. 562.
(62) (1834) 1 Cr. M. & R. 65.
(63) (1860) 18 C. B. (N. S.) 831.

United States: *Drown* v. *Forrest* (64), *Rhoades* v. *Chesapeake Railway Company* (65) and *McDaniels* v. *Robinson* (66). It is further well settled that where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of effecting their rights in respect to the former transaction. As observed by Willes, J., in *Noble* v. *Ward* (67), this is in accordance with a series of cases which will be found referred to in the second of the Agreement cases, *Doe* d *Biddulph* v. *Pool* (68). A similar view was taken in *Britt* v. *Ayllet* (69). In the case before us, the second agreement was inoperative in law, as it contravened the provisions of R. 103 of the Statutory Rules previously mentioned. We cannot, consequently, hold that the original agreement of the 31st August, 1898 was, by implication, rescinded by the subsequent agreement of the 4th December, 1900.

As regards the *second* point, we have to consider whether the agreement of the 6th September, 1898 was impliedly rescinded by abandonment, when Ramkumar Saha applied to the District Board, on the 24th April, 1904, 9th June, 1907 and 12th August, 1907, for return of the sum previously paid by him; for, there is no dispute that where one party, by acts and conduct, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. The rule on this subject was formulated by Lord Coleridge, C. J., in *Freeth* v. *Burr* (70): "Where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which, I think, the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, namely, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." This exposition has been twice affirmed by the House of Lords. In *Mersey Steel & Iron Company* v. *Naylor Benzon & Company* (71) Selborne, L. C., said: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." In the same case, Lord Blackburn added: "Where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'if you go on and perform your side of the contract, I will not perform mine,' that in effect amounts to saying, 'I will not perform the contract.'" To the same effect is the observation of Lord Collins in *General Bill Posting Company* v. *Atkinson* (72). "the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." As renunciation is thus based on an absolute abandonment of the contract, it follows, as Bowen. L. J., said in *Boston Deep Sea Fishing Company* v. *Ansell* (73), that a rescission of the contract implies that you relegate the parties to the original position they were in before the contract was made; that cannot be where half the contract has been performed. It is also well settled that the Court insists upon clear and precise evidence of a mutual intention to determine and abandon the contract: *Robinson* v. *Page* (74) and *Buckhouse* v. *Crossby* (75). Sugden, L. C., said in *Carolan* v. *Brabazon* (76): "The Court requires as clear evidence of the waiver as of the existence of the contract itself; and will not act upon less." To the same effect is his

(64) (1891) 63 Vermont 557.
(65) (1901) 49 W. Va. 494.
(66) (1854) 26 Vermount 316.
(67) (1867) 4 H. & C. 149.
(68) (1848) 11 Q. B. 713.
(69) (1850) 11 Arkanasa 475.
(70) (1874) 9 C. P. 208.

(71) (1884) 9 App. Cas. 434.
(72) (1909) App. Cas. 118.
(73) (1881) 39 Ch. D. 339.
(74) (1826) 3 Russel 114.
(75) (1737) 2 Eq Cases Abr. 32.
(76) (1846) 3 J. & L. 200.

observation in *Moore* v. *Crofton* (77). Smith, M. R., in *Clifford* v. *Kelly* (78) and in *Carton* v. *Bury* (79) quotes with approval the statement of Lord St. Leonards in his celebrated work on Vendors and Purchasers (1862), Chapter 4, S. 9, paragraph 3, page 168: "An abandonment of the whole agreement, clearly made out (for the Court will look at the evidence with great jealousy), is a good defence in equity:" *Brophy* v. *Connolly* (80), *Chambers* v. *Betty* (81), *Homan* v. *Skelton* (82), *Chubb* v. *Fuller* (83), *Lloyd* v. *Collett* (84), *Reynolds* v. *Nelson* (85), *Garrett* v. *Besborough* (86), and *Cubitt* v. *Blake* (87) and *Earl of Rosse* v. *Sterling* (88). Now let us examine the relative situation of the parties in the light of these principles. The applications by the plaintiff for return of his money do not state explicitly that he wished to rescind the contract. His conduct, indeed, was inconsistent with any such possible implication; he did not offer to quit possession of the land on receipt of the money. In fact, if he rescinded the contract and gave up the land, he would be entitled not only to a return of his money, but also to compensation assessed under the Land Acquisition Act. The Chairman, when he recorded the order for return of the money, no doubt, noted that if the plaintiff took back the money, he might find himself estopped in his attempt to enforce the contract, not, indeed, the earlier contract, but the later agreement, which formed the basis of the unexecuted draft conveyance; in any event, his remarks show that he, at any rate, thought that there was a subsisting contract between Ramkumar Saha and the District Board. But whatever the result might have been if the plaintiff had actually received back his money, the incontestable fact remains that the amount has not yet been paid to him. The order of the Chairman was never communicated to him; the money has never been tendered, much less actually paid, to him. The District Board have never sought to obtain possession of the land from him, as they would unquestionably be entitled to do on a rescission of the contract. The plain truth is that whatever may have been recorded on paper, both parties have conducted themselves as if there had been no rescission; they have not been relegated to the original position they occupied before the contract was made. Their conduct has been inconsistent with the theory of rescission, and when, for the first time, more than a year after the order for refund had been recorded by the Chairman, the District Board attempted to sell the land as if they were emancipated from continued liability under the contract, the plaintiff forthwith protested and relied upon the contract, and there is no room for doubt that whatever might have been said, nothing had been done, up to that stage, on either side, on the hypothesis that the contract had been abandoned. The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract; but where, as in *Whalen* v. *Stuart* (89), such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later seek specific performance, for, as has been said, a non-existent contract cannot be specifically enforced. We hold accordingly that the conduct of the parties does not show that the contract was rescinded, and it has not been urged that, apart from this, the conduct of the plaintiff has been such that, though it does not amount to rescission, it still disentitles him from insistence on specific performance, as was held in *Price* v. *Assheton* (90) and *Price* v. *Dyer* (91). The conclusion follows that, at the date of the institution of this suit, there was a valid contract specifically enforceable by the plaintiff against the District Board.

No question of limitation obviously arises under Article 113 of the Schedule to the Indian Limitation Act, as the plaintiff had notice, for the first time, on the 22nd February, 1909, that the

(77) (1846) 3 J. & L. 438.
(78) (1858) 7 Ir. Ch. Rep. 333.
(79) (1860) 10 Ir. Ch. Rep. 387.
(80) (1857) 7 Ir. Ch. Rep. 173.
(81) (1815) Beatty 488.
(82) (1860) 11 Ir. Ch. Rep. 75.
(83) (1858) 4 Jur. (N. S.) 153.
(84) (1793) 4 Brown. C. C. 469.
(85) (1821) 6 Madd. 290.
(86) (1839) 2 Dr. & Wall 441.
(87) (1854) 19 Beav. 454.
(88) (1816) 4 Dow. 442=3 E. R. 1221.
(89) (1909) 194 N. Y. 495.
(90) (1834) 1 Y. & C. Exch. 82.
(91) (1810) 17 Ves. 356.

performance was refused, and the suit was instituted within three years from that date.

The question *next* arises, whether the plaintiff is entitled to the assistance of the Court in any other manner. The District Judge has made in his favour a conditional decree for recovery of Rs. 992-11-1 from the District Board. In the view we take of the right of the plaintiff to enforce specific performance of the contract of the 6th September, 1898, it is plain that this decree must be modified. The plaintiff is not entitled to a return of the sum of Rs. 25 paid on the 6th September, 1898 but he is entitled to a return of the sum of Rs. 957-11-1 paid on the 4th December, 1900, when he accepted the second offer. The second agreement, as we have already seen, is not enforceable and never superseded the original contract. Consequently, the District Board are not entitled to retain the money paid by the plaintiff thereunder. It cannot be disputed that where a Corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation: *Rankin* v. *Emigh* (92). This is good sense and based on sound principle. The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the Corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract; *Central Transport Company* v. *Pullman Palace Car Company* (93). As Baggally, L. J., said in *Chapleo* v. *Brunswick Building Society* (94), if the Company has received the benefit of the payment, if, for instance, that amount has found its way to the credit of its banking account, the plaintiff might have been enabled to establish a claim against the Company to the extent of the benefit derived by it from the transaction: *Lawford* v. *Billericay Rural Council* (45) and *Douglas* v. *Rhyl Urban District Council* (46). In the case before us, the plaintiff is clearly entitled to a return of Rs. 957-11-1 together with interest thereon from the date of deposit to the date of realisation.

One *other* question requires consideration, namely, whether the plaintiff is entitled to relief against the District Board by way of cross-objections to the decree in an appeal preferred by the other defendants. It need not be disputed that, as an ordinary rule, a respondent in an appeal is not entitled to urge cross-objections except as against the appellant: *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy* (95), *Shabiuddin* v. *Deomoorat Koer* (96), *Kallu* v. *Manni* (97), *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (98), *Nursey Virji* v. *Alfred H. Harrison* (99) and *Abdul Ghani* v. *Muhammad Fasih* (100). But R. 22 (3) of O. 41 of the Code of 1908 has materially altered the pre-existing law by substitution of the words "party who may be affected by such objection" for the word "appellant" contained in S. 561 (3) of the Code of 1882. It may further be observed that R. 33 of O. 41 has conferred wide discretionary powers on the Court of Appeal to alter the decree of the Court below as the case may require. In the case before us, the Saha defendants, who are appellants in this Court, have attacked even the conditional decree made by the District Judge in favour of the plaintiff; the appeal, in fact, reopens the whole matter in controversy and calls upon the Court to re-examine the questions in dispute from all possible points of view. That appeal has been supported by the District Board respondent. The plaintiff-respondent has been constrained, with a view to ensure his safety, to take cross-objections, which, if successful, would make his title unassailable. These cross-objections, no doubt, primarily touch the co-respondent, but that co-respondent has throughout supported the defendants-appellants against the plaintiff-respondent. No question of surprise arises, as every party

(92) (1910) 218 U. S. 27.
(93) (1890) 139 U. S. 24.
(94) (1881) 6 Q. B. D. 696.

(95) (1899) 26 Cal. 114.
(96) (1903) 30 Cal. 655.
(97) (1901) 23 All. 93
(98) 13 I. C. 653.
(99) (1913) 37 Bom. 511=21 I. C. 7
(100) (1906) 28 All. 95.

has been given full notice and opportunity to place his own case before the Court in its true bearing. The circumstances are thus obviously of a very special character; the District Board has decided to part with the land acquired for a purpose which has fallen through. The substantial question is, whether relief should be granted in respect of that land to the original owner or to the subsequent purchaser. If we allow the cross-appeal, though relief is granted in form against the District Board, the ultimate result is that the title of the original owner is secured as against the subsequent purchaser. In these peculiar circumstances, it is in no sense unjust that effect should be given to the cross-objections. There is no answer to the cross-objections on the merits, while the appeal itself is, as we have seen, groundless. The cross-objections must, consequently, succeed, while the appeal cannot be sustained.

We may add that even if we had declined to entertain the cross-objections, and had merely dismissed the appeal, the practical result would have been identical with what will be the consequence of our decree. The plaintiff Ramkumar Saha has been in undisturbed possession of the land all along, notwithstanding the acquisition. His possession became adverse to the Board on the 21st February, 1898: consequently, he acquired an indefeasible title on the 21st February, 1910. If the conditional decree, made by the District Judge, be maintained, the plaintiff need never take back the deposit, but he will be entitled to receive from the Collector the compensation awarded under the Land Acquisition Act. The plaintiff thus achieves the end he has in view, namely, retention of possession of the land; that possession can no longer be disturbed by the District Board. The Counsel for the District Board fully appreciated the difficulties of the situation; he complained that the decree of the District Judge is ineffectual for his purposes, as it does not entitle the District Board to recover possession of the land by execution and on payment of the decretal amount to the plaintiff. The obvious answer is that the decree cannot be modified, in the way suggested, in favour of the District Board; the Board are not the plaintiffs in suit, and have never chosen to appeal against the decree made by either Court.

We have *finally* to consider the question of costs. In the three appeals, in which the decree of the District Judge is affirmed, the appellants will pay the costs of the respondent in this Court. In the other appeal, in which the appeal is dismissed and the cross-objections allowed, the appellants will also pay the costs of the plaintiff-respondent. But the costs of the plaintiff, both in the primary Court and in the Court of the District Judge, should, in our opinion, be paid by the District Board: *Thornhill* v. *Weeks* (101). The history of this protracted litigation proves conclusively that the whole difficulty has been created by the utterly unbusinesslike manner in which the transactions reviewed by us have been carried on ever since 1898 by the District Board of Chittagong. There is no exaggeration whatever in the quaint observation, embodied in one of the office notes in the record, that this matter "remained to be decided from a long time owing to different opinions of different officers." One can only hope that the long delay and uncertainty, which have characterised the proceedings of the Board in this particular matter, furnish but a solitary instance of the way in which business is transacted by a Corporation created for purposes of public utility. The net result to the plaintiff has been that though his land was acquired under very doubtful circumstances in 1898; he has had to wait for more than 18 years to get back his property, notwithstanding that he has, in the interval, responded promptly to every demand of the District Board.

The result of our decision may now be summarised. Appeals Nos. 1979, 1980 and 1981 of 1912 are dismissed with costs Appeal No. 1243 is dismissed but the cross-objections therein are allowed and the decree of the District Judge discharged. In lieu thereof, we direct that the suit (No. 435 of 1909), out of which that appeal arises, do stand decreed in the manner following. The plaintiff Ramkumar Saha is awarded a decree for specific performance of the contract of sale of the land mentioned in the schedule to the plaint, as against the

(101) (1915) 1 Ch. 106.

District Board of Chittagong : the Board is directed to execute a conveyance in his favour in accordance with law. On failure of the Board to execute the conveyance, the plaintiff will be at liberty to proceed in accordance with O. 21 Rr. 32 and 34 of the Code. The possession of the plaintiff will be confirmed, and should it transpire that he has been dispossessed, he will be restored to possession in execution of the decree of this Court, as explained in *Madan Mohan Singh* v. *Gaja Prasad Singh* (102); *Fateh Chand* v. *Narsingh Das* (103). The plaintiff will, in addition, have a decree, against the District Board, for Rs. 957-11-1 together with interest thereon at 6 per cent. per annum from 4th December, 1900 to the date of realisation. The plaintiff will have his costs in the Courts of the Subordinate Judge and the District Judge from the District Board, and his costs in this Court from the other defendants. A self-contained decree, which will set out the various sums in detail, will be drawn up in this Court.

It has been brought to our notice that the District Board have not been correctly described in these proceedings in accordance with S. 20 of Bengal Act III of 1885 B. C. The cause title of the plaint will accordingly be amended and the expression "District Board of Chittagong" will be substituted for "The Chairman of the District Board, Chittagong."

V.B./R.K.

Appeals dismissed ; Cross-objection allowed.

(102) (1911) 11 I. C. 228.
(103) (1912) 16 I. C. 988.

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JENKINS C. J. AND TEUNON, J.

Sarojbasini Devi—Petitioner.

v.

Sripati Charan Chowdhury and *others*—Opposite Party.

Criminal Revn. Petn. No. 1154 of 1914, decided on 9th September, 1914.

Criminal P. C. (5 of 1898), Ss. 133 and 137 (1)—Conditional order passed—Opposite party showed cause—Magistrate must take evidence and not drop proceedings—What is proper order stated.

Where a Magistrate made a conditional order under S. 133 of the Code of Criminal Procedure to remove any unlawful obstruction from a way used by the public and the opposite party showed cause.

Held, that the provisions of S. 137 (1) must be observed and that the Magistrate should take evidence in the matter as in a summons case and should not at once drop the proceedings. [P. 151, C. 2 & P. 152, C. 1.]

In such a case it is open to the Magistrate to consider, when that evidence is taken, whether there is a complete answer to the case against the opposite party or whether this is not a proper case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide. [P. 152, C. 1.]

Dasarathi Sanyal and *Debendra Nath Bhattacharjee*—for Petitioner.

Atulya Charan Bose and *Dwijendra Nath Mukherjee*—for Opposite Party.

Jenkins, C.J.—The proceedings which are called in question by the Rule now under consideration, arise out of action taken by the Magistrate under Chapter X of the Code of Criminal Procedure. S. 133 provides that whenever a Magistrate, of the qualifications there described, considers, on receiving a Police report or other information and on taking such evidence, if any, as he thinks fit, that any unlawful obstruction should be removed from any way used by the public, he may make a conditional order of the nature described in the section and may call upon the person affected to appear before himself and move to have the order set aside or modified. Here it appeared to the Magistrate that there was a public nuisance coming within the terms of that section and the nature of the nuisance was an unlawful obstruction of a way used by the public. He accordingly made a conditional order. The person affected undoubtedly appeared and showed cause, but notwithstanding that the Magistrate has allowed the proceedings to drop, without following the procedure prescribed by Section 137, Clause (1). It is this omission on the part of the Magistrate that has led to the Rule being granted calling upon the opposite party to show cause why the order complained of should not be set aside and such other and further order made as to this Court might seem fit.

We have been assured that a large number of cases appear to sanction what the Magistrate has done, though they do not go the length that he has. But whatever may have been

decided, we cannot escape from the words of the Legislature until we are told by some higher authorities that we must. The Legislature in the event that has happened has directed that the Magistrate shall take evidence in the matter as in a summons case, and in so far as he has failed to do that, he has not performed the duty cast upon him by law. It appears to me that the Rule is rightly conceived.

It is said that it is open to the Magistrate to consider whether the claim by the opposite party in derogation of this asserted public right affords an answer or not. But in deciding that S. 137 must be followed ; we in no way deprive the opposite party of his right to show that the terms of S. 133 do not apply, or say that the Court should not apply them, in the particular circumstances of the case, either by reason of real doubt as to the applicability of the section or otherwise. All we have to say is that the Magistrate having taken such measures as makes the provisions of S. 137 applicable, those provisions must be observed.

Therefore, we must make the Rule absolute and direct the case to go back to the Magistrate in order that he shall take evidence in the matter as in a summons case in the manner provided by S. 137. It will be open to him, as I have indicated, to consider, when that evidence is taken, whether there is a complete answer to the case against the opposite party or whether this is not a proper case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide. But in saying that I do not wish to encourage the idea that the Magistrate should endeavour to escape from dealing with matters which legitimately fall within his jurisdiction.

There is one further matter that has been pressed upon us. It is that these proceedings are in some measure barred by the doctrine of *res judicata*. We are not satisfied that there is any room on the facts of this case for the application of this doctrine.

Teunon, J.—I agree.

V.B./R.K.

Rule made absolute.

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MOOKERJEE AND ROE, JJ.

Kalim Sheikh—Defendant—Appellant.

v.

Mocham Mandal—Plaintiff—Respondent.

Appeal Nos. 3550 and 4140 of 1913, decided on 27th May, 1915, from the Appellate Decrees of Sub-Judge, Mymensingh, dated 5th June, 1913.

Landlord and Tenant—Occupancy—Forfeiture—Sale of portion of occupancy in execution of money-decree does not cause forfeiture no settlement can be made of same portion unless there is abandonment or forfeiture—Held also Art. 11, Limitation Act applies as plaintiff under settlement not having brought suit within one year of an adverse order against him under O. 21, R. 90, Civil P. C.

A sale, in execution of a decree for money against the tenant, of a portion of a non-transferable occupancy holding does not cause a forfeiture of the tenancy, but so far as the landlord is concerned the tenancy continues unaffected, so that he is entitled to look for payment of rent to his recorded tenant.

[P. 153, C. 1 & 2.]

Where after the sale of a portion of a non-transferable occupancy holding in execution of a money-decree against the tenant, who took a sub-lease of a portion of the land sold from the auction-purchaser, the plaintiff getting a settlement of the holding from the landlord sued to eject the auction-purchaser as a trespasser and obtained a decree against him ; but when he attempted to execute the decree the defendant, the representative of the original tenant, who was still in occupation, opposed, with the result that a proceeding under R. 100, of O. 21, Civil Procedure Code, which was thereupon instituted, terminated in favour of the defendant on the 25th May, 1909, whereupon the plaintiff instituted a suit on the 20th September, 1911 to recover rent from the defendant as his under-*raiyat*.

Held, that there was no relationship of landlord and tenant between the plaintiff and the defendant and the claim for rent was bound to fail and that the landlord was not competent to create a valid occupancy holding in favour of the plaintiff by the settlement, as there was no abandonment by the original tenant nor forfeiture of original tenancy.

[P. 153, C. 2 & P. 154, C. 1.]

Held, also (*semble*), that the plaintiff's suit, not having been brought within one year from the order in the proceeding under R. 100 of O. 21, Civil Procedure Code, was barred by limitation under Article 11 of the Limitation Act, as the title set up by the defendant in that proceeding must be deemed to have been the right of an occupancy *raiyat* which the plaintiff claimed in the suit and that the defendant was not estopped to question the alleged title of the plaintiff under the settlement from the landlord as he (the plaintiff) did not claim through the

auction-purchaser from whom the defendant got his sub-lease. [P. 154, C. 1.]

Mahendra Nath Roy—for Appellant.

Kali Kinker Chuckerbutty and *Gopal Chunder Chuckerbutty*—for Respondent.

Judgment.—This is an appeal by the defendant in a suit for rent. The land in dispute originally belonged to one Golak Sheikh. In execution of a decree for money obtained against him, one Kissen Singh purchased a portion of the holding on the 23rd March, 1904. Thereupon the representative of the original tenant took sub-leases from the purchaser in respect of a portion only of the land acquired by him, under two leases dated the 14th and 19th February, 1905. On the 7th July, 1906, the plaintiff took a settlement from the superior landlord of the disputed land which constituted the occupancy holding of Golak Sheikh. He subsequently sued to eject Kissen Singh as a trespasser and obtained a decree against him on the 14th February, 1908. When he attempted to execute this decree, he was opposed by the present defendant, the representative of the original tenant, who was still in occupation of the land. The result was a proceeding under O. 21, R. 100 of of the Civil Procedure Code, which terminated in favour of the objector on the 25th May, 1909. This suit was instituted on the 20th September 1911 to enable the plaintiff to recover rent from the defendant as his under-*raiyat*. The defendant resists the claim on the ground that the plaintiff has acquired no valid title under his settlement from the superior landlord and that, in the events which have happened, the occupancy holding still belongs to him as the representative of the original tenant. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision. On the present appeal the decree of the Subordinate Judge has been assailed on two grounds; namely, *first*, that the plaintiff has acquired no valid title under his settlement from the superior landlord; and *secondly*, that the suit is barred by limitation under Article 11 of the Schedule to the Indian Limitation Act.

As regards the *first* question, it is clear that the plaintiff cannot possibly succeed. The effect of the purchase, by Kissen Singh, of a portion of the occupancy holding of Golak Sheikh did not cause a forfeiture of the tenancy. This is settled by a long series of decisions of this Court [*Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (1), *Durga Prasad Sen* v. *Doula Gazee* (2) and *Sheik Gozoffur Hossien* v. *E. Dablish* (3)] and is now finally confirmed by a Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (4). Notwithstanding the purchase of a portion of the holding by Kissen Singh, the tenancy, so far as the superior landlord was concerned, continued unaffected, and he was entitled to look for payment of rent to his recorded tenant. There was also no abandonment in fact, because representative of the original tenant has continued in actual occupation of the land. This is proved conclusively by the circumstance that when the plaintiff endeavoured to execute the decree for ejectment against Kissen Singh, he was opposed and opposed successfully by such representative. It follows that as the original tenancy, still continued, the landlord was not competent to create a valid occupancy holding in favour of the plaintiff by the settlement of the 7th July, 1906. It has been ingeniously argued, however, that the defendant is estopped to question the title of the plaintiff. The argument is that the defendant, after he had, on the 14th and 19th February, 1905 accepted leases from Kissen Singh, could not have contested the title of the latter; consequently he cannot question the title of the plaintiff. This argument is manifestly fallacious; for let it be conceded that the defendant could not have contested the title of Kissen Singh; but how does that avail the plaintiff? The plaintiff does not claim through Kissen Singh. He has, on the other hand, successfully sued Kissen Singh as a trespasser, he has obtained a decree for ejectment against him and has actually removed him from the land. He cannot now turn round and contend, that the same estoppel which might have been operative against defendant in favour of Kissen Singh operates in his own favour, though he does not acknowledge the title of Kissen Singh. We are of opinion that the defendant was

(1) (1893) 20 Cal. 590.
(2) (1897) 1 C. W. N. 160.
(3) (1897) 1 C. W. N. 162.
(4) (1915) 42 Cal. 172=27 I. C. 61 (F. B.).

competent to question, as he has successfully assailed, the alleged title of the plaintiff under the settlement from the landlord. Consequently there is no relationship of landlord and tenant between the plaintiff and the defendant, and the claim for rent is bound to fail.

In this view, it is not necessary to discuss the *second* question, namely, whether the suit is barred under Article 11 of the Schedule to the Indian Limitation Act. But it may be observed that the title which the defendant sets up is that of an occupancy *raiyat* and the only title which the plaintiff claims is also that of an occupancy *raiyat*; consequently this must be deemed to have been the right set up in the proceeding under R. 100 of O. 21 of the Code; and the present suit for cancellation of that order should have been brought within one year from its date: in this view, the suit is barred by limitation.

The true position is that if the plaintiff fails on the merits, his suit is also barred under Article 11 of the Schedule to the Limitation Act; if he succeeds on the merits, no question of limitation arises.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with costs in all the Courts.

It is conceded that this judgment will govern the other appeal (Second Appeal No. 4140 of 1913), which is also allowed with costs.

V.B./R.K.

Appeals decreed.

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HOLMWOOD AND CHAPMAN, JJ.

Kala Gasi and *others* —Defendants— Appellants.

v.

Maheswar Chaudhuri — Plaintiff — Respondent.

Second Appeal No. 2970 of 1911, decided on 8th April, 1914, against the decree of Sub-Judge, Tippreah, dated 17th July, 1911.

(a) Civil P C. (5 of 1908), S. 11—*Gomastah* **obtained lands and leased them out—In rent suit by** *gomastah* **his title as landlord was denied and payments were contended to be made to him on behalf of landlord—Contention was upheld—In suit for ejectment, decision in rent suit did not affect.**

The plaintiff, a *gomastah* of the landlord of a village obtained certain lands from the landlord and let them out to the defendant. In a previous rent suit brought by the plaintiff against the defendant, the defendant had pleaded that he had always paid his rent to the plaintiff for the benefit of the landlord and that the plaintiff was nothing more than a *gomastah*, and he was a *raiyat* holding directly under the landlord. The rent suit was decided in favour of the defendant, and the plaintiff then sued that in establishment of his title as *raiyat* he could eject the defendant without notice as a trespasser:

Held, that the decision in the rent suit did not operate as *res judicata* on the question of title of the plaintiff. [P. 155, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), S. 49—For ejectment of tenant, notice under S. 49 is essential.

That the defendant could not be evicted without notice to quit as required by S. 49 of the Bengal Tenancy Act 1885. 20 Cal. 101, foll; 8 I. C. 660, dist. [P. 155, C. 1.]

Moulvi Nuruddin Ahmed and *Rajendra Prosad*—for Appellant.

Tarakishore Chaudhuri and *Bepin Chandra Mullick*—for Respondent.

Judgment.—This is a second appeal in a suit in which the plaintiff sued for *khas* possession of some land mentioned in schedule II of his plaint.

It appears that the plaintiff was the *gomastah* of the landlord of the village and that he obtained certain lands from the landlord and let them out to the defendant. In a previous rent suit brought by the plaintiff against the defendant, the defendant pleaded that he always paid his rent to the plaintiff for the benefit of the landlord and that the plaintiff was nothing more than a *gomastah*, and he was a *raiyat* holding directly under the landlord. That rent suit was decided in his favour, and the plaintiff now sues that in establishment of his title as *raiyat* he can eject the defendant without notice as trespasser.

The first point that was taken by the defendant was that the case is barred by limitation, inasmuch as the plaintiff had been unable to prove that he was in actual possession within twelve years. The first Court found that there was such limitation. The lower Appellate Court has clearly found that within four or five years the plaintiff was in possession as *raiyat* of the land and is the defendant's landlord, and, therefore, there was nc

limitation. This decision, we think, cannot be impugned.

The next question raised was the question of *res judicata*. It was urged on behalf of the appellant that the decision in the rent suit operated as *res judicata*, so as to bar the plaintiff from putting forward his title as superior landlord to the defendant. We think that the case of *Sahadeb Dhali* v. *Ram Rudra Haldar* (1) entirely disposes of this contention.

But then there comes the third question, whether the plaintiff can eject the defendant without notice. It seems to us that as regards this question he is on the horns of a dilemma. If he pleads denial of his title in the rent suit and the finding against him in that suit did not operate as *res judicata*, then he has to allege, as he does allege in his plaint, that the defendant is still his under-*raiyat* and that he is still a *raiyat*. Now if he alleges that, then it seems on the authority of the rulings of this Court [we may refer to the case cited by the learned Subordinate Judge, *Dhora Kairi* v. *Ram Jewan Kairi Mahton* (2)] that where it is found by the lower Appellate Court that the defendant was an under-*raiyat* of the plaintiff, he could not be evicted from his holding except after notice to quit, and this applies to all cases to which the Bengal Tenancy Act applies. We are referred as against this decision to a decision in *Faiyaj Dhali* v. *Aftabuddin Sirdar* (3) and to a case reported as *Ekabbar Sheikh* v. *Hara Bewah* (4), where the case of *Dhora Kairi* v. *Ram Jewan Kairi Mahton* (2), to which we have just referred, is discussed and distinguished. We may say that in the same way as *Dhora Kairi's* case (2), is distinguished by the learned Chief Justice from the case that was before him, so we can distinguish *Ekabbar's* case (4). This case appears to us to fall within the rule in *Dhora Kairi's* case (2), and that rule has never been doubted. In the case in *Ekabbar Sheikh* v. *Hara Bewah* (4), there was no question of under *raiyati* or of notice, and it appears to us that if the plaintiff were to carry his plea of *res judicata* so far as to exclude the defendant's right to any notice, then he would be in grave jeopardy of himself falling within the law of *res judicata*, which we have just now held does not apply.

It, therefore, appears to us consonant with justice and with the true interpretation of law to hold that the plaintiff, having in this case pleaded that the defendant was an under-*raiyat* and the defendant not having denied tenancy in the land but having stated that he held it on a higher basis, he still remains on the finding of the lower Courts an under-*raiyat* and can only be ejected upon notice. For these reasons we decree the appeal and the plaintiff's suit must be dismissed without prejudice to any action that he may take under S. 49 of the Bengal Tenancy Act.

We make no order as to costs, as the plaintiff has lost his rent for a long time.

V.B/R.K.

Appeal allowed

(1) (1906) 10 C. W. N. 820.
(2) (1893) 20 Cal. 101.
(3) (1902) 6 C. W. N. 575.
(4) (1910) 8 I. C. 660.

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CHATTERJEE AND BEACHCROFT, JJ.

Kailas Chandra Aich and *another*—Defendants—Appellants.

v.

Romesh Chandra Sen and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 4247 of 1913, decided on 5th January, 1916, from the Appellate Decree of Sub-Judge, Faridpur, dated 18th September, 1913.

(a) Civil P. C. (5 of 1908), S. 100—Finding of abandonment arrived at on evidence on record cannot be challenged in second appeal.

A finding of a lower Appellate Court on the question of abandonment, arrived at on evidence on the record, is unassailable in second appeal. [P. 156, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), S. 87—Abandonment of non-transferable occupancy holding by sale—Lessee of landlord is entitled to ejectment decree.

When an occupancy *raiyat* sells his non-transferable holding and abandons it, the lessee of the landlord, to whom the landlord's right of re-entry has been transferred, is entitled to an ejectment decree, even though the purchaser of the holding executes a deed of release in favour of the *raiyat* and puts him in possession. [P. 156, C. 1.]

A. K. Fazlul Huq—for Appellants.

Gunada Charan Sen and *Prakash Chandra Mojumdar*—for Respondents.

D. Chatterjee, J.—The facts of this case are shortly stated as follows:—Defendants Nos. 4 and 5 were occupancy tenants

in respect of 10 *bighas* of land. Occupancy rights in that part of the country are not transferable by custom. Defendants Nos. 4 and 5 sold their occupancy rights to defendants Nos. 1 to 3 in 1910. Defendants Nos. 1 to 3 attempted to obtain recognition of the landlord but failed. Then on the 3rd February, 1912 the plaintiffs book a *miras-ijara* of the 10 *bighas* of land. The landlord stated that he had not been informed when the original tenants had sold their rights and that the purchaser had not taken any settlement from him. On the 23rd February, 1912, this suit was brought against the purchasers for ejectment on the ground that the holding had been abandoned by the origtnal tenants. Three days after that, that is on the 26th of February, 1912, there was a deed of release executed by the purchasers in favour of defendants Nos. 4 and 5 and defendants Nos. 4 and 5 were brought on the record as defendants in April 1912. The first Court gave a decree for a declaration that the plaintiff was entitled to rent from defendants Nos. 4 and 5 who were in possession under the release. The Court of Appeal below has set aside that decree and has given a decree for ejectment. The appeal before us is on the ground that upon the facts found there was no abandonment and, therefore, the decree for ejectment cannot be sustained. We think that this contention is not right. There was a sale and the learned Subordinate Judge has found that defendants Nos. 4 and 5 did not pay any rent after the transfer and refused to pay. He also found that there was an abandonment by defendants Nos. 4 and 5 of their holding. If there was an abandonment, then the landlord had a right to re-enter and such right has been transferred to the plaintiffs by the *miras-ijara*. The contention that the landlord did not contemplate a transfer of his right of reentry, does not appear to be supported by the document. It is further contended that the pendency of the negotiation with the landlord is evidence that the landlord did not treat the holding as abandoned. That, however, is negatived by the terms of the *miras-ijara* and I think that the finding of the learned Subordinate Judge on the question of abandonment, arrived at on evidence on the record, is one that cannot be assailed in second appeal.

The case seems, no doubt, to be a hard one for the original tenants, but they chose to make an out and out sale, refused to pay rent and went out of possession of the land until the vendees, finding it impossible to obtain recognition, rendered back the land to them.

In this view of the case the appeal is dismissed with costs.

Beachcroft, J.—I agree.

A strong appeal was made to our sympathy by the learned Vakil for the appellants. A bare recital of the facts would seem to suggest that his appeal was well-founded. But a reference to the deed of release and the written-statement, in which it was stated with the most engaging cynicism that the original transfer was made with the object of defeating the appellants' creditors, robs the appellants of any claim to our sympathy.

V.B./R.K.

Appeal dismissed.

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STEPHEN AND MULLICK, JJ.

Ganga Narain Singh and *others*—Defendants—Appellants.

v.

Shashi Bhusan Rai — Plaintiff and others—Defendants—Respondents.

First Appeals Nos. 219 and 241 of 1910, decided on 16th June, 1914, against the decree of Sub-Judge, Manbhum, dated 28th February, 1910.

(a) Grant—Mineral rights—Grant of rent free *brahmottar* of whole village does not convey mineral rights.

A grant of a rent-free *brahmottar* of the whole of a *mouza* made before the Permanent Settlement by the *zemindar* did not transfer any mining rights to the grantee. *Hari Narain Singh Deo Bahadur* v. *Sriram Chakravarti*, 37 Cal. 723, foll. [P. 159, C. 2 & P. 160, C. 2.]

(b) Evidence Act (1 of 1872), S. 114—On proof of *zemindar's* title he will be presumed to be owner of mineral, unless contrary shown.

On the title of the *zemindar* being established, he must be presumed to be the owner of the under-ground rights thereto appertaining, in the absence of evidence that he ever parted with them. Case-law discussed. [P. 160, C. 1.

Graham, Monmotha Nath Mukherjee, Kunja Behari Sen, Rash Behari Ghose, Lalit Mohan Ghose and *Karunanoy Ghose*—for Appellants.

S. P. Sinha, Bepin Behari Ghose, Satish Chandra Mookherjee and *Hem Chandra Mookerjee*—for Respondents.

Judgment.—The plaintiff brought this suit to have the *mourasi* rent-free *brahmottar* title of his lessors, defendant's Nos. 3 to 18, to the *mouza* Gobindpore established; and to have it declared that he has a right to mines in the *mouza* and that the first defendant has no such right. His case is that at sometime before the Permanent Settlement the *mouza* in question was in the *zemindary* of *Raja* Jaga Mohun Singh, the ancestor of defendant No. 2, who granted it as *brahmottar* to the ancestor of the Chakravarty defendants (Nos. 3 to 18) by a *pattah*, dated the 26th May, 1784 and on that being, lost, by a second *pattah*, dated the 10th December, 1790. On the 14th of June, and the 1st December, 1907, the plaintiffs took a settlement of the underground rights of the whole *mouza* from the Chakravartys, and commenced to exercise them by sinking a pit. In the following March the principal defendants opposed their doing so, and proceedings under S. 145, Criminal Procedure Code, were instituted, which led to the defendants being declared to be in possession. Hence this action.

The defendants generally deny the plaintiff's title, and set up one of their own. This is that on the 25th January, 1893, the second defendant made a settlement of the mining rights in the *mouza* to one Purna Chandra Dwan, who assigned them to the Kattras Jherriah Company who abandoned them in 1896. From that time till 1899, the Court of Wards, who had taken over the estate of defendant No. 2, tried to secure a lessee of the mineral rights, and eventually settled them with the first defendants on the 3rd October, 1899, who say that they have since then been in possession. They also plead that the plaintiff is barred by limitation, as they say that he was not in possession of the mines or minerals for more than 12 years before suit. The defendants raised a further point during the hearing that the plaintiff's lease of 1907 conveys nothing to him, as the Chakravartys had let the same property to Dr. Saise in 1896 and that lease was still outstanding.

The suit was decreed by the Subordinate Judge of Manbhum, and both the defendants have appealed against his decree. They have appealed separately; but the two appeals have been heard together, and we need not distinguish between them.

The points raised before us by the appellants are as follows:—

1. There is no evidence of a permanent *lakheraj brahmottar* grant made in favour of the plaintiff's ancestor;

2. If there was any such grant it comprised only cultivated and not waste or *danga* land;

3. Such a grant, whether made before or after the date of the Permanent Settlement, could not pass any mining rights;

4. The suit is barred by limitation as the defendant and his lessees had been in possession of the mines in the land for more than 12 years;

5. The suit must fail because there was a lease to Saise prior to that of the plaintiff, which was actually subsisting at the time of the institution of the suit.

The evidence of a permanent *lakheraj brahmottar* grant in favour of the plaintiff's ancestors rests in the first place on the *patta* put forward by the plaintiff. This is dated the 27th *Aughran* 1197=the 10th December, 1790, and contains a gift from the ancestor of defendant No. 2 to Lakshan Chakravarty of *mouza* Gobindpore as *brahmottar*. It also recites that the grantor had granted a *patta* to Bhagwat Chakravarty on the 15th *Jeyt* 1192=the 26th May, 1784, but that as it was lost he granted a second *patta*. The lower Court has disbelieved the authenticity of this document, and we are not prepared to accept it as authentic. The reasons for accepting it are that it is produced from proper custody; reference was made to it in the Settlement proceedings in 1871, in Registration proceedings in 1877, and in the proceedings under S. 145, Criminal Procedure Code, in 1908, that we have mentioned. The reasons for disbelieving it given by the lower Court are that the writing and paper do not appear to be so old as they purport to be, that it was not produced either in the proceedings under S. 145 or when this suit was brought. The plaintiff denied having seen it in his deposition in this suit, though he said the contrary in the criminal proceedings; the Judge disbelieves the evidence of Shashi Bhusan Chakravarthy, who speaks to its custody and eventual discovery, for reasons with

which we agree, and he gives good reasons for doubting the endorsements on the back of the document purporting to show that it was produced in the proceedings in 1871 and 1877. The defendant is not concerned to deny that there may have been a grant in 1784; but he suggests that as the terms of that grant were not such as would support the case now made by the plaintiff he has forged Exhibit 2 to take the place of the grant alleged to have been lost. For ourselves we can only say that the grant of 1790 has not been sufficiently well proved for us to be able to treat it as authentic.

The question then arises whether the plaintiff can make out a title in the Chakravartys, his grantors, apart from the discredited *patta*, and again we agree with the Judge who finds that the Chakravartys held the *mouza* under a rent-free *brahmottar* grant and not as a service tenure. We see no reason however, for holding that the grant was made either before or after the Permanent Settlement. The evidence afforded by the *mulki* papers of 1843 (Exhibit 1) where the Raja returns Bhagat Chakravarti as holding under a *brahmottar patta* of 1784, the *jammabandi* of 1854 (Exhibit B-2) where the manager of the Court of Wards shows Gobindpore as rent-free, the return of 1861 (Exhibits 14-13) where the Raja describes Gobindpore as *brahmottar*, the claim by the Chakravartys in 1871 (Exhibit 5) to hold the *mouza* in rent-free *brahmottar* with its recognition by Mr. Rowlitt (Exhibits 5 and 12), the admission in the road cess return of 1872 (Exhibit 19) that Gobindpore was *brahmottar*; even though it was made by a manager on behalf of the minor, largely outweigh any inference that can be drawn from the receipts (Exhibits B-30 to B-39) in which the Chakravartys are described as '*jimmas*,' while the application for the registration of the *mouza* as rent-free *brahmottar* and its rejection (Exhibit 7) do not, at least, tell against the defendants' contentions since it is not attempted to show that the land is free from payment of revenue, which it would have been for the application to have succeeded.

This brings us to the second point in the appellants' case, which is that the lands granted to the ancestors of the plaintiff's grantors were only the cultivated lands in the *mouza* and did not include the waste lands.

From Exhibit B-70, the general (*touzi*) register of revenue-paying lands in Manbhum, it appears that the area of Gobindpore, as it is now known, is 76 acres, which is about 220 *bighas*. Was the whole of this granted, in whatever manner, to the Chakravartys? The answer to this question depends in part on documents that we have already considered. Thus in the *mulki* papers of 1843 the area of the land referred to is stated to be approximately 54 *bighas*. The "remarks column" is provided to show "how many *bighas* of the said *mouza* or *patit* lands, how many *bighas* cultivated, whether inhabited or without habitation:" and it does show that "in this *mouza* there are 24 *bighas* of cultivated land, 30 *bighas* of *danga* land not inhabited." It also gives boundaries, which on the evidence of both parties, in the opinion of the lower Court, are boundaries of the entire *mouza*, and the correctness of this finding has not been disputed before us.

In 1861 the *thakbust* map was being prepared. The Raja made a return (Exhibit 13) "that the *mouza* is *brahmottar*," saying nothing of any distinction between the waste and the cultivated land. A deposition by Ram Kanai Chakravarty (Exhibit 17) seems to show that measurement was made of the *asli-mouza* and no other *tola* was included, and that the entire *mouza* was given to Bhagwat Chakravarty, the grantee in 1784. In settling the *thakbast* boundaries it seems (Exhibit 18) that the matter was left entirely to the Chakravarthys, and that the Raja contended himself with making the return, Exhibit 13, which we have already referred to. The *hadbust* map itself Exhibit 16) indicates the extent of the *mouza* as only 9 *bighas* 10 *cottahs*, and the boundaries do not seem to have any relation to those given in *mulki* papers. This does not fit in with the case made by either party and leads to the conclusion that the map is not to be relied on and measurement of whole *mouza* was made by Ram Krishna Mistri (Exhibit 12) in 1871 when he found that it contained 59 *bighas* in all. We agree, however, with the Subordinate Judge that, for the reasons he has given, there may have been waste lands outside the *mouza*. The

road-cess return of 1872 (Exhibit 19) made by the Tahsildar of the Court of Wards in 1872 (Exhibit 19) and subsequent returns made by the Chakravartys, are all made without any reference to the existence of waste lands which, if the law contained in Act IX of 1880 B. C., had been complied with, would have been an indication that no waste lands existed in the *mouza*. We find it difficult, however, to attach much weight to this argument in face of the reasons for not doing so advanced by the Subordinate Judge and the evidence to which he refers.

In the proceedings in 1871, when the Chakravartys applied to have their *brahmottar* released from rent it does not appear that either they or Mr. Rowlett, the Manager for the Court of Wards, recognised the *mouza* as containing more than the 59 *bighas* mentioned in the measurement papers of that year. In the application for registration made by the Chakravartys in 1877 (Exhibit 7) we find that it is stated that the area of lands, which include Gobindpore, has not been found out by measurement; but that a measurement by *murris*, that is by a unit of cultivated land, is given, a fact which supports the view taken by the Judge of the road-cess papers.

In 1904 we have a curious petition from Akshoy Kumar Chakravarty (Exhibit B) in which he complains that the Katras Jherriah Coal Company called the Bird Coal Company is "unjustly possessing the surface lands of Gobindpore and another *mouza* under a right derived from the Raja's estate;" as a result of which an order was made (Exhibit B26) by the Court of Wards disallowing the claim made to the waste lands of Gobindpore. The order itself was based on the road-cess returns and is of no importance; but as the Katras Jherria Company were in possession of the land merely for mining purposes, the limitation of the complaint in the petition to surface rights is certainly curious.

In the land acquisition proceedings in 1905, there seems to be no doubt that the manager for the Raja received all the compensation for waste land that was acquired, while the Chakravartys obtained compensation only as cultivators. The Raja's rights to the waste land seem thus to have passed uncontested—a conclusion highly adverse to the full claim made by the plaintiff. The Judge, however, points out that the acquisition proceedings were based on a mistake, as the Chakravartys were supposed to have a *kheraji* and, not as they in fact had, a *lakheraj brahmottar* that the Chakravartys may not have known that the *danga* lands were being ascribed to the Raja and that the amounts in question were not large enough to make litigations profitable. This conclusion depends in part on the evidence of Shashi Bhushan Chakravarty, whom elsewhere the Judge has not been inclined to trust, and in view of the fact that he was a party to the proceedings and in fact received compensation under them, it is difficult to believe that he did not know that it was also paid to the Rajah, as he swears it was not.

This concludes all the evidence on which we must decide this part of the case; and we feel that any decision we come to must be open to considerable doubt; and necessarily so, because it is probable that for many years both the Chakravartys and the Raja regarded the lands as of no value, and both sides may well have exercised rights over them without attracting the notice of the other. On the whole, however, we feel disposed to attach more importance to the earlier than to the later documents before us: and while we regard the *mulki* papers as ambiguous as to the point before us, we attach a good deal of importance to the Raja's return of 1861 and to the fact that the Raja did not care to take any part in settling the *thak* map, which he probably would have done, had the *mouza* been divided between the Chakravartys and himself. On the other hand, we should not like to depend much on the road-cess papers and though the Land Acquisition proceedings have to be carefully considered, we cannot consider that they outweigh the conclusion we draw from the earlier proceedings. Under these circumstances we hold, though with considerable doubt, that the waste lands were included in the *brahmottar* granted to the Chakravartys.

We have next to deal with the most important point in the case, which, on the findings that we have come to is as follows: Did a grant of rent free *brahmottar* of the whole of a *mouza* made before the Permanent Settlement pass any mining rights? From this point of view we consider that the case is covered

by the decision in *Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (1). In that case the Subordinate Judge and the High Court both held that the defendants had a permanent tenure at a fixed rental in the plaintiff's *zemindari*; there was nothing to show how the tenure originated, or that anything had or had not been settled about mineral rights at that time. The first Court held that the minerals did not pass to the grantee, partly, it appears, because of the low rent that was reserved. This Court set aside that finding, holding that the *zemindar* had divested himself of everything except the nominal proprietorship and turned his right practically into a perpetual annuity of the amount of the rental. This decision was reversed in the Privy Council. The finding as to the nature of the tenure created is not overruled and seems to be accepted: the inference drawn by the Subordinate Judge from the smallness of the *jama* is noticed, and it was held that on the title of the *zemindar* being established he must be presumed to be the owner of the under-ground rights thereto appertaining, in the absence of evidence that he ever parted with them. We are unable to distinguish that case from the present. It then seemed probable that the tenure was created after the Permanent Settlement. The present tenure may according to our view have been created either before or after that event. If, however, it was granted before the Permanent Settlement, the case for the appellant is stronger than if it were granted afterwards, as the *zemindar's* interest at the time of the grant must have been restricted to a ten years' Settlement, which may lead us to suppose that he would have been unlikely to deal with the minerals, even if he had the power to do so. In the former case the *jama* reserved was low: here no *jama* at all is reserved. The area of the holding affected in *Hari Narayan Singh's* case (1) does not appear from the judgment, and in the present case the point does not help us, as we have held that the whole *mauza* was transferred. Had only a small proportion, such as 54 *bighas* out of 200, been affected, it might have been argued that the *zemindar* would not have parted with his mineral rights on so small a scale, as we are admittedly deciding the case by imputing intentions to the parties, which in their ignorance of facts known to us they could never have formed: and it is this that makes the second point we have decided one of essential importance.

The rule laid down in *Hari Narayan Singh* v. *Sriram Chakravarty* (1) was afterwards followed in *Durga Proshad Singh* v. *Brojo Nath Bose* (2), reversing the decision in this Court, [see *Brojanath Bose* v. *Durga Proshad Singh* (3)] but nothing else was then decided that bears on this case. In *Megh Lal Pandey* v. *Raj Kumar Thakur* (4), it was held that the insertion of such general words as *mai hak hakuk*, with all rights in the original grantor, would pass the minerals, and it is suggested that it was this decision that led to similar words being inserted into Exhibit E, the *patta* in this case. On our findings, however, the terms of that document are of no importance. The present case closely resembles *Jyoti Prosad Singh* v. *Lachipur Coal Company* (5), where it was held that the *zemindar* retained a right to the minerals; as also the case of *Kunja Behari Lal* v. *Raja Darga Prasad Singh* (6), decided on the 7th May 1914, where Fletcher, J., treats the decision in *Hari Narayan Singh's* case (1) as governing the relations of a *zemindar* and any one deriving a title from him whether as a tenure-holder or a *ryot*, a construction in which we quite agree.

In the result we hold that the *zemindar* did not transfer any mining rights to the predecessors of the Chakravartys.

There remain only two points to be noticed on neither of which we need say much.

The *first* is that the suit is barred by limitation, as the defendant and his lessees had been in possession of the mines in the land for more than twelve years. As to this we agree with the findings of the lower Court, though we think that on the facts of the case his finding is not strong enough, as the mining operations of the Katras Jherriah Company before

(1) (1910) 37 Cal. 723=6 I. C. 785=37 I. A. 136 (P. C.).

(2) (1912) 39 Cal. 696=15 I. C. 219=39 I. A. 133. (P. C.).
(3) (1907) 34 Cal. 753.
(4) (1907) 34 Cal. 358.
(5) (1911) 38 Cal. 845=12 I. C. 482.
(6) A. I R. (1914) Cal. 205=25 I. C. 819.

1896 were obviously of the slightest possible kind.

The *second* remaining point is that the suit must fail because there was a lease to Mr. Saise prior to that of the plaintiff and that it was subsisting at the time of the suit. This point was raised at the very last stage" of the trial, the onus of proving the lease and its continuance up to the date of the trial was on the defendant, and he has not discharged it. We, therefore, agree with the lower Court that the lease cannot stand in the plaintiff's way.

The result is that both the appeals before us are decreed with costs.

V.B./R.K.

Appeals decreed.

A.I.R. 1916 Calcutta 161 (1)

TEUNON AND SHEEPSHANKS, JJ.

Ashutosh Mookerjee and *others*—Judgment-Debtors—Appellants.

v.

Akhoy Kumari Debi and *others*—Decree-holder—Respondents.

Appeal Nos. 285 and 334 of 1915, decided on 26th May, 1916, from the orders of Dist. Judge, Bankura, dated 23rd March, 1915.

Hindu Law—Widow—Rent decree against widow—Tenure in hands of reversioners is liable for sale—Bengal Tenancy Act (1885), S. 65.

A tenure or holding in the hands of the reversionary heirs after the death of a Hindu widow remains liable in respect of decrees for its arrears of rent obtained against the widow when she held it as heiress to her husband. 16 Cal. 511 and 16 I. C. 437, dist. 30 Cal. 550 (P. C.), foll. [P. 161, C. 2.]

Jadu Nath Kanjilal and *Jogendra Kumar Dey*—for Appellants.

Mohini Mohan Chatterjee—for Respondents.

Judgment.—These two appeals arise out of proceedings in execution of two decrees for rent. These decrees were obtained against a Hindu widow and on her death the reversionary heirs of the husband were brought on the record as her representatives for the purposes of the execution. The only questions in these appeals are, whether the holding in respect of which decrees for rent were obtained, being now in the hands of the reversionary heirs, can be sold in execution of decrees obtained, against the widow. In support of his contention that the defaulting holding cannot be sold, the appellant has invited our attention to the cases of *Kristo Gobind* v. *Hem Chunder* (1) and *Bireswar Das Day* v. *Kamal Kumar Dutt* (2). But in these two cases the question for decision was whether the estate of the husband (other than the defaulting tenure) could be sold in execution of such decrees. They, therefore, throw no light upon the present question. On the other hand the case of *Jiban Krishna Roy* v. *Brojo Lal Sen* (3) decided by their Lordships of the Privy Council appears to us to be good authority for the proposition that the tenure in the hands of the reversionary heirs does remain liable in respect of decrees for rent obtained in the time of the widow; and this also is in accordance with the provisions of S. 65 of the Bengal Tenancy Act. For these reasons we dismiss the appeals with costs. We assess the hearing-fee at one gold *mohur* in each case.

V.B./R.K.

Appeals dismissed.

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(1) (1889) 16 Cal. 511.
(2) (1912) 16 I. C. 437.
(3) (1903) 30 Cal. 550 = 30 I. A. 81 (P. C.).

A. I. R. 1916 Calcutta 161 (2)

HOLMWOOD AND CHAPMAN. JJ.

Kali Kumar Chuckerbutty—Plaintiff—Appellant.

v.

Aslam and *others*—Defendants—Respondents.

Appeal No. 1941 of 1912, decided on 3rd August, 1914, from the Appellate Decree of Dist. Judge, Noakhali, dated 19th April, 1912.

Civil P. C. (5 of 1908), O. 2, R. 2—Suit for possession by purchaser of holding—Prior suit for possession of part of holding dismissed—Suit is not maintainable even in respect of portion not included in former suit.

The purchaser of a holding in execution of a rent-decree sued for its possession against the judgment-debtors and it was found on evidence that the plaintiff after his purchase had never obtained anything more than formal delivery of possession of any portion of the holding and that he had previously sued the same defendants for possession of a portion of the holding but his suit was dismissed for want of prosecution:

Held, that the plaintiff could not maintain his suit even as regards the portion of the holding which was not included in the former suit, for having omitted to sue for that portion in the former suit, he could not under O. 2, R. 2, sue for it again.

[P. 163, C. 2 & P. 164, C. 1.]

Baido Nath Dutt and *Jnanendra Nath Sircar*—for Appellant.

Brojendra Nath Chatterjee—for Respondents.

Judgment.—This appeal arises out of a suit for the possession of a holding which the plaintiff had purchased at a sale in execution of a rent-decree in January 1906. He obtained formal delivery of possession in September, 1906. The holding consisted of a homestead and the arable land attached thereto. In April 1907, the plaintiff sued for *khas* possession of that portion of the holding only which included the homestead. His allegation was that the defendants had dispossessed him of the homestead. That suit was dismissed for want of prosecution in November 1907. An application to restore was also dismissed in February 1908. The plaintiff had also brought a criminal case charging the defendants with criminal trespass on the arable portion of the holding. The criminal case ended in acquittal in June 1908.

The first Court held that the plaintiff's suit was barred so far as the homestead was concerned, his previous suit for the homestead having been dismissed. The Court, however, decreed the suit for the arable land. The Court of first appeal has reversed this decision holding that by reason of the dismissal of the previous suit, the suit for the arable portion of the land was also barred under O. 2, R. 2, Code of Civil Procedure.

The plaintiff appeals. The contention in appeal is that the provisions of O. 2, R. 2, do not apply to the case. The material portion of the rule referred to is to the following effect:—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted." The previous suit was for a portion of the holding only. The plaintiff in that suit omitted to sue for the arable land. The present suit for the arable land has thus been held to be barred. The argument on appeal, however, is that the cause of action in the previous suit was a re-entry into the homestead only. The cause of action alleged in the present suit was a dispossession from the arable land on a subsequent date and on an entirely independent occasion, namely, after the application for review in the previous suit was dismissed. The argument is that the acts of dispossession being different the causes of action were different and the rule does not apply. The Court of first appeal has, however, found that in fact there were not two separate acts of dispossession; and that the plaintiff never obtained anything more than formal delivery of possession of any portion of the land and that, therefore, the causes of action were not different: they were in fact the same and the allegations in the plaint in this respect were untrue. It is, however, contended that the learned District Judge fell into error in so dealing with the question and that he should not have gone outside the four corners of the plaints in the two cases. In support of this contention the case of *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1) is relied upon, in which it is said that the cause of action must be sought for between the four corners of the plaint. The facts of that case were, however, entirely different. In that case the previous suit had been one for confirmation of possession and had been dismissed upon the ground that the plaintiff had never been in possession. The suit which was before the learned Judges was for recovery of possession and it had been held in the suit before them that the plaintiff had in fact been dispossessed. The learned Judges with reference to the facts of the case said that the findings in the previous suit must not be considered in determining whether the cause of action was the same. In the present case, however, we are not concerned with any finding in the previous suit. It is not the finding in the previous suit, it is the finding in the present suit now before us, with which we have to deal and that finding was that the causes of action in the two suits were the same. In *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*, (1) the finding in the suit before the Court was that the causes of action in the two suits were different. That is the distinction

(1) (1882) 8 Cal. 819.

between the present case and the case cited and it goes to the root of the matter. The findings in the present case are (1) that the title is the same, (2) that the parties are the same, (3) that the plaintiff was never in possession and that, therefore, the cause of action was the same. We are of opinion that the learned District Judge fell into no error in so dealing with the case.

We have been referred in course of the argument to the case of *Pittapur Raja* v. *Suriya Row* (2). That case, if it has any bearing on the question which is now before us, is against the contention of the appellant. It was a case where the plaintiff had sued to obtain his share of an estate in land under a will in consequence of having been wrongfully dispossessed by the defendant. He afterwards brought a suit for his share of the personal property under the will. It was held that the subsequent suit was not barred by reason of the omission to claim the personal property in the previous suit, the decision of the case being based on the fact that the dispossession of the plaintiff from his land was an entirely different cause of action from that which formed the basis of his claim to the personal property. The cause of action was different both upon the pleadings and in fact.

It has finally been argued that the learned District Judge was not justified in coming to the findings of fact above referred to. It appears that subsequently to the plaintiff's purchase, the holding was sold in execution of a decree for arrears of rent obtained against the plaintiff. The present defendants deposited the amount due and obtained an annulment of the sale. The then auction-purchaser, Janki Nath Choudhuri, obtained a Rule in this Court against the Munsif's order allowing the deposit to be made. In the course of the judgment of this Court disposing of this Rule, it was said "Kali Kumar (the present plaintiff) purchased the holding in execution of a rent decree obtained by the landlords against Hamid Ali and obtained possession of the lands of the holding except the homestead portion, which in spite of the sale Hamid Ali retained in his possession." It is argued that in view of this expression of opinion the learned District Judge ought not to have held that the plaintiff never obtained possession of any portion of the land. It is clear, however, that there was no estoppel.

The statement in the judgment of this Court was nothing more than an introductory recital of the facts. Moreover, the present plaintiff was merely a formal party to the proceeding. The real contest was between the then auction-purchaser Janki Nath and the present defendants. Further, the result of the Rule would have been the same if the facts had been stated to be that Kali Kumar had never obtained possession of any portion of the land. For the purpose of Rule it was quite immaterial whether the present defendants were in possession of the whole land or only of a portion. In either case they were entitled to make the deposit. It is clear there was no estoppel. To what extent there was any admission in that case we are unable to determine. The Rule was obtained on the application of Janki Nath, not of the defendants. We do not know what statement, if any, the defendants made in the case. It has further been argued that as there was admittedly formal delivery of possession to the plaintiff by the Court, the District Judge ought not to have held that actual possession was not obtained. There is no substance in this contention. The fact that there was formal delivery of possession is not relevant to the question whether the causes of action in the two suits were the same or not. The formal delivery of possession was the common fact in both suits. If that was all that took place, the causes of action were identical. It is finally argued that the dispossession of the arable land must, in any case, have been by a different act from the re-entry in the homestead. The plaintiff's specific allegation, however, that he was dispossessed in March 1908 was not believed. We should have to have recourse to surmise if we were to say that the finding that there was not more than one act of dispossession was wrong.

We are of opinion that the findings of fact cannot be successfully assailed on any ground of law.

Those findings are that the cause of action in the previous suit was the same as the cause of action in the present suit. In the previous suit the plaintiff omitted

(2) (1885) 8 Mad. 520=12 I. A. 116 (P.C.).

to sue for a portion of his claim, namely, for the arable lands. He cannot under O. 2, R. 2, of the Code of Civil Procedure be permitted to sue for them now.

The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 164

FLETCHER AND TEUNON, JJ.

Kuarmani Singha Mandhata—Plaintiff—Appellant.

v.

Wasif Ali Murza—Defendant—Respondent.

Appeal No. 411 of 1913, decided on 26th February, 1915, from the Original Decree of Sub-Judge, 1st Court, Midnapur, dated 16th May, 1913.

(a) Civil P. C. (5 of 1908), O. 14, R. 2—R. 2 applies even where issues of fact have been framed and not postponed.

O. 14, R. 2, Civil Procedure Code, does not only apply to cases in which the issues of fact have not been settled, but also to cases where the Court has not postponed the settlement of the issues of fact. A. I. R. (1915) Cal. 87, not foll. [P. 165, C. 1.]

(b) Limitation Act (9 of 1908), Ss. 6, 8, 9 and 22—Being ward under Court of Wards is no disqualification to extend period of limitation.

Under the terms of the Indian Limitation Act, 1908, no other cause of disqualification than those mentioned in the Act, *viz.*, minority, insanity and idiocy, can be admitted to save limitation and time runs against a disqualified proprietor whose property is taken under the Court of Wards. [P. 165, C. 2.]

(c) Bengal Court of Wards Act (9 of 1879), S. 35—No one but the ward can bring a suit for his property in charge of Court of Wards.

No one except the disqualified proprietor can bring a suit in relation to property taken charge of by the Court of Wards. [P. 165, C. 2.]

(d) Civil P. C. (5 of 1908), O. 7, R. 4—Fact of representative character need not be stated in the title of the plaint though it is the proper place.

O. 7, R. 4, Civil Procedure Code, does not require that where the plaintiff sues in a representative capacity that fact should be stated in the cause-title of the plaint although no doubt, that is a convenient place to state it. [P. 166, C. 1.]

(e) Civil P. C. (5 of 1908), O. 6, R. 17—Amendment of plaint by Court's permission is not addition or substitution of party within S. 22, Limitation Act—Limitation Act (9 of 1908), S. 22.

The amendments made in the plaint by the leave of the Judge cannot, in any view, amount to an addition or substitution of a new plaintiff within the meaning of S. 22 of the Indian Limitation Act. [P. 166, C. 1.]

(f) Limitation Act (9 of 1908), Art. 91—Art. 91 does not apply where idol's property is conveyed by Court of Wards, it being a nullity.

Where certain properties belong to idols the conveyance of those properties by the Court of Wards, is a nullity, and Article 91 of the Limitation Act does not apply. [P. 166, C. 1 & 2.]

(g) Bengal Court of Wards Act (9 of 1879), S. 18—S. 18 provides the only manner in which ward's property can be dealt with.

The Court of Wards can only deal with the property of the ward in the manner provided by S. 18 of the Court of Wards Act (9 of 1879.) [P. 166, C. 2.]

Dwarka Nath Chakravarti and *Kali Kumar Chakravarti*—for Appellants.

Rash Behary Ghose, Hemendra Nath Sen and *Naresh Chandra Singha*—for Respondent.

Fletcher, J.—This is an appeal by the plaintiff against a judgment of the learned First Subordinate Judge of Midnapore, dated the 16th May, 1913, dismissing the plaintiff's suit.

The plaintiff brought the suit for a declaration that a *kabala*, dated the 7th June, 1890, executed by the Collector on behalf of the Court of Wards in favour of the late father of the defendant, and that a subsequent *kabala*, dated the 11th February, 1901, executed in manner aforesaid in the like favour, are invalid and illegal, and for an order restoring the plaintiff to possession of the properties comprised in such *kabalas* and for certain alternative and consequential relief.

The issues of law and fact were settled by the learned Judge on the 9th of December, 1912.

The defendant, on the 16th of February, 1913, applied to the learned Judge for the trial of the 1st three issues under the provisions of O. 14, R. 2, Civil Procedure Code. The learned Judge assented to that application. The first three issues were in the following terms: 1. Is this suit barred by limitation? 2. Is the suit bad for not making the Secretary of State for India in Council and the Court of Wards parties to the suit? 3. Is the suit maintainable, in respect of the properties said to be *debutter* in the plaint, in the present form? For the purpose of determining these three issues the learned Judge assumed, as he was bound to, the correctness of all the allegations contained in the plaint.

These allegations of fact so far as material to the present appeal are very simple.

On the 30th July, 1886 upon her own application the plaintiff was declared to be a disqualified proprietor and the Court of Wards took charge of her estate. On the 7th of June, 1890 by a *kabala* the Court of Wards sold and conveyed to the father of the defendant the property to which this suit relates other than and except the *Mouzas* Sakdubi and Pirote. By a further *kabala*, dated the 11th of February, 1901, the Court of Wards conveyed to the father of the defendant the two *Mouzas* Sakdubi and Pirote. The plaintiff does not state whether this second *kabala* was executed for consideration or by way of further assurance or otherwise.

The Court of Wards, on the 1st of August, 1911, released the property of the plaintiff from its charge. The present suit was instituted on the 31st of May, 1912. The plaintiff on the present appeal before us has urged that the course the learned Judge adopted in disposing of the first three issues of law was illegal. The argument is based upon the terms of O. 14, R. 2, Civil Procedure Code. It is argued that the rule only applies to cases in which the issues of fact have not been settled. The wording of the rule is opposed to such a construction. The words "for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined" clearly indicate that the rule also applies to cases where the Court has not postponed the settlement of the issues of fact.

It is said that the decision in the case of *Rai Yatindra Nath Chowdhury* v. *Hari Charan Chowdhury* (1) is in accordance with the argument put forward on behalf of the plaintiff. But as I read that decision all that was decided in that case was that the course adopted by the trying Judge in that particular case was highly inconvenient and his procedure ought to be set aside by the Appellate Court. I think there is no force in this argument raised on behalf of the appellant. The next argument is as to whether the suit is barred by limitation as regards the lands comprised in the *kabala* of the 7th of June, 1890. It is argued that as the plaintiff was a disqualified proprietor whose estate was under the charge of the Court of Wards time did not run against her during the period the Court remained in charge.

Under the terms of the Indian Limitation Act, 1908, no other cause of disqualification than those mentioned in the Act can be admitted to save limitation. The only disqualifications that Ss. 6, 8 and 9 of the Act recognise are minority, insanity and idiocy. It is argued that notwithstanding this when the plaintiff was declared a disqualified proprietor and the Court of Wards Act (IX of 1879, B. C.) vested the right of possession of her property in the Court of Wards, and that the possession of the defendant and his father could not become adverse as regards the plaintiff until the Court of Wards released the property of the plaintiff on the 1st of August, 1911.

This argument in substance rests upon the wording of S. 35 of Act IX of 1879. No doubt the words "directing that possession be taken of such person and property" occur in that section. But the whole scheme of the Act, as is manifest from many sections, is the taking of the property of the disqualified proprietor under the charge of the Court of Wards. The position of the Court of Wards being that of a guardian of the disqualified proprietor, the possession of the guardian would be that of the ward and the plaintiff in that view was in possession when the Court sold the property in June 1890. Moreover, the Act preserves the right of suit of the disqualified proprietor. No one except the disqualified proprietor can bring a suit in relation to property taken charge of by the Court of Wards. It is true that by Part 7 of the Act restrictions have been placed upon the right of the disqualified proprietor to sue. The fact, however, remains that no one except the plaintiff could have maintained a suit with reference to the property taken charge of by the Court of Wards.

I think, therefore, that the learned Judge came to a correct conclusion when he found that the plaintiff's suit, as regards the properties comprised in the *kabala* of 7th of June, 1890 was barred by limitation under Articles 91 and 142 of the Indian Limitation Act. I may mention in passing that the learned Vakil for the

(1) A. I. R. (1915) Cal. 87=26 I. C. 954.

S. N. DAR, B. A. LL. B.
Vakil High Court.

appellant informed us that he makes no case to bring the plaintiff's suit within S. 18 of the Indian Limitation Act, the case of the plaintiff being that she knew of the fraud all along and applied to the Court of Wards for release of her property in order to institute a suit.

I will now proceed to deal with the case so far as it relates to the two *Mouzas* Sukdabi and Pirote. In the cause-title of the suit as given in the plaint as originally presented to the Court, the character in which the plaintiff brought the suit as regards these two *mouzas* was not given, although it is manifest from the body of the plaint and the prayers thereto that the plaintiff was suing to recover possession of the two *mouzas* comprised in the *kabala* of the 11th February, 1901 as the *shebait* of certain idols. On the 12th of April, 1913, the plaintiff applied to the learned Judge for leave to amend the plaint by stating in the cause-title that she sued on behalf of herself and as *shebait* of the idols and for making the necessary and consequential amendments in the body of the plaint. The learned Judge gave the necessary leave and the amendments were duly made. By reason of such amendment the learned Judge has held that there has been addition of a new plaintiff to the suit and, therefore, the suit as regards the two *mouzas* is barred under Aricles 91 and 142 of the Indian Limitation Act. I am unable to agree with the view taken by the learned Judge. It seems to me abundantly clear on reading the plaint as originally filed that the plaintiff was suing as *shebait* of the idols as regards these two *mouzas*. O. 7, R. 4, does not require that when the plaintiff sues in a representative capacity that fact should be stated in the cause-title of the plaint, although no doubt that is a convenient place to state it. The amendments made in the plaint by the leave of the Judge cannot, in any view I think, amount to an addition or substitution of a new plaintiff within the meaning of S. 22 of the Indian Limitation Act. Nor am I able to agree with the view of the learned Judge that this suit, so far as regards the two *mouzas*, is governed by Article 91 of the Limitation Act. The case the plaintiff sets up in her plaint is that these two *mouzas* belonged to the idols and that the conveyance of them by the Court of Wards to the defendant's father was a nullity. Obviously Article 91 does not apply to such a case. I think that there is a case which ought to be tried so far as relates to these two *mouzas*. How or why they were transferred to the father of the defendant by the *kabala* of 11th of February, 1901 does not appear and that, of course, will be a material matter to inquire into in the course of the trial. The Court of Wards could only deal with the property of the plaintiff in manner provided by S. 18 of the Court of Wards Act (IX of 1879.)

I think, therefore, we ought to reverse the decree passed by the lower Court and remand the case for trial on the issues so far as they relate to the two *mouzas* Sukdabi and Porote comprised in the *kabala* of the 11th of February, 1901.

The decision of the learned Judge as to the suit being barred by limitation so far as regards the property comprised in the *kabala* of the 7th of June, 1890, will remain unaffected by this order of remand. The costs of the present appeal will be costs in the suit.

Teunon, J.—I agree.

V.B./R.K.

Decree reversed ; Case remanded.

A. I. R. 1916 Calcutta 166

CHATTERJEA AND RICHARDSON, JJ.

Nabakumar Chakraburtty and *another* —Plaintiffs—Appellants.

v.

Abdul Jabbar Mian—Defendant—Respondent.

Second Appeal No. 750 of 1914, decided on 18th July, 1916, against the decree of Sub-Judge, 2nd Court, Chittagong, dated 13th August, 1913.

(a) Bengal Tenancy Act, (8 of 1885), Ss. 67 and 179—Agreements should not be lightly interfered—Interest at 75 per cent. on default of *kist* is penalty and should be relieved against—Court can grant relief under equitable jurisdiction.—(*Richardson, J., dissenting*).

(Per *N. R. Chatterjea, J.* (*Richardson, J.*, dissenting).—Although the Courts should not lightly interfere with contracts between landlords and tenants in cases of permanent *mokarari* leases, a stipulation by the tenant to pay interest at 75 per cent., besides full damages, on default of *kists* is either a penalty or an unconscionable bargain and should not be allowed to be enforced. [P. 168, C. 1.]

The Court can grant relief in the exercise of its equitable jurisdiction, if the contract is unconscionable. [P. 167, C. 1.]

Per *Richardson, J.*—A stipulation by a permanent *mokarari* lessee to pay interest at 75 per cent. and damages on account of default of *kists* is not a penalty nor is it such a contract as ought not to be enforced according to its true construction. [P. 169, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 67 and 179—S. 67 does not control S. 179—Contract of higher rate of interest than that provided in S. 67 is enforceable, S. 179 does not exclude consideration of other laws.

Although S. 67 of the Bengal Tenancy Act does not control the provisions of S. 179 and a contract for the payment of interest on arrears of rent at a rate, higher than that provided for by S. 67, entered into by a landlord and a permanent tenure-holder under him is enforceable by law, yet S. 179 does not exclude the consideration of the question whether the contract is affected by the provisions of law other than the Bengal Tenancy Act. 26 Cal. 315 and 33 Cal. 683, ref. to. [P. 167, C. 2.]

(c) Bengal Tenancy Act (8 of 1885), Ss. 67 and 179—Considerations of needy debtor do not apply to perpetual lessee at fixed rent—Hard bargain unless amounting to fraud is no ground of relief—Contract Act (9 of 1872), Ss. 16, 17 and 74.

In enforcing the terms of a contract, creating a permanent lease at an invariable rent, the lessee is not *prima facie* entitled to the indulgent consideration which might be extended to a needy and improvident debtor in the clutches of a grasping money-lender in cases of money-lending contracts. [P. 169, C. 1.]

Where the Courts are appealed to merely on the ground of some apparent hardship in the contract itself, it has to be borne in mind that Courts of Equity cannot give relief from a transaction and contract merely on the ground that it is a hard bargain, except perhaps when the extortion is so great as to be of itself evidence of fraud. Case-law discussed.

[P. 169, C. 1.]

Khitish Chandra Sen—for Appellants.

Nuruddin Ahmed—for Respondent.

N. R. Chatterjea, J.—This appeal arises out of a suit for arrears of rent, based upon a *kabuliyat* which provided for the payment of interest at the rate of 75 per cent. on arrears of rent besides "full damages." The Court of Appeal below held in effect that the stipulation was in the nature of a penalty and awarded damages only at 25 per cent.

The plaintiff has appealed to this Court, and it is contended on his behalf, that as the lease is a permanent *mokarari* lease, he is entitled to the interest at 75 per cent. as well as the damages stipulated for.

It is true S. 67 of the Bengal Tenancy Act does not control the provisions of S. 179, and it has been held with reference to the provisions of S. 179 that a contract for the payment of interest on arrears of rent, at a rate higher than that provided for by S. 67, entered into by a landlord and a permanent tenure-holder under him is enforceable by law [see *Matangini Debi* v. *Mokrura Bibi* (1)]. But all that S. 179 lays down is that nothing in the Bengal Tenancy Act shall be deemed to prevent a proprietor or permanent tenure-holder from granting a permanent *mokarari* lease on any terms agreed on between him and his tenant. That section does not exclude the consideration of the question whether the contract is affected by the provisions of law other than the Bengal Tenancy Act.

The contract in the present case was to pay interest at 75 per cent. besides full damages. I think the stipulation was by way of penalty and the Court should not allow it to be enforced. It is true we do not know whether the rent was high or low or whether any premium was paid at the creation of the tenancy. But interest represents compensation for the detention of the rent, and the stipulation to pay 75 per cent. interest plus full damages appears rather to have been intended as an effective means of securing punctual performance of the contract than represents the damages which the landlord was to suffer by reason of non-payment of the rent

Although there may be no question of payment of higher interest on default of payment on the due date, the contract, if it contains any stipulation by way of penalty, may come under S. 74 of the Contract Act as amended, and in any case the Court can grant relief in the exercise of its equitable jurisdiction, if the contract is unconscionable. No hard and fast rule can be laid down as to what is unconscionable and exorbitant, which must be determined with regard to the facts of each case.

There are observations in some cases to the effect, that the rule of law relating to hard and unconscionable bargains applies to contracts relating to

(1) (1902) 29 Cal. 674 (F. B.).

payment of interest between landlord and tenant. See *Kali Nath Sen* v. *Trailokhya Nath Roy* (2) and *Narendra Kumar Ghose* v. *Gora Chand Poddar* (3). It is true the observations are *obiter*, as the cases related to ordinary *raiyats* to whom the provisions of S. 67 of the Bengal Tenancy Act are applicable, and not cases of permanent *mokarari* lessees who are apparently not considered as requiring any special protection in the matter of contracts with their landlords. In the first case the rate of interest was 225 per cent. but in the second it was 75 per cent., and the learned Judges observed that even if it was open to the parties to contract themselves out of the provisions of S. 67, "a contract to pay interest at the rate of 75 per cent. for arrears of rent payable for the land, for which arrears the landlord had good security in the holding on which arrears are a first charge and which he can recover in other ways, was an unconscionable one, and one which should not be allowed to be enforced." I agree in the above observations, and although the Courts should not lightly interfere with contracts between landlords and tenants in cases of permanent *mokarari* leases, I think that a stipulation to pay interest at 75 per cent., besides full damages is an unconscionable one and should not be allowed to be enforced. It may be mentioned that although the lease in the present case is a permanent *mokarari* one, it is a lease of only 3 *kanis* and one *ganda* of land at a rent of Rs. 20 and the terms indicate that it was taken for the purposes of cultivation. The Court of Appeal below has awarded 25 per cent. damages which is a reasonable compensation. The appeal is accordingly dismissed. No order as to costs.

Richardson, J.—This second appeal arises out of a suit for arrears of rent payable in respect of a permanent *mokarari* tenure. The appellants are the plaintiffs, the landlords. The respondent, the defendant No. 6 in the suit, purchased the tenure at a sale held in execution of a previous decree for arrears of rent obtained by the landlords against his predecessors, the defendants Nos. 1 to 5. The sale was confirmed on the 20th July, 1910. The tenure is held under a *kabuliyat* executed in the plaintiffs' favour by the original tenants. Under that document rent is payable at the rate of Rs. 20 per annum in two *kists*. The default clause runs as follows:—"If we fail to pay rent as per *kist*, you shall be competent to realise the claim together with interest on account of default of *kist* at the rate of Rs. 6-4-0 per cent. per mensem (75 per cent. per annum) and the full amount of damages together with costs in Court..."

Part of the arrears claimed fell due before the auction-sale was confirmed, but nothing turns on that because neither the respondent nor the tenure has been made liable for those arrears for which, in accordance with the decision in *Faez Rahaman* v. *Ramsukh Bajpai* (4), the trial Court made a decree against the defendants Nos. 1 to 5 personally. Against that decision no appeal was preferred to the Court below. The liability of the respondent and of the tenure for the subsequent arrears is undisputed. The only question is whether the plaintiffs are entitled as against the respondent to interest at the contract rate.

On that question the Munsif and the Subordinate Judge have taken different views. The Munsif allowed the interest claimed while the Subordinate Judge substituted for interest damages at 25 per cent. on the amount of the claim. His reasons for so doing are loosely stated, but he proceeded apparently on the footing that interest at the contract rate was a penalty.

Now, the explanation to S. 74 of the Contract Act, "a stipulation for increased interest from the date of default may be a stipulation by way of penalty," has no application to a case where no interest being payable in respect of the period before the date of default, interest runs only from that date. In *Rani Sundar Koer* v. *Rai Sham Kishen* (5), the question whether a stipulation of the latter description might amount to a penalty was expressly left undecided by the Privy Council. In view, however, of the decision of this Court in *Khagaram Das* v. *Ram Sankar Das Pramanik* (6), it may be conceded that such a stipulation may be "a stipulation by way of penalty" under the first part of S. 74. But though that is so,

(2) (1899) 26 Cal. 315.
(3) (1906) 33 Cal. 683.
(4) (1894) 21 Cal. 169.
(5) (1907) 34 Cal. 150=34 I. A. 9 (P. C.).
(6) (1915) 42 Cal. 652=27 I. C. 815.

the question in any particular case depends entirely on the circumstances [*ibid* at page (663 of 42 Cal.) *cf. Dunlop Pneumatic Tyre Company, Limited* v. *New Garage* and *Motor Company Limited* (7).

The Indian cases cited were cases between money-lenders and their debtors. In a similar case of *Dyanipal Das* v. *Raja Maneshar Bakhsh Singh* (8), the Privy Council made this observation: "Apart from a recent Statute, an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps when the extortion is so great as to be of itself evidence of fraud, which is not this case." The caution so conveyed has to be borne in mind in all cases where the Courts are appealed to merely on the ground of some apparent hardship in the contract itself. In general, evidence of facts and circumstances outside the contract is necessary to justify interference. In money-lending cases, however, while the Act referred to, the English Money-Lenders Act (63 and 64 Vic. Ch. 51), has no precise counterpart in Indian Legislation, the case of *Samuel* v. *Newbold* (9), decided under it, may be referred to for the general remark made by the Lord Chancellor, Lord Loreburn, that money-lending contracts belong to a class "which peculiarly lend themselves to an abuse of power." That is not less true in India than in England, and it follows naturally that in dealing with such contracts the Courts are more disposed to regard an apparently oppressive stipulation for interest as a penalty or to find ground for equitable relief under Ss. 16 and 19-A of the Contract Act. The contract which has given rise to this appeal cannot be approached from the same standpoint. It is a permanent lease at an invariable rent and the lessee is not *prima facie* entitled to the indulgent consideration which might be extended to a needy and improvident debtor in the clutches of a grasping money-lender. On the contrary, where a permanent tenure is concerned, the improvidence is often on the side of the grantor, who, as the Privy Council have said, parts for ever with all his interest in the improvable value of the lands [*Musammat Balasmani Dasi* v. *Raja Sheo Persad Singh* (10)].

The Usury Laws Repeal Act (XXVIII of 1855) enacts that "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." S. 179 of the Bengal Tenancy Act further provides that "nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokarari* lease on any terms agreed on between him and his tenant." It may be that these provisions must be read subject to the power of the Court to intervene under the Contract Act, but even so in such a case as the present they cannot be overlooked or left out of account. It was for the lessee, the respondent, to show circumstances which would justify an interference with the contract into which he entered or rather which he deliberately purchased at a Court sale. He has entirely failed, if he ever attempted, to discharge this burden. We were referred to no materials other than the contract itself which would justify even a suspicion that the original *kabuliat* or his purchase of the tenure was induced by fraud or by any domination of one man's will by that of another. We were not told whether any premium was paid by the original lessees nor the price at which the tenure was knocked down to the respondent. There is nothing to show whether the rent reserved is a high rent or a low rent. In my opinion there is no ground for saying that the stipulation as to interest and damages is a penalty or is otherwise one which ought not to be enforced according to its true construction. The mere fact that the interest expressed to be payable is high, is, in the circumstances, not in itself a sufficient ground for relief.

A difficulty was raised as to the meaning of the words used. The lessee engages to pay interest at the rate specified and "full damages." It was argued that this can only mean full damages, because full damages must include interest. On this ground, it was suggested that the decree of the Subordinate Judge awarding *in lieu* of interest damages at 25 per cent.

(7) (1915) A. C. 79.
(8) (1906) 28 All. 570=9 O. C. 188=33 I. A. 118 (P. C.).
(9) (1906) A. C. 461.
(10) (1882) 8 Cal. 664=9 I. A. 33 (P. C.).

on the amount claimed might be supported. But under the Usury Act it was open to the parties to agree upon the rate of interest and the agreed rate is clearly and unequivocally stated. The parties, in my opinion, must be taken to have meant that in addition to the interest such damages (if any) should be awarded as the law might allow. The implication is that the interest was to be regarded as part of the substantive contract between them. If that be so, it is difficult to see how the addition of the words "and full damages" can cut down the rate of interest or convert into a penalty a stipulation which would not otherwise be a penalty. The award of damages is entirely within the discretion of the Court.

Apart from any question of penalty, it is settled by the decision of the Full Bench in *Lal Gopal Dutt Chowdhry* v *Manmatha Lal Dutt Chowdhry* (11) that the purchaser of a tenure at a sale in execution of a decree is bound by the lease and liable for interest at the contract rate. The point there decided turned entirely on the Bengal Tenancy Act and the report does not state what in that case was the contract rate. But in several of the cases brought before the Full Bench for review, interest was claimed at the rate of 75 per cent. per annum It was allowed in one case and disallowed in others on grounds unconnected with the Contract Act. In *Kishore Lal Dev* v. *Administrator-General of Bengal* (12) interest at that rate was allowed. In *Matangini Debi* v. *Mokrura Bibi* (1), decided by a Full Bench, interest was allowed at the rate of 37½ per cent. per annum and in *Raj Narain Mitter* v. *Panna Chand Singh* (13), at the rate of 30 per cent. per annum. If interest at 37½ or 30 per cent. is not unreasonable, where is the line to be drawn ? Again, if interest at the contract rate be disallowed, the question apparently will arise every time a suit for arrears is brought, what the interest or damages should be.

In the view indicated the appellant landlord is entitled to the interest which he claims, namely, interest at the contract rate. He is not entitled to any further damages.

(11) (1905) 32 Cal. 258 (F. B.).
(12) (1898) 2 C. W. N. 303.
(13) (1903) 30 Cal. 213.

As, however, my learned brother is of a different opinion, and as I now understand that the same or a similar question has been dealt with by him and Mr. Justice Sheepshanks in another case decided since the present case was argued (Second Appeal No. 3957 of 1913). I do not press my view, though I am not prepared to change it.

The appeal will be dismissed in accordance with the judgment pronounced by my learned brother.

V.B./R.K.

Appeal dismiseed.

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MOOKERJEE AND ROE, JJ.

Girija Kanta Chakrabutty and *others*—Defendants—Appellants.

v.

Mohim Chandra Acharjya—Plaintiff—Respondent.

Appeal No. 3486 of 1912, decided on 2nd June, 1915, from the Appellate Decree of Sub-Judge, Faridpur, dated 12th July, 1912.

(a) Civil P. C. (5 of 1908), S. 47—S. 47 does not bar suit for actual possession by auction-purchaser having obtained symbolical delivery.

S. 47, Civil Procedure Code, is no bar to a suit for actual possession by a purchaser who obtained only symbolical delivery after confirmation of the execution sale. A.I.R. (1915) Cal. 137, foll. 35 Bom. 452 and 26 Mad. 740, diss. from. [P. 171, C. 2.]

(b) Decree—*Ex parte* — When can be impeached for fraud, stated.

An *ex parte* decree may in a subsequent claim of the plaintiff be impeached on the ground of fraud by the persons against whom it was obtained. 27 Cal. 11, foll. [P. 172, C. 1.]

(c) Civil P. C. (5 of 1908), S. 11—Mortgage suit—Person not party to execution joined as representative — Fresh suit for possession—Question of validity of mortgage as against such person is not constructive *res judicata*.

The validity of the mortgage as against a person not a party thereto cannot properly be raised and determined in a suit to enforce the security, though such person is impleaded as representative of a deceased executant. 33 Cal. 425 and 11 C. W. N. 284, rel. on. [P. 172, C. 1.]

But the question can be raised in a subsequent suit for recovery of the mortgaged property and an enquiry into the same is not barred by the doctrine of constructive *res judicata* on the ground that it was not pressed at the trial of the mortgage suit. [P. 172, C. 1.]

(d) Hindu Law—Alienation—Co-parcener—Mortgage by some brother—Decree and sale thereon does not pass other brother's interest.

Where some of the brothers, members of an undivided Hindu family, execute a mortgage of the whole property, the decree obtained in a suit to enforce the mortgage, and the sale in execution thereof, will only pass the interest of the mortgagor brothers and not of those who did not join in the mortgage. [P. 172, C. 1.]

(e) Execution—Decree against co-parcener—Stranger purchaser of co-parcener's interest can only execute it by way of partition.

A stranger purchaser of the share of an undivided Hindu co-parcener cannot claim to be put in joint possession of the family dwelling-house. He can either ask for delivery of possession of what he acquired by purchase by partition in execution proceedings, or resort to a separate suit for partition. (1853) Beng. S. D. A. 768; (1857) Beng. S. D. A. 1585; 2 W. R. Mis. 30; 8 W. R. 239; 4 B. L. R. App. 55; 10 Cal. 244; 22 W. R. 214; 2 Bom. 676 and 5 Bom. 499, ref. to. [P. 172, C. 2.]

Prokash Chandra Majumdar — for Appellants.

Mukund Nath Roy and *Satish Chandra Bhattacharjee*—for Respondent.

Judgment.—This is an appeal by the defendants in a suit for possession of land and huts on declaration of title by purchase at a sale in execution of a mortgage-decree. The facts essential for the decision of the questions of law raised before us may be briefly stated. Three brothers *A*, *B* and *C*, were owners of the disputed property, and their interest may be regarded as the unit for our present purpose. On the 18th December, 1887, *A* and *B* executed a mortgage in favour of the plaintiff; they dealt with the entire property and apparently ignored the interest of their brother *C*. A died in 1892 and left his two brothers *B* and *C* as his representatives. On the 30th November, 1895 the mortgagee sued *B* and *C* to enforce his security. *C* was made a party in his character as one of the original mortgagors, and also as one of the representatives of *A*; *C* was described only as the representative of his deceased brother *A*. There was no allegation in the plaint that the mortgage, though executed by *A* and *B*, was operative against *C*, either because the debt had been incurred for family purposes or because *A* and *B* had implied authority to bind their brother *C*. Neither *B* nor *C* entered appearance and an *ex parte* decree was made on the 19th December, 1895. The decree was executed in due course, the property was brought to sale and passed into the hands of the plaintiff. The plaintiff as execution purchaser obtained symbolical delivery of the property, but not actual possession. He accordingly instituted the present suit on the 6th August, 1907 to eject the defendants who are the representatives of *B* and *C*, as *C* had died in 1898 and *B* in 1901. The Court of first instance decreed the suit in part. Upon appeal the Subordinate Judge has decreed the claim in full. On the present appeal, four points have been urged on behalf of the defendants, *first*, that the suit was barred under S. 47, Civil Procedure Code, and that the remedy of the plaintiff was by way of an application to the execution Court to be placed in actual possession of the purchased property; *secondly*, that the defendants are at liberty to impeach the *ex parte* decree as fraudulently obtained and consequently inoperative; *thirdly*, that the defendants are not bound by the doctrine of *res judicata* and are entitled to establish that the plaintiff has acquired title, if at all, to only two-thirds share of the property, that is, only to the interest of the two mortgagors *A* and *B*; and *fourthly*, that there should be no decree for joint possession of the huts, which are used for residential purposes by the family of the mortgagors and of their deceased brother.

As regards the *first* ground, there is plainly no substance in it. The plaintiff obtained symbolical delivery after the sale had been confirmed. That delivery was operative against the judgment-debtors, who from the date thereof become trespassers. The plaintiff can consequently sue to recover actual possession from them. This view is in accord with the decision in *Sasibhushan Mookerjee* v. *Radhanath Bose* (1), where this Court dissented from the contrary opinion expressed by the Bombay High Court in *Sadashiv Mahadu* v. *Narayan Vithal* (2) and by the Madras High Court in *Kattayat Pathumayi* v. *Raman Menon* (3). We are accordingly of opinion that the suit as framed is maintainable.

As regards the *second* ground, it need not be disputed that, as was ruled by this Court in *Rajib Panda* v. *Lakhan Sendh Mahapatra* (4) and *Nistarini Dassi* v. *Nundo Lall Bose* (5), *Nistarini Dassi* v.

(1) A. I. R. (1915) Cal. 137=25 I. C. 267.
(2) (1911) 35 Bom. 452=11 I. C. 987.
(3) (1903) 26 Mad. 740.
(4) (1904) 27 Cal. 11.
(5) (1903) 26 Cal. 891.

Nundo Lal Bose (6) the defendants are competent to impeach the *ex parte* decree on the ground of fraud by way of defence to the claim of the plaintiff. But the answer to the contention of the appellants is that no issue was raised on this point and they cannot be permitted to attack the decree as fraudulent, when the question is not covered by any of the issues and the evidence has not been directed to the elucidation of this matter.

As regard the *third* ground, we are of opinion, that the appellants have a legitimate grievance. They contend that *C* was made a party to the mortgage suit as a representative of his deceased brother *A* and that consequently the question whether the mortgage was operative against him in his personal capacity was not and could not have been raised in that litigation. There is no answer to this argument. It is, besides, clear from the decisions in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (7) and *Bhaja Cowdhury* v. *Chuni Lal Marwari* (8) that the question of the validity of the mortgage as against *C*, who was not a party thereto, could not have been properly raised and determined in a suit to enforce the security. The position was not altered by the circumstance that one of the mortgagors was dead at the commencement of the suit and one of his representatives was a person interested in his own right in the hypothecated property, adversely, to the mortgage. We hold accordingly that the question now in controversy, namely, was *C* bound by the mortgage, was not only not raised but could not have been raised in the mortgage suit as framed. The decision of this matter is thus not barred by the doctrine of constructive *res judicata*. On the merits, it is plain that no circumstances have been established which would justify the conclusion that the mortgage, though executed by *A* and *B*, also bound the interest of *C*. The inference follows that the plaintiff has acquired the interest of *A* and *B* alone and not that of *C*. Consequently, the plaintiff is entitled to a declaration of title to the extent of a two-thirds share exclusive of the share of *C*.

As regards the *fourth* ground, we are of opinion that the plaintiff, a stranger to the family, should not be placed in actual joint possession of the huts, in which the defendants reside, whatever the strict rights of the plaintiff may be, as purchaser of a two-thirds share of the disputed property. S. 44 of the Transfer of Property Act provides that where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in the section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. The proper course to follow is either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition. [*Kesabnath* v. *Har Gobind* (9), *Ramtonoo* v. *Gobind* (10), *Koonwur Bejoy Keshub Roy* v. *Shama Soonduree Dossee* (11), *Eshan Chunder* v. *Nund Coomar* (12), *Futtah Bahadoor* v. *Jankee Bibee* (13) and *Rajanikanth Biswas* v. *Ram Nath Neogy* (14)]. This applies with much greater force to cases under the Mitakshara Law [*Kalee Pudo Banerjee* v. *Choitun Pandah* (15) and *Kallappa* v. *Venkatesh Vinayak* (16)]. If the contrary view were maintained, results would follow which are best described in the weighty words of Westropp, C. J., in *Balaji Anant Rajadiksha* v. *Ganesh Janardan Kamati* (17), "it is a far safer practice, and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family, who may be not only of a different caste from his own, but also different in race and religion." We are of opinion that, in the circumstances of this case, the plaintiff should not be placed in actual joint possession of all the huts, but should be left to his remedy by a suit for partition.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The plaintiff will

(6) (1903) 30 Cal. 369.
(7) (1906) 33 Cal. 425.
(8) (1907) 11 C. W. N. 284.

(9) (1853) Beng. S. D. A. 768.
(10) (1857) Beng. S. D. A. 1585.
(11) (1865) 2 W. R. Mis. 30.
(12) (1867) 8 W. R. 239.
(13) (1870) 13 W. R. 74.
(14) (1884) 10 Cal. 244.
(15) (1874) 22 W. R. 214.
(16) (1877-78) 2 Bom. 676.
(17) (1880-81) 5 Bom. 499.

have a decree declaring his title to the extent of the two-thirds share of the disputed land and huts, which belonged to *A* and *B*, the original mortgagors, exclusive of the one-third share of their brother *C* who did not join in the mortgage transaction. The decree will also declare that the plaintiff is entitled to institute a suit for partition of the property covered by the decree. Each party will pay his own costs throughout the litigation.

V.B./R.K.

Appeal allowed.

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SHARFUDDIN AND CHAPMAN, JJ.

Basdeo Narain—Defendant—Appellant.

v.

Mt. Bachan Chowdurani—Plaintiff—Respondent.

Appeal No. 30 of 1913, decided on 1st December, 1915, from the Appellate Decree of Sub-Judge, 2nd Court, Muzafferpur, dated 12th September, 1912.

Mortgage—Suit on—Defendant contesting suit on claim of paramount title—Suit decreed with order of costs against him—Defendant cannot in appeal ask for setting aside of order.

A defendant contesting a mortgage suit on the claim of a title paramount to the mortgaged property cannot in appeal, after the suit has been decreed with order of costs against him, ask for setting aside the order on the ground that the suit as against him should have been dismissed. 33 Cal. 425, ref. to. [P. 173, C. 2.]

Akhoy Kumar Banerjee—for Appellant.

Jogendra Chandra Ghose—for Respondent.

Judgment.—On the 26th September, 1889, *Musammat* Tafa Koer executed a conveyance purporting to convey a certain property in the name of Lala Rajbansi Lal. On the 17th May, 1898 Lala Rajbansi Lal executed a mortgage of this property in favour of the plaintiff. But sometime after the execution of the mortgage, Mahant Darbishergir was recorded in the Collectorate as the proprietor of this property. On the 26th March, 1907, Mahant Darbishergir executed a conveyance purporting to convey the property to Lala Bansdeo Narain. The suit out of which this appeal arises is a suit brought upon the mortgage-bond executed by Lala Rajbansi Lal in May 1898. Lala Bansdeo Narain and Mahant Darbishergir were made parties to the suit on the allegation that the mortgagor Lala Rajbansi Lal, in order to defeat the plaintiff, fraudulently procured the registration of Mahant Darbishergir's name as the proprietor of the mortgaged property and with the same object subsequently fraudulently procured a fictitious conveyance by Mahant Darbishergir in favour of Lala Bansdeo Narain. The suit was contested by Lala Bansdeo Narain alone. He contested the *bona fides* of the mortgage, alleged that he was the owner of the mortgaged property and that the mortgagee never had had any title to the property. He also contested the allegation of payment which the plaintiff had made in order to save his claim from limitation. Lala Bansdeo Narain was defeated upon all these points and he now appeals to this Court.

The *first* ground taken in appeal is that inasmuch as Lala Bansdeo Narain claimed to have a title paramount to that of both the mortgagor and mortgagee, the suit should have been dismissed against him.

We cannot, however, find that any such prayer was ever made to either of the Courts below. It is manifest that the appellant invited the decision of the Court upon the question of his title to the mortgaged property. That being so, it is not open to him now to ask this Court to set aside the order directing him to pay the costs of the litigation which he invited. It has been held by this Court in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) that if a Court goes into such a question, the matter is not one of jurisdiction. As the case comes before us, it is at present merely a question of costs. As we have said, no ground has been made out as to why we should interfere with the order of the lower Court.

The *second* ground taken in appeal is somewhat inconsistent with the first. The contention is that the lower Court is wrong in coming to the finding that the payment of interest has been made in such a manner as to save limitation. If the first contention was sustainable that the suit should have been summarily dismissed as against the appellant then, of course it

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(1) (1906) 33 Cal. 425.

would not be open to us to go into this question. However, we may say that assuming that it is open to this Court to go into the matter, we find no ground of law on which we can interfere with the finding of the Subordinate Judge. The question involved was whether a sum of Rs. 66 had been paid by way of interest on the 11th May, 1898. The finding that the payment was by way of interest has not been contested.

It has, however, been argued that the Subordinate Judge was wrong in holding that the payment had been made by an agent duly authorised in that behalf within the meaning of S. 20 of the Limitation Act. It appears that a sum of Rs. 186 was lying in deposit to the credit of the mortgagor and that this deposit was withdrawn by one Madan Behary Lal, who was at the time the Pleader of the mortgagor. There is evidence that Rs. 66 out of this sum was paid by the aforesaid Pleader to the mortgagee in discharge of the interest due upon the mortgage-bond. There is evidence also that the mortgagor was present when this payment was made. The learned Subordinate Judge adds that there were circumstances to show that the Pleader must have been authorised by the mortgagor to withdraw the deposit on her behalf and that the suit has not been contested by the mortgagor. From this circumstance, the Subordinate Judge has inferred that the Pleader was an agent duly authorised to make the payment on account of interest. There is no mistake of law in this conclusion.

The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 174

MOOKERJEE AND RICHARDSON, JJ.

Monmohan Roy—Plaintiff—Appellant.

v.

Hemanta Kumar Mookherjee—Defendant—Respondent.

Appeal No. 274 of 1915, decided on 26th July, 1915, against the order of Dist. Judge, Faridpore, dated 22nd and 26th May, 1915.

(a) Provincial Insolvency Act (3 of 1907), S. 43, sub-S. (2) and S. 46—Interlocutory order is not appealable.

An order calling upon a person who has already been adjudicated an insolvent to show cause why an order should not be made against him under sub-S. (2) of S. 43 of the Provincial Insolvency Act, is not appealable under sub-S. (2) of S. 46 of the Act. [P. 174, C. 2.]

Quære.—Whether such an order could be appealed from by obtaining leave under sub-S. 3 of S. 46. [P. 174, C. 2.]

(b) Provincial Insolvency Act (3 of 1907), S. 59—Power of receiver to make enquiry.

A Receiver under the Insolvency Act is an officer of the Court and can be authorised by the Court to ascertain facts and report them to it with a view to the adoption of such steps as may be deemed necessary in the interests of justice, such as paying a surprise visit to the insolvent's house to see if he has concealed properties. [P. 175, C. 1.]

Satish Chandra Ghose and *Bhupendra Chandra Guha*—for Appellant.

Joges Chunder Roy and *Hem Chander Majumdar*—for Respondent.

Mookerjee, J.—This appeal is directed against an order calling upon the appellant, who has already been adjudicated an insolvent, to show cause why an order should not be made against him under sub-S. (2) of S. 43 of the Provincial Insolvency Act. That section authorises the Court to sentence an insolvent to simple imprisonment for a term which may extend to one year, when it is established that he has fraudulently concealed property. In this case, some of the creditors reported to the Receiver that the insolvent had fraudulently concealed property at his residence. The Receiver obtained the permission of the Court to pay a surprise visit. But the visit was of no use, because, although the insolvent was shown the order of the Court, he closed the doors and declined to admit the Receiver into the house. This was reported to the Court, and the Judge thereupon made an order on the insolvent to show cause in the terms stated. This order is clearly not appealable under sub-S. 2 of S. 46 of the Provincial Insolvency Act, which allows an appeal against an order, under sub-S. 2 of S. 43, for imprisonment of the insolvent, and has no reference to an interlocutory order of the description now before us. The appellant, however, obtained leave of this Court under sub-S. 3 of S. 46 to prefer this appeal. Whether sub-S. 3 of S. 46 was even intended to be applied to a case of this description may be a matter for controversy; but it is plain that there are

no merits whatsoever in the appeal. The insolvent has merely been called upon to show cause why an order should not be made against him under sub-S. 3 of S. 43; that does not in any way prejudice his position. But, on his behalf, it has been argued, *first*, that the Court should not have authorised the Receiver to pay a surprise visit, and, *secondly*, that the Court had no material for any order. These contentions are groundless. The Receiver is an officer of the Court and when he had good grounds to believe that an enquiry should be made into the conduct of the insolvent, the Court could authorise him to ascertain the facts and to report them to the Court, with a view to the adoption of such steps as might be deemed necessary in the interests of justice. Thus, if we assume that the appeal is competent it is clearly groundless, and must be dismissed with costs, three gold *mohurs*.

Let the record be sent down as soon as possible.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 175

CHATTERJEE AND CHAPMAN, JJ.

Keshab Chandra Pramanik—Judgment-Debtor—Appellant.

v.

Ajahar Ali Biswas—Decree-holder—Respondent.

Appeal No. 318 of 1913, decided on 22nd December, 1914, from the Order of Dist. Judge, Nadia, dated 13th May, 1913.

(a) Civil P. C. (5 of 1908), S. 60—Word "Saleable" in S. 60 refers to execution sale and not private sale.

The word "saleable" in S. 60 of the Civil Procedure Code means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties. 20 Cal. 273, foll. [P. 175, C. 2.]

(b) Landlord and tenant—Transferable—Permanent lease—Condition of immunity from Court sale not imposed—Tenant cannot object to Court sale.

Where a landlord does not impose on a holding, under a permanent lease an immunity from Court sales, the tenant has no right to complain if the land is sold by Court. 7 Bom. 256, ref. to. [P. 175, C. 2.]

Surendra Kumar Bose—for Appellant.

Ambicapada Chowdhury—for Respondent.

Judgment.—The appellant held a permanent lease of some lands on which he had his huts. There was a condition, however, in his lease that if he made any transfer of the lands the landlord would re-enter. The respondent having attached this land and the huts, the appellant objected that the land was not saleable and the huts were exempt from sale as being huts occupied by an agriculturist as such. The Court of first instance upheld these objections but the lower Appellate Court repelled them, holding that the condition in the lease did not prevent a compulsory sale by the Court and the huts were not occupied by an agriculturist as such. The present appeal is against that decision.

It is contended that under S. 60 of the Civil Procedure Code such lands only can be sold as are saleable and belong to the judgment-debtor and as the judgment-debtor could not sell the lands, the Court cannot sell the same. This argument is based on a misapprehension of the word "saleable" used in the section. The word evidently means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties. The lease in this case forbade a sale by the tenant but did not prevent a sale by the Court. This view is in accord with the opinion expressed in the case of *Golak Nath* v. *Mathura Nath* (1), and we have no reason to differ from the same. The landlord might perhaps have imposed on the holding an immunity from Court sales as was done in the case of *Vyankatraya* v. *Shivarambhat* (2), but he did not, and the tenant has no right to complain. The first ground, therefore, fails.

The reasoning upon which the learned District Judge holds that the appellant is not an agriculturist may not be sound and is certainly open to criticism, but it is a finding of fact with which we cannot interfere.

The appeal, therefore, must be dismissed and we dismiss it with costs, one gold *mohur*.

V.B./R.K.

Appeal dismissed.

(1) (1893) 20 Cal. 273.
(2) (1883) 7 Bom. 256.

A. I. R. 1916 Calcutta 176

MOOKERJEE AND ROE, JJ.

Basi Nath Pal and *others*—Plaintiffs—Appellants.

v.

Jagat Kishore Acharjee Chowdhury and *others*—Defendants—Respondents.

Appeal No. 3198 of 1912, decided on 2nd June, 1915, from the Appellate Decree of Dist. Judge, Mymensingh, dated 13th August, 1912.

(a) Evidence Act (1 of 1872), Ss. 13 and 42—Judgment not *inter partes*—Evidentiary value—Recitals in cannot be used—They are conclusive about their existence date and legal effect as opposed to their accuracy.

A judgment, not *inter partes*, may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact or possibly as a transaction, but the recitals in the judgment cannot be used as evidence in a litigation between the parties. 22 Cal. 533 (P. C.), 19 All. 277 (P. C.); 29 Cal. 187 (P. C.); 25 Cal. 522; *Malcomson* v. *O'Dea*, (1864) 10 H. L. C. 593 and *Bristow* v. *Cormican*, (1878) 3 A. C. 641, ref. to. [P. 177, C. 1.]

All judgments are conclusive of their existence as distinguished from their truth, so every judgment is conclusive evidence, for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. The law attributes unerring verity to the substantive as opposed to the judicial portions of the record. [P. 177, C. 1.]

(b) Evidence Act (1 of 1872), S. 90—Presumption does not extend to authority of grantor.

The authority of the person making a grant, the genuineness whereof is presumed by the Court under the provisions of S. 90 of the Evidence Act, is not proved by that section. 24 W. R. 428; 3 Cal. 557 and 6 Cal. 209, ref. to. [P. 177, C. 2.]

Nil Madhab Bose, *Basanta Kumar Bose* and *Bepin Chandra Bose*—for Appellants.

Dwarka Nath Chuckerbutty, *Gobinda Chandra Dey Roy* and *Satish Chandra Battacharjee*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for recovery of possession of a share of land on declaration of *shikmi taluki* right thereto. The subject matter of the litigation is waste land in *Mauza* Gurai included in estates Nos. 51 and 80 of the Collectorate of the District of Mymensingh. The estates were sold in 1833 for arrears of revenue and passed into the hands of one Bhawani Kishore Acharyya Choudhury, the predecessor-in-interest of the first defendant. According to the plaintiff the defaulting proprietor, or his predecessor, had created six *shikmi taluks*, which comprised the whole village, excluding 2 *kanis* of private land held in the possession of the proprietor and some specific lands comprised in two other *taluks* Chand Ram and Sova Ram. The plaintiffs set out their title by transfer and succession from the tenure-holders and allege that they have been wrongfully kept out of possession by the first defendant. The first defendant defended the suit mainly on the ground that the six *shikmi taluks* did not cover all the lands of the village to the exclusion of 2 *kanis* of the proprietor's private lands and the specific lands of the two other *taluks* already mentioned; he also contended that the six *taluks* did not exist from before the Permanent Settlement and that the plaintiffs had no right to the specific lands claimed by them. The Subordinate Judge in a careful judgment decided all the points in favour of the plaintiffs and made a decree in their favour. Upon appeal the District Judge, in an elaborate judgment, has differed from the conclusions of the Subordinate Judge and has dismissed the suit. On the present appeal, the decision of the District Judge has been assailed substantially upon two grounds of law; *first*, that reliance should not have been placed upon the facts stated in the report of the decision of the Judicial Committee in the case of *Wise* v. *Bhooban Moyee Debia Chowdrainee* (1), which related to the same estate although not to the lands now in controversy; and *secondly*, that the District Judge has allowed the defendant to succeed on a case not specifically made in the Court of first instance.

As regards the *first* ground, it is plain that, in the Court of first instance, reference was made to the judgment of the Judicial Committee in *Wise* v. *Bhooban Moyee Debia Chowdrainee* (1) in order to meet the objection that the *shikmi taluks* were not mentioned in the quinquennial papers of 1302. What happened in the lower Appellate Court was that the defendant relied upon facts in the history of the title to this property, stated in the judgment of the Judicial Committee, and the District Judge has made such facts the basis of his judgment. The result

(1) (1865) 3 W. R. 5=10 M. I. A. 165 (P. C.).

has been that he has come to the conclusion that the plaintiffs had failed to explain how two of their predecessors Ibrahim Abdul Masam could grant a valid *sanad* in 1807 and Asan Bibi another valid *sanad* in 1809. In our opinion the judgment of the Judicial Committee in a suit not *inter partes*, could not be used for the purpose for which it was used by the defendant in the Court below. It is well settled that although a judgment not *inter partes* may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction [*Ram Ranjan Chakerbati* v. *Ram Narain Singh* (2), *Bitto Kunwar* v. *Kesho Prasad Misr* (3), *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (4), *Tepu Khan* v. *Rajani Mohun Das* (5), *Malcomson* v. *O'Dea* (6), *Bristow* v. *Cormican* (7)], the recitals in the judgment cannot be used as evidence in a litigation between the parties. The principle is that all judgments are conclusive of their existence, as distinguished from their truth; judgments, as public transactions of a solemn nature, are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence, for or against all persons, whether parties, privies, or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. We hold accordingly that the judgment of the Judicial Committee could not be used in proof of the facts stated therein, and the *first* ground must prevail.

As regards the *second* ground, namely, that the plaintiffs were taken by surprise by the argument which was advanced on behalf of the defendants in the lower Appellate Court, we may observe that it is in a sense closely connected with the *first* objection. The plaintiffs relied upon three old *sanads* whose genuineness was questioned by the defendant in both the Courts below. The Subordinate Judge as also the District Judge, however, have concurrently found in favour of the plaintiffs. This, no doubt, did not necessarily show that the grantors of the *sanads* were competent to carve out the interest which they really intended to create. It is well settled that S. 90 of the Indian Evidence Act does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. If it were necessary to rely upon authority in support of this position, reference may be made to the decisions in *Thakoor Pershad* v. *Musammat Bashmutty Kooer* (8) and *Ubilack Rai* v. *Dallial Rai* (9) and *Uggrakant Chowdhry* v. *Huro Chunder Shickdar* (10). A similar view has been taken in respect of ancient documents under the English Law [*Airey*, *In re Airey* v. *Stapleton* (11)]. But the point here is that this objection to the validity of the *sanads* was not specifically raised in the Trial Court; when taken, and for the first time, in the Court of Appeal below, it was rested on facts recited in the judgment of the Judicial Committee already mentioned, but not proved in this suit. The plaintiffs were taken by surprise and have, we think, a legitimate grievance; if the objection had been taken, as it might have been, in the Primary Court, the plaintiffs might have adduced evidence to explain away the circumstances apparently adverse to their case. Indeed, this is more than probable, for they have, in this Court, actually referred to two ancient documents, namely, applications in Court, dated 16th December, 1804 and 1st February, 1805, which, as alleged in a petition presented to us, they have discovered since the date of the decision of the District Judge, and which, they contend, fully explain how the predecessors of the plaintiffs were competent to carve out the interest which they actually created by the *sanads* mentioned. The appellants have invited us to receive these documents in evidence; we are of opinion that the application should be granted in the interests of justice. But in view of the course we intend to adopt, we must decline to accede to the prayer of the appellants that we should discuss in detail the legal effect of the facts found by the District Judge.

(2) (1895) 22 Cal. 533=22 I. A. 60 (P.C.).
(3) (1897) 19 All. 277=24 I. A. 10 (P.C.).
(4) (1902) 29 Cal. 187=29 I. A. 24.
(5) (1898) 25 Cal. 522.
(6) (1864) 10 H. L. C. 593.
(7) (1878) 3 App. Cas. 641.
(8) (1875) 24 W. R. 428.
(9) (1877-78) 3 Cal. 557.
(10) 6 Cal. 209.
(11) (1897) 1 Ch. 164.

If we were to adopt that course, we might influence the decision of the District Judge after remand, which would be obviously unfair, as the facts must be re-investigated by him in the light of the documents now produced by the appellants. But we desire to add that a perusal of the judgment of the Subordinate Judge shows that the arguments which he adduced in support of his view, require serious consideration, and that till those reasons have been successfully met, his decision should not be reversed.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be re-heard. The documents which have been produced before us will be sent down to the District Judge to be considered along with the other evidence in the case. The parties will be at liberty to adduce evidence to elucidate the question of the competence of the grantors of the *sanads* to create the interest actually created by those instruments. The costs of this appeal will abide the result.

V.B./R.K.

Appeal allowed ; Case remanded.

A. I. R. 1916 Calcutta 178 (1)

WOODROFFE AND COXE, JJ.

Sadhu Charan Datta—Defendant—Appellant.

v.

Hara Nath Datta and *others*—Plaintiffs—Respondents.

Second Appeal No. 2826 of 1912, decided on 11th August, 1914, against the decree of the Offg. Sub-Judge, 2nd Court, Dacca, dated 14th May, 1912.

Civil P. C. (5 of 1908), S. 100—No appeal from preliminary decree lies when final decree is passed.

Where before the filing of a second appeal against a preliminary decree a final decree, was passed and no appeal was preferred against the final decree :

Held, that no appeal lay against the preliminary decree as it had been confirmed by the final decree. 21 I. C. 516, foll. and 19 I. C. 630, dist. [P. 178, C. 2.]

Gonoda Charan Sen and *Surendra Nath Das*—for Appellant.

Sarat Chandra Basak and *Bepin Chandra Bose*—for Respondents.

Judgment.

Woodroffe, J.—It is quite clear in this case that no appeal lies and the preliminary objection must succeed.

This is an appeal against a preliminary decree for partition. Now, before the filing of the second appeal a final decree was passed and there has been no appeal filed against the final decree. What is the result? The result is that the preliminary decree which was passed has been affirmed by the final decree and the final decree is itself not made the subject of appeal.

The case cited to us, [*Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (1)], is in point and the case of *Ugra Narain Singh* v. *Basan Narain Singh* (2) does not assist the appellant, because it is pointed out there that at the time when the appellant preferred his appeal, no final decree had been passed. In this case, however, a final decree has been passed and this is the material difference between the two cases.

The appeal, therefore, must be dismissed with costs.

Coxe, J.—I agree.

V.B./R K.

Appeal dismissed.

(1) (1913) 21 I. C. 516.
(2) (1913) 19 I. C. 630.

A. I. R. 1916 Calcutta 178 (2)

MOOKERJEE AND NEWBOULD, JJ.

Motilal Radhakissen—Creditor—Appellant.

v.

Ganpatram and *others*—Insolvents—Respondents.

Appeal No. 224 of 1915, decided on 5th August, 1915, from the Original Order of Dist-Judge, Monghyr, dated 1st May, 1915.

(a) Provincial Insolvency Act (1907), Ss. 16 and 42—Adjudication—Annulment of—Proof of circumstances specified under S. 42 (1) is necessary.

An adjudication under S. 16 of the Provincial Insolvency Act can be annulled only upon proof by the applicant under S. 42 of the existence of one or more of the circumstances specified in sub-S. 1 of that section. *In re Gyll, Ex parte Board of Trade*, (1888) 5 Mor. 272; *Ex parte Hester, In re Hester*, (1889) 22 Q. B. D. 632; *In*

re Painter, Ex parte Painter, (1885) 1 Q. B. D. 85; *Ex parte Ashworth, In re Hoare*, (1874) 18 Eq. 705; ref. to. [P. 179, C. 2.]

(b) Provincial Insolvency Act (1907), S. 16—Adjudication—Annulment of—Consent of creditors is not by itself sufficient.

The consent of all the creditors is not by itself necessarily sufficient to justify an order for annulment of adjudication. [P. 180, C. 1.]

(c) Provincial Insolvency Act (1907), S. 42 (1)—Existence of circumstances specified in S. 42 (1)—Whether Court can refuse to make order of annulment.

Quaere.—Whether under the Indian Law the Court could refuse to make an order of annulment, where one or more of the circumstances specified in sub-S. (1) of S. 42 of the Provincial Insolvency Act were proved to exist.

[P. 180, C. 1.]

Jogendra Narain Mojumdar—for Appellant.

Surendra Nath Ghosal—for Respondents.

Mookerjee, J.—This appeal is directed against what purports to be an order under sub-S. (1) of S. 42 of the Provincial Insolvency Act, whereby an order of adjudication has been annulled. The respondents applied on the 24th July, 1912 to be adjudicated insolvents under the provisions of the Provincial Insolvency Act. The order of the adjudication was made in due course under S. 16 on the 12th August, 1912. Since then, a Receiver has been appointed and has taken charge of the assets. Proceedings were thereafter instituted under S. 43 on the allegation that the insolvents had misconducted themselves in the manner contemplated in that section. Pressed by these proceedings, the insolvents repeatedly applied under S. 42 to have the adjudication annulled. The application was refused on more than one occasion, but was ultimately granted on the 1st May, 1915. The present appeal by one of the creditors is directed against that order and is supported on the ground that none of the circumstances, enumerated in S. 42 as essential for an order of annulment, has been established. In our opinion, there is no answer to this objection.

Sub-S. (1) of S. 42 authorises the Court to annul an adjudication of insolvency when the Court is satisfied that the debtor should not have been adjudged an insolvent or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full or where a composition or a scheme has been approved by the Court under S. 27. There is no foundation for any possible suggestion here that the respondents should not have been adjudged insolvents. They were adjudged insolvents on their own application, and they cannot, with any show of reason, now turn round and contend that the order was improperly obtained. It is also clear that the debts of the insolvents have not been paid in full; in fact, in their petition for annulment, the respondents state that they will endeavour hereafter to satisfy the claims of their creditors. The only question, then is, whether a composition or scheme has been approved by the Court under S. 27. There is no trace on the record of an order of the Court, which can, by any stretch of language, be deemed to express its approval of a composition or a scheme. Indeed, an examination of the proceedings shows conclusively that the preliminary steps requisite for an order under S. 27 have not yet been initiated. The position, consequently, is that not one of the three circumstances mentioned in S. 42, which would justify an exercise of the power vested in the Court to annul an adjudication of insolvency, exists in the present case. An earnest appeal has, however, been made by the respondents to induce us to hold that the failure of the Receiver to satisfy the debts up to the present time, justifies the order of the Court below. The obvious answer is that an order for annulment of adjudication can be made only upon proof of the existence of one or more of the circumstances specified in sub-S. (1) of S. 42. That section is moulded on S. 35 of Statute 45 and 46 Vict., Chap. 52; with reference to the latter provision, it has been ruled that the Court has no power to annul otherwise than in exercise of the authority vested in it by Statute: *In re Gyll, Ex parte Board of Trade* (1); *In re Hester, Ex parte Hester* (2) and *In re Painter, Ex parte Painter* (3). It may be incidentally noted that a contrary view had been taken and wider powers claimed for the Court under the Statute of 1869 by Bacon, C. J., in the case of *Ex parte Ashworth, In re Hoare* (4). We have then

(1) (1888) 5 Mor. 272=58 L. J. Q. B. 8:
(2) (1889) 22 Q.B.D. 632=60 L.T. 943.
(3) (1895) 1 Q.B.D. 85=64 L. J. Q. B. 22.
(4) (1874) 18 Eq. 705=43 L. J. Bk. 142.

the fundamental position that it is obligatory upon an applicant under S. 42 to establish the existence of one or more of the circumstances mentioned therein ; this has not been done here. It may be a matter for consideration whether, if one or more of these circumstances were proved to exist, the Court could, under the Indian Law, as under the English Law, refuse to make an order of annulment ; there is apparently an important variation here from English Law, for whereas S. 42 of the Provincial Insolvency Act uses the word "*shall*," S. 35 of the Bankruptcy Act, 1883, uses the word "*may*," and it was with reference to the latter phraseology that Stirling, L. J., said *In re Keet, Ex parte Official Receiver* (5), that the jurisdiction is discretionary, and that it would not, in the absence of special circumstances, be a good exercise of discretion to make an order of annulment, where, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted : *In re Taylor, Ex parte Taylor* (6) ; *In re Beer, Ex parte Beer* (7). But it is perfectly plain that, even under S. 27 of the Provincial Insolvency Act, the consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment In the case of *In re Hester, Ex parte Hester* (2), Lord Esher, M. R. said. "The cases are clear that the Court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The Court has gone still further, and I think rightly so, and has said that under the present Bankruptcy Act, it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large ; and it will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger." Bowen, L. J., was equally emphatic and observed : "When the creditors have not been paid in full, and there are no objections to the original validity of the receiving order, it is not enough for the debtor to collect the assents of his creditors, and come to the Court and say, rescind the receiving order. He ought, if he wishes to move the Court to interfere in a matter which, to a certain extent, is one of discretion, to bring before it some clear grounds for thinking that what is proposed is a *bona fide* proposal, which it will be in the interest of the creditors to uphold. I wish emphatically to add my entire concurrence in what the Master of the Rolls has said, that the proposal ought to be also one which is not detrimental to the interests of the public. These interests are part of what the Court has to consider upon such applications under the present Bankruptcy Act." Fry, L. J., added : "It is an idle notion that the Court is bound by the consents of the creditors. The Court has far larger and more important duties to perform than merely to consider whether the creditors have consented to the rescinding of the order. We are bound, in the exercise of our jurisdiction in such a matter, and I think, I might almost say, in all matters under this Act, to take a wider view. We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country." To the same effect are the decisions in *In re Gyll, Ex parte Board of Trade* (1) and *In re Flatau, Ex parte Official Receiver* (8). It is consequently fruitless for the respondents to rely, as they have done, upon the fact that the appellant, at one stage, was willing to accept a composition, and to have the matter settled out of Court.

The result is that this appeal is allowed, and the order of the Court below set aside. The appellants are entitled to their costs in both the Courts out of the estate of the insolvents. We assess the hearing fee in this Court at five gold *mohurs*.

V.B./R.K.

Appeal allowed.

(5) (1908) 2 K. B. 666=74 L. J. K. B, 694.
(6) (1901) 1 K. B. 744=70 L. J. K. B, 531.
(7) (1903) 1 K. B 628=72 L. J. K. B. 366.
(8) (1893) 2 Q. B. 219=62 L. J. Q. B. 569.

A. I. R. 1916 Calcutta 181 (1)

JENKINS, C. J. AND CHATTERJEA, J.

Harchand Ray Gobordon Das—Petitioner.

v.

B. N. Ry. Co.—Opposite Parties.

Civil Rule No. 556 of 1914, decided on 19th June, 1914, against the order of Sm. C. C. Judge, Sealdah, dated 15th May, 1914.

Civil P. C. (5 of 1908), O. 3, R. 1—Recognised agent as such cannot be heard.

A recognised agent as such has no right of audience. [P. 181, C. 1.]

Rash Behary Ghose, Biraj Mohan Mozumdar and *Probadh Chandra Roy*—for Petitioner.

Ram Charan Sen—for Opposite Parties.

Judgment.—A recognised agent as such has no right of audience.

We must, therefore, discharge the rule with costs (hearing fee, one gold *mohur*) payable to opposite party, Bengal-Nagpur Railway Company.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 181 (2)

SANDERSON, C. J., WOODROFFE AND MOOKERJEA, JJ.

Kassim Ebrahim Saleji—Defendant—Appellant.

v.

Johurmull Khemka—Plaintiff—Respondent.

Appeal No. 17 of 1915, decided on 25th November, 1915 from the original order of Imam, J., passed on 3rd March, 1915.

(a) Civil P. C. (5 of 1908), O. 5, Rr. 12 and 17—Bailiff going to defendants place of business with partners on three separate days—On each occasion bailiff told that defendant was not there—Bailiff eventually posting writ of summons upon premises—Held there was no sufficient service according to law.

Where a bailiff for the purpose of serving summons upon the defendant went on three separate days to the place where the defendant carried on business with his partners and tried to find him there and on somebody in the place telling the bailiff on each of the occasions that the defendant was not at that time at the place the bailiff eventually posted the writ of summons upon the premises after having cried aloud the name of the defendant three times.

Held, that there was no sufficient service according to law, even if the defendant might know of the issue of the writ. [P. 182, C. 1.]

(b) Civil P. C. (5 of 1908), O. 5, R. 17—Substituted service—Defendant not served personally—Rules must be strictly complied with.

Per *Sanderson, C.J.*—Where it is a question of substituted service, and the defendant has not been served personally, it is most essential that the requirements of the rules (of the Civil Procedure Code) should be strictly observed in all respects. [P. 182, C. 1 & 2.]

(c) Civil P. C. (5 of 1908), O. 5, R. 10—Service of summons—Proper inquiry and substantial effort to find out defendant should be made.

For serving summons upon the defendant proper enquiries and real and substantial effort, and not perfunctory, should be made to find out when and where the defendant is likely to be found. 19 Cal. 201, appr. [P. 183, C. 2.]

(d) Civil P. C. (5 of 1908), O. 5, R. 10—Service of summons—Whenever practicable service should be made personally upon defendant.

Per *Mookerjee, J.*—The fundamental rule for service of summons upon a defendant is that wherever practicable service shall be made upon him personally, unless he has an agent empowered to accept service, in which case service upon such agent shall be sufficient. [P. 184, C. 1.]

(e) Civil P. C. (5 of 1908), O. 9, R. 13—Summons not duly served—Defendant although aware of suit, can get *ex parte* decree set aside.

A defendant is entitled under O. 9, R. 13, Civil Procedure Code, to have the *ex parte* decree set aside as against him if the summons was not duly served, even when the defendant was aware of the institution of the suit against him. [P. 184, C. 2.]

B. C. Mitter, S. C. Roy and *C. C. Ghose*—for Appellant.

H. D. Bose and *K. P. Khaitan*—for Respondent.

Sanderson, C. J.—This appeal is from an order made by Mr. Justice Hasan Imam on the 3rd of March in this year, in which he refused to set aside a decree for specific performance of an agreement between the plaintiff and defendant. The decree was made on the 9th of December, 1914, and it was made *ex parte*, the defendant not being present or taking any part in the proceedings. Then in consequence of a letter which was dated the 22nd of January, 1915 and written by the plaintiff's Solicitor to the defendant, an application was made to Mr. Justice Imam to set aside the decree on the ground that the writ of summons had not been served upon the defendant. The learned Judge refused to set aside the decree and this is an appeal from his judgment.

Now, the service was supported in the first instance upon an affidavit in the usual form, which is to be found at page 15 of the paper-book, in which one Sitaram, who was employed by the plaintiff and another Ishak, who was in the employ of the Sheriff of Calcutta, swore that they had been to the defendant's house where he ordinarily lived and resided on the 1st, 3rd and 4th day of August, that they could not find him there, that they could not see any adult male member of his family, that they had called out his name in the usual way but got no response and that thereupon the writ has been posted upon the premises, and it was upon that affidavit of service that the learned Judge of the Court of first instance proceeded to give his decree.

Now, it turns out that the defendant did not reside at the premises, which are mentioned in the affidavits namely, No. 1, Amratolla Lane, in Calcutta. What took place was that these two men whose names I have already mentioned, one in the employ of the plaintiff and the other in the employ of the Sheriff of Calcutta, went to the place where the defendant carried on business with his partner, and tried to find him there on the days in question, that the bailiff went into the business premises and saw somebody seated on a chair on each occasion, who told him that the defendant was not at that time at the place, and that then having cried aloud his name three times he posted the writ of summons upon the premises. The question is whether that is sufficient service. I may say at once that in one sense I regret that we have to allow this appeal, because I have not much doubt in my mind, speaking for myself, that the institution of these proceedings did come to the knowledge of the defendant, and I do not think that the defendant has any merits in this application. But that is not the question. If I were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service, it would not be right for us to say that it was sufficient service, because we are strongly of opinion that the defendant knew of the issue of the writ. In my judgment, where it is a question of *substituted service*, and the defendant has not been served personally, it is most essential that the requirements of the *rules* should be strictly observed in all respects.

Now, the *rules* which are material to this matter have already been referred to, and I only intend to refer to them quite shortly. The first is O. 5, R. 12, which says, "Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." Now, in this case there is no doubt that service upon the defendant was not made personally, nor was it made upon an agent empowered to accept service. It is quite true that a letter was written by the plaintiff's Attorney to a gentleman who was acting in respect of the dispute about these premises on behalf of the defendant, but that does not empower him to accept service, and unless he has authority from his client to accept service, and does accept service, the mere fact that the plaintiff's Attorney writes to the defendant's Attorney saying 'will you accept service,' and he receives no reply, in my opinion, speaking for myself, is not sufficient. Therefore, it does not come within R. 12.

The next rule which is really material is O. 5, R. 17. That has already been read by Mr. Bose, but I will read it again in part for the purpose of making my judgment intelligible. It says, "— where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court..."

Now, the question in this case is whether the facts as set out in two or three affidavits which have been referred to by Mr. Bose show that the serving officer used all due and reasonable diligence. In my opinion, it would be dangerous for this Court to hold that the facts set out there show that all due and reasonable diligence was used. One must remember that the first affidavit

represented that the serving officer had gone to the defendant's dwelling-house and tried to find him on three separate occasions, that he could not find him or any adult male member of the family and that he then proceeded to call out, outside the house, the name of defendant and then posted a copy of the writ upon the premises of the defendant. This is one thing. But it turns out that a very different matter occurred. The serving officer went to the defendant's place of business, where he carries on business with his partner. There is no mention in the affidavit that the defendant resides there. In fact the defendant swears that he does not ordinarily reside there; and, I am not prepared to hold that merely going to a man's place of business on three separate days, a place of business, where he carries on business with other partners, and where he may or may not be on these particular days or at the particular time of the day, and merely asking for him, and then when he does not find him, posting a copy of the writ on the outer door of the premises is sufficient service. I may adopt the very excellent common sense rule laid down by one of my predecessors, Chief Justice Sir Comer Petheram. It is this. He says: "It is true that you may go to a man's house, and not find him, but that is not attempting to find him. You should go to his house, make enquiries, and if necessary follow him. You should make enquiries, to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found not, as seems to be done in this country, to go to his house in a *perfunctory way*....." I lay stress upon the words "perfunctory way." [See *Cohen* v. *Nursing Dass Auddy* (1).] Now, those are the words used by Chief Justice Sir Comer Petheram when he was dealing with a case where service was attempted to be made on a man at his dwelling-house. I think that remark will apply *a fortiori* to this case where service was effected in a perfunctory manner, by going to a man's place of business where he carries on business with a partner, and where he may be or may not be on those days. As has been said, it is a very good rule to follow that proper enquiries, and real and substantial effort, not in a perfunctory way should be made to find out when and where the defendant is likely to be found.

Under these circumstances I think that, although, as I have said before, I have no sympathy with the defendant, but having regard to the fact that if we allowed this service to pass we might be approving something which would be taken as a precedent which, in my opinion, should not be taken as a precedent, I think that the appeal should be allowed and we will hear Mr. Mitter on the question of costs.

(After discussion.) We think that the proper order in this case is that the appeal will be allowed upon the undertaking by Mr. Mitter that no further service of the writ will be necessary. The suit will, of course, be restored. The costs of the application before Mr. Justice Imam to set aside the decree will be costs in the cause, and each party will bear the costs of this appeal. Any costs, if already paid by the appellant, will be refunded.

Woodroffee, J.—I agree that the appeal should be decreed. As there is no question in this case that the respondent did not go to the house of residence it cannot be said that all due and reasonable diligence was used to find the defendant. The fact that the plaintiff went to the house where summons was posted under the impression that it was the defendant's place of residence which it was not, indicates an intent and knowledge that the defendant was likely to be found at his place of residence, though in fact no search was made there. That the defendant had otherwise knowledge of the institution of the suit is highly probable. But that is not sufficient, if the service is not formally proved.

I would like to add that the decision referred to by the Chief Justice [*Cohen* v. *Nursing Dass Auddy* (1)] was followed by Sir Lawrence Jenkins, C. J. and myself in an unreported decision in Appeal from Order No. 75 of 1912, dated the 28th November, 1913.

Mookerjee, J.—I am of opinion that the order of Mr. Justice Imam cannot be supported. The question for determination is, whether the appellant, as an applicant who seeks to set aside a decree

(1) (1892) 19 Cal. 201.

made *ex parte* against him, has satisfied the Court, within the meaning of R. 13, O. 9, of the Code, that the summons in the suit was not duly served upon him. The answer depends upon the true construction of Rr. 12 and 17 of O. 5. R. 12 recognizes the fundamental proposition that, whenever practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service upon such agent shall be sufficient. The present case does not fall within the exception, as it is not suggested that the defendant had an agent empowered to accept service. The notice given to Mr. Dutt, who had acted as his Attorney on a previous occasion, was also clearly insufficient, and reliance has not been placed thereon in support of the order under appeal. The question, consequently, arises, whether service was made in fulfilment of the requirements of R. 17. That rule—I quote only so much of it as is relevant for our present purpose—provides that where the serving officer, after using all due and reasonable diligence, cannot find the defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. Here the plaintiff caused the notice to be affixed on the house at 1, Amratola Lane. The plaintiff erroneously assumed that the defendant ordinarily resided there; as a matter of fact, it was not his residence; but in that house, business was carried on by a firm whereof the defendant was a partner. In these circumstances, can we say that the plaintiff used all due and reasonable diligence to find defendant; if he did not, the service in the mode in which it was effected was not in fulfilment of the requirements of the Code. In my opinion, the answer must be in the negative. I am not prepared to affirm the proposition that if the plaintiff makes no effort whatever to find the defendant in the place where he ordinarily resides, and not finding him where he carries on business along with others, affixes the summons upon a conspicuous part of the business premises, the requirements of the Code are satisfied: *Cohen* v. *Nursing Dass Auddy* (1). Indeed, the plaintiff has not proceeded on the theory that it was permissible under the law to serve summons in this manner. He acted on the footing that the defendant actually resided in the premises to which the summons was taken. He now discovers that he was under a misapprehension, and is consequently driven to maintain a position which is absolutely unsustainable. There is thus no escape from the conclusion that the summons was not duly served. It has finally been argued that there are ample indications that the defendant was aware of the institution of the suit against him. But this is plainly of no real assistance to the respondent; for, if the summons was not duly served, as I hold it was not, the defendant is entitled, under O. 9, R. 13, to have the *ex parte* decree set aside as against him. Consequently, this appeal must be allowed and the application to set aside the *ex parte* decree granted.

V.B./R.K.

Appeal allowed.

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CHATTERJEA AND MULLICK, JJ.

Khemesh Chandra Rakshit—Defendant—Appellant.

v.

Abdul Hamid—Plaintiff—Respondent.

Second Appeals Nos. 2627 to 2629 of 1909 and 1419 of 1912, decided on 19th March, 1915, against the decree of Addl. Sub-Judge, Chittagong, dated 18th June, 1909.

(a) Bengal Land Revenue Sales Act (11 of 1859), Ss. 13 and 54—Share itself and not right, title and interest of recorded proprietor passes under revenue sale—*Obiter*—Widow in possession as heir—Revenue sale passes not her life interest but share itself.

At a sale under S. 13, Bengal Land Revenue Sales Act XI of 1859, it is not the rights of the recorded proprietor that pass, but the share itself. [P. 186, C. 2.]

Obiter.—A Hindu widow in possession of a share of an estate as the heiress of her husband or her father represents the full owner's interest and the purchaser of such a share acquires the share itself. and not merely a life-estate. 22 Cal. 641 and 11 C. W. N. 821, ref. to and foll. [P. 186, C. 1 & 2.]

It is not the right, title and interest of the previous owner of the share which pass to the purchaser under S. 54, but the share as recorded in the Collector's book, on which the revenue is assessed. [P. 187, C. 1.]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 54—Adverse possession for whatever period against defaulter does not affect purchaser.

Adverse possession against the defaulter, whether for the statutory period or for a lesser period, does not bind the purchaser of a share, who is not a person claiming from or through the defaulter. 14 I. C. 219, ref. to.

[P. 186, C. 2.]

(c) Bengal Land Revenue Sales Act (11 of 1859), S. 54—Meaning of words 'shall not acquire any rights' in S. 54, explained.

The words "shall not acquire any rights" in S. 54, Bengal Land Revenue Sales Act, refer to the acquisition of rights in respect of interests, such as incumbrances or the like, which are referred to in the previous phrase of that section. [P. 187, C. 2.]

Mohendra Nath Roy, Dhirendra Lall Kastgir and *Khitish Chandra Sen*—for Appellant.

Joges Chandra Roy and *Probodh Coomar Dass*—for Respondent.

Judgment.

In No. 1419.—The question for decision in this appeal is, what is the extent of share which passed to the plaintiff, at a sale held under S. 13 of Act XI of 1859.

It appears that a 14 annas 9 pies share of an estate belonged to one Mofizar Rahaman.

Mofizar Rahaman died, leaving two sons, Fazor Rahaman and Dula Meah, a widow and three daughters. Under the Muhammadan Law the two sons got one-half (a quarter each) and the widow and the daughters the other half of the estate. On the 29th October, 1886 Fazor Rahaman got himself and his brother Dula Meah, who was then a minor, registered in the Collectorate with respect to the whole of the 14 annas 9 pies share, ignoring his mother and sisters who may be conveniently referred to as the females.

The females, however, on the 21st March, 1893 obtained an order for registration of their names in respect of one-half of 14 annas 9 pies share, that being their shares in the estate left by Mofizar Rahaman.

On the 7th June, 1893, the plaintiff purchased the interest of Fazor Rahaman at a sale held in execution of a money decree and got himself registered with respect to 7 annas 4½ pies share, although that share included the share of Dula Meah. On the 25th March, 1897, the share of Dula Meah was purchased by one Wasek Ali, and he also got his name registered with respect to 7 annas 4½ pies share, although Dula Meah's share was only one-half of that.

Now after the females got their names registered with respect to 7 annas 4½ pies share, Wasek Ali, as purchaser of Dula Meah's interest, ought to have been recorded as owner of one-half of 7 annas 4½ pies share, and the share registered in the name of the plaintiff also ought to have been reduced to one-half of 7 annas 4½ pies share. In the general register, however, the females were recorded as owners of 7 annas 4½ pies share and Wasek Ali and the plaintiffs were recorded as owner of 7 annas 4½ pies each. The total, therefore, (treating the 14 annas 9 pies as 16 annas) amounted to 24 annas.

It appears that sometime before 1895, the plaintiff got a separate account opened in respect of 7 annas 4½ pies share with a proportionate Government revenue and it was called *hissya* No. 2.

The shares of the females together with that of Wasek Ali (purchaser of Dula Meah's interest) were formed into a separate account consisting of 7 annas 4½ pies share with a proportionate Government revenue and was known as *hissya* No. 5.

Both the *hissyas* Nos. 2 and 5 were sold for arrears of revenue under S. 13 of Act XI of 1859, on the 4th March, 1898, and *hissya* No. 2 (which formerly belonged to him) was purchased by the plaintiff, and *hissya* No. 5 was purchased by the defendant.

It appears from the judgment of the Court below, that a person claiming the interest of the females in the estate has lost his suit as against the plaintiff and the defendant, by reason of these sales for arrears of revenue. We are not, therefore, concerned with the shares of the females, and the only question now is whether the plaintiff by his purchase of *hissya* No. 2 acquired only one-half of 7 annas 4½ pies share (that being the share which originally belonged to Fazor Rahaman and subsequently to the plaintiff under his purchase in execution of the money decree) or the entire 7 annas 4½ pies share covered by separate account No. 2.

The question turns upon the construction of S. 54 of Act XI of 1859, which runs as follows:—"When a share or shares of an estate may be sold under the provisions of S. 13 or S. 14, the

purchaser shall acquire the share or shares subject to all incumbrances and shall not acquire any rights which were not possessed by the previous owner or owners."

It is contended on behalf of the appellant that the words "shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser shall not acquire any rights which were not possessed by the previous owner at any time previously, and that as Fazor Rahaman or the plaintiff never possessed more than a moiety of 7 annas $4\frac{1}{2}$ pies share, the plaintiff as purchaser at the revenue sale could not acquire a title to more than that share. On the other hand, it is contended on behalf of the respondents, that the purchaser acquires the share itself which is put up for sale, irrespective of the extent of the share of the person whose name was recorded in the separate account.

The rights of the purchaser, under S. 54, Act XI of 1859, have been considered in several cases by this Court. In *Dabi Das Chowdhuri* v. *Bipro Charan Ghosal* (1), where an estate held by a Hindu widow was sold for arrears of revenue, and it was contended that under S. 54, the purchaser did not purchase any estate which lasted longer than her lifetime, Pigot, J., after referring to the provisions of S. 13 observed: "It is plain that as the result of a sale under S. 13, it is contemplated that the whole share in respect of which the arrear may have been due shall pass to the purchaser; and that confirms the impression which, upon reading S. 54 alone, one would be disposed to form with regard to its meaning that the words 'shall not acquire any rights' in that section refer to the acquisitlon of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase of that section. We are therefore, of opinion that the entire share passed upon the sale for arrears of revenue under S. 54 and that the purchaser did not take any interest limited to the life of Satanmani." No doubt a Hindu widow in possession of a share of an estate as the heiress of her husband, or her father represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life-estate, and this is the ground upon which Brett and Sharf-ud-din, JJ., based their decision in *Banalata Dasi* v. *Monmotha Nath Goswami* (2). Pigot and Stevens, JJ., however, in the case cited above based their judgment upon a construction of the section and held that the words "shall not acquire any rights" which were not possessed by the previous owner or owners" refer to the acquisition of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase.

It has also been held that adverse possession against the defaulter, whether, for the statutory period or for a lessor period does not bind the purchaser of a share, and that the purchaser is not a person claiming from or through the defaulter. See *Kumar Kalanand* v. *Syed Sarafat Hossein* (3), *Rahimuddi Munshi* v. *Nalini Kanta Lahiri* (4) and *Bilas Chandra Mukherjee* v. *Akshay Kumar Das Sarkar* (5). See also *Bhawani Koer* v. *Mathura Prasad* (6).

The authorities clearly show that at a sale under S. 13 of Act XI of 1859 it is not the rights of the recorded proprietor that pass, but the share itself.

Reliance was placed on behalf of the appellant on the case of *Annada Prosad Ghose* v. *Rajendra Kumar Ghose* (7). In that case, the plaintiff, who purchased in execution of a money decree, the rights of the defaulter in whose name a separate account had been opened in respect of a share of an estate, sued for declaration of his title to, and recovery of possession of, the share against the purchaser thereof at a revenue sale, and it was contended on his behalf that the words "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser at a revenue sale only acquires the rights possessed by the previous owner or owners *at the date of the sale*. Such a contention, if upheld, would lead to the result that if the previous owner parts with all his rights before the share is put up for sale

(1) (1895) 22 Cal. 641.

(2) (1907) 11 C. W. N. 821.
(3) (1908) 12 C. W. N. 525.
(4) (1909) 1 I. C. 81.
(5) (1912) 14 I. C. 219.
(6) (1908) 7 C. L. J. 1.
(7) (1902) 29 Cal. 223.

for arrears of revenue, the purchaser at such a sale acquires nothing, and the learned Judges (Rampini and Pratt, JJ.) overruled the contention. In doing so, however, they held that the words quoted above meant that "the purchaser shall not acquire any rights not possessed by the previous owner or owners at some time or another." It is upon this passage of the judgment that the appellant relies, and it is contended that as the previous owner of *hissya* No. 2 never had rights to anything more than one half of 7 annas 4½ pies share, the plaintiff could not, by his purchase of *hissya* No. 2, acquire a title to the entire 7 annas 4½ pies share. No doubt there is the passage in the judgment, but then the learned Judges also said with reference to the interpretation sought to be placed upon the section, "To put such an interpretation upon these words would be to entirely ignore the policy of the revenue law, which is to protect the revenue and make the share, on which the revenue is assessed, available for the arrears of revenue due upon it," and they quoted with approval the observation of Phear, J., in the case of *Ganga Deen Misser* v. *Kheroo Mandal* (8), "The sale of the Collector passes to the purchaser the share of the defaulting share-holder of the entire estate, as it was registered in the Collector's books," and, "It was not the intention, we think, of the Legislature to introduce uncertainty of this kind into auction-sales held for the purpose of realizing revenue. On the contrary, it is rather the general principle of the Legislature to make these sales effective to pass the full share of the defaulting share-holder free, so to speak, of all incumbrances."

In none of the cases which we have referred to, was there any question of the extent of the share which belonged to the person in whose name the separate account of the share of the estate was opened, but these authorities establish the proposition that it is not the right, title and interest of the previous owner of the share which pass to the purchaser under S. 54, but the share as recorded in the Collector's book, on which the revenue is assessed. It is true Phear, J., refers to the "full share of the defaulting share-holder." In the present case although Fazor Rahaman and subsequently the plaintiff as purchaser of his interest had only a moiety of 7 annas 4½ pies, the separate account was opened with respect to the whole 7 annas 4½ pies share in the name of the plaintiff with a proportionate Government revenue. The other moiety belonged to Dula Meah, and the name of Wasek Ali, the purchaser of his interest, ought to have been recorded in that separate account, but was entered in the separate account No. 5 along with the names of the females. But the 7 annas 4½ pies share was formed into the separate account No. 2 with a proportionate Government revenue, and not with a moiety of the revenue payable for that share. And if the policy of the revenue law is to protect the revenue and make the share on which the revenue is assessed available for the arrears of revenue assessed upon it, as we think it is, the whole of the 7 annas 4½ pies share when it fell into arrears, became liable to be sold for such arrears, although the person recorded as the owner of that share had right to only a moiety of it.

We agree with the view taken by Pigot, J., in *Dabi Dae Chowdhuri* v. *Bipro Charan Ghosal* (1) [followed by Mookerjee, J., in *Bhawani Koer* v. *Mathura Prasad* (6)] *viz.*, that the words "shall not acquire any rights" in S. 54 refer to the acquisition of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase of that section. It is to be observed that a separate account is opened under Act 11 of 1859, after service of notice to the other share-holders. It is pointed out, however, on behalf of the appellant that S. 69 of the Land Registration Act provides that no separate account shall be opened under the provisions of S. 10 or 11 of Act XI of 1859 in respect of the share of any applicant under the said section otherwise than for a share corresponding with the character and extent of interest in the estate, in respect of which such applicant is recorded as proprietor or manager under the Land Registration Act, and that, therefore, *hissya* No. 2 ought not to have been opened with respect to 7 annas 4½ pies share in the name of the plaintiff when he applied for opening of a separate

(8) (1875) 14 B. L. R. 170=22 W. R. 449.

account of his share. But as already stated, in the general register the plaintiff was registered with respect to 7 annas 4½ pies; Wasek Ali and the females also were recorded each with respect to a similar share, the total shares thus amounting to more than 16 annas. That, no doubt, was a mistake, but the separate accounts were opened several years before the *hissyas* were put up to sale, one in the name of the plaintiff for a 7 annas 4½ pies share, and the other in the name of Wasek Ali and the females for a 7 annas 4½ pies with proportionate Government revenues. Neither Wasek Ali nor the females appear to have ever taken any steps to have the mistake corrected. The *hissya* No. 2 consisting of the whole of 7 annas 4½ pies stood in the name of the plaintiff, though erroneously, and when the Government revenue for that share fell into arrears, the Collector put up that *hissya* for sale, and if we are to hold that the entire *hissya* No. 2 did not pass to the purchaser because the person in whose name it stood recorded did not possess the entire 7 annas 4½ pies share, we would be introducing uncertainty into auction sales for the purposes of realizing revenue which, as pointed out by Phear, J., was not the intention of the Legislature.

Lastly, it was contended on behalf of the appellant, that the Court of first instance having found that sale of *hissya* No. 2 was brought about by the plaintiff fraudulently, the Court of Appeal below ought to have come to a finding upon the point, and it is wrong in holding that no question of fraud or mistake comes in. But the only ground upon which the Court of first instance found that the revenue sale was brought about by the fraud of the plaintiff, is that he took no steps to have the mistake in the matter of separate account having been opened in respect of a 7 annas 4½ pies share rectified. But the separate accounts were opened several years, before the sale for arrears of revenue, and we cannot say that there was any obligation on the part of the plaintiff to have the mistake corrected for the benefit of Wasek Ali or persons representing him.

We are not concerned with a consideration of the rights of the females. As already stated, the purchaser of their rights has been held in a previous suit to have lost his rights by reason of the revenue sales, and both the plaintiff and the defendant were parties to that suit.

We are of opinion that the entire 7-annas 4½-pies share constituting *hissya* No. 2 passed to the plaintiff at the sale for arrears of revenue, and this appeal will accordingly be dismissed with costs.

In Nos. 2627 to 2629. — These appeals arise out of suits for rent in respect of 7-annas 4½-pies share instituted by the plaintiff as purchaser of *hissya* No. 2. Having regard to our decision in Appeal No. 1419 of 1912, we think these appeals must also be dismissed with costs.

V.B./R.K.

Appeals dismissed.

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MOOKERJEE AND RICHARDSON, JJ.

Amritalal Hazra and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 587 to 590 and 598 of 1914, and Govt. Appeal No. 4 of 1914 and Rule No. 1293 of 1914, decided on 25th February, 1915, against the conviction of Addl. Sessns. Judge, 24-Parganas, dated 4th June, 1914.

(a) Criminal P. C. (5 of 1898), Ss. 221, 225 and 537—Omission of mention of possession of explosives and of intention of endangering life in charge under S. 4 of Explosives Act does not vitiate charge—Defect is curable.—Practice—In keen contest strict compliance with law is essential—Criminal P. C. (5 of 1898), Ss. 256 and 342—Statement filed under S. 256 is not evidence or does not dispense with examination of accused.

Where it is alleged on behalf of the accused that the charge under S. 4 (*b*) of Act VI of 1908 is materially defective inasmuch as it omits to state, *first*, that the accused were in possession of explosive substance or had them under their control "unlawfully and maliciously," and *secondly*, that it was the intent of the accused to endanger life in British India:

Held, that these defects in the charge do not vitiate the trial and conviction, and that the case would be covered by S. 225 and by Clause (*a*) of S. 537 of the Code of Criminal Procedure. *Webb* v. *Catchlove*, (1886) 3 T. L. R. 159, ref. to. [P. 192, C. 2.]

In a case where every possible point is likely to be contested, a strict compliance with the statutory provisions is desirable. [P. 214, C. 1.]

When a written statement is accepted by a Court from the accused, it does not take the place of evidence nor of such examination of the accused as is contemplated by the Code of Criminal Procedure. [P. 214, C. 1.]

(b) Criminal P. C. (5 of 1898), S. 221—Exact nature of charge must be disclosed otherwise accused is prejudiced.

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, otherwise he may be seriously prejudiced in his defence.

[P. 192, C. 2.]

(c) Explosive Substance Act (6 of 1908), S. 4 (b)—In charge of criminal conspiracy for getting in possession of explosives the explosive substance must be specified.

It is not essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control, where the illegal act, charged under S. 120-B, Indian Penal Code, is the unlawful and malicious possession of explosive substances within the meaning of S. 4 of the Explosive Substances Act, 1908.

[P. 193, C. 1 & 2.]

(d) Indian Penal Code (45 of 1860), Ss. 120-A and B—Accomplishment of illegal act is not necessary for charge of conspiracy.

Even though the illegal act which he has agreed to do or caused to be done, has not been done, a person may be guilty of criminal conspiracy.

[P. 193, C. 2.]

(e) Criminal P. C. (5 of 1898), S. 225—Charge—Defect—If no objection taken verdict cures the irregularity.

Although an indictment, which omits to set out the particular false pretence alleged, is held bad where an objection is taken before verdict, the defect is deemed cured by verdict if no such objection is taken and there is a verdict of guilty on such an indictment. *Reg.* v. *Goldsmith*, (1873) 2 C. C. R. 74 and *Heymann* v. *Reg.*, (1873) 8 Q. B. 102, ref. to. [P. 194, C. 1.]

(f) Indian Penal Code (45 of 1860), Ss. 120-A and B.—In charge of conspiracy object of it need not be specifically stated as in case of charge of an offence.

The indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed. Case-law discussed. [P. 194, C. 1]

(g) Criminal P. C. (5 of 1898), S. 224—Language of charge should conform with statute.

When a charge is drawn up, the Court should adhere to the language of the Statute as far as practicable. [P. 195, C. 1.]

(h) Indian Penal Code (45 of 1860), Ss. 120-A and B—Amendment by Act 8 of 1913—For offence under S. 120-B accused must be proved member of conspiracy after 27th March, 1913.

Ss. 120-A and 120-B did not find a place in the Indian Penal Code before the 27th March 1913, when Act VIII of 1913 became law; and, therefore, persons accused under S. 120-B cannot be convicted, unless the prosecution establishes that the accused were members of a conspiracy after the 27th March, 1913. [P. 195, C. 1 & 2.]

(i) Criminal P. C. (5 of 1898), Ss. 233 and 239—Misjoinder vitiates trial.

Where it is established that there has been a misjoinder of charges, the trial must be deemed illegal, because held contrary to an express provision of the law relating to the mode of trial.

[P. 195, C. 2.]

(j) Criminal P. C. (5 of 1898), S. 235—No general rule of determining "same transaction" can be laid down—But points to be considered are stated.

A comprehensive formula of universal application cannot be framed to determine whether two or more acts constitute the same transaction: but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are, proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

[P. 196, C. 1.]

(k) Criminal P. C. (5 of 1898), S. 235—Conspiracy by three persons for possessing explosives—Possession by one—Offence of S. 120-B of Indian Penal Code and S. 4—S. 4 Explosive Substance Act can be joined and tried.

If *A*, *B* and *C* conspire to make or have in possession or under control an explosive substance within the meaning of the Explosive Substances Act, and if in pursuance of such conspiracy, *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under S. 120-B, Indian Penal Code, and S. 4 (*b*) of Act VI of 1908.

[P. 196, C. 1 & 2.]

(l) Criminal P. C. (5 of 1898), S. 235—Provisions of joint trial one not mandatory—Conspirators can be tried separately.

The Court has the option to place co-conspirators on their trial separately. [P. 197, C. 1.]

(m) Evidence Act (1 of 1872), S. 10—Accused is entitled to insist on strict compliance with requirements of S. 10 when evidence under S. 10 is admitted.

Whenever evidence is attempted to be made admissible under S. 10 of the Indian Evidence Act, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together.

[P. 197, C. 2.]

(n) Explosive Substance Act (6 of 1908), S. 4 (b)—Offence of S. 4 (b) can be separately tried without offence of conspiracy.

Where an offence is committed under S. 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute the accused for such offences, irrespective of the question of the ultimate design of the alleged conspiracy.

[P. 197, C. 2 & P. 198, C. 1.]

(o) Evidence—Criminal trial—Evidence must be conclusive and should admit of no doubt of innocence.

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. *Reg* v. *Hodges*, (1838) 2 Lewin, C. C. 227, ref. to. [P. 199, C. 1.]

If the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt. [P. 200, C. 1.]

(p) Evidence Act (1 of 1872), S. 10—In charge of conspiracy general evidence of its existence is

first given then accused are to be proved to members of it.

Where there is a charge of conspiracy, particular facts are proved to show that one or more of the defendants took part in it after general evidence of the existence of the conspiracy is first given. *Rex* v. *Sydney*, (1863) 9 St. Tr. 817, ref. to. [P. 200, C. 2.]

(q) Evidence Act (1 of 1872), S. 15—Evidence of similar facts are admissible to prove knowledge and intention—But acts must be of the same kind and proximate in time.

Evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. [P. 202, C. 1.]

To admit evidence under this, head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character and the acts tendered must also have been proximate in point of time to that in question. [P. 202, C. 1.]

(r) Criminal trial—Meaning of term "unlawfully and maliciously" explained.

The term "unlawfully and maliciously," in the sense in which it is familiarly used In the criminal law of England, signifies "not for a lawful object and intentionally, without justification or excuse or claim of right." *Reg.* v. *Clemens*, (1898), 1 Q. B. 556; *Miles* v. *Hutchings*, (1903) 2 K. B. 714; *Rex* v. *Ward*, (1871) 1 C. C. R. 356; *South Wales Miner's Federation* v. *Glenmorgan Coal Co.*, (1905) A. C. 239 ref. to. [P. 203, C. 1.]

(s) Explosive Substance Act (6 of 1908), S. 4 (b)—Substance mentioned in (b) need not be dangerous by itself—Any thing used in causing an explosive is also included.

The explosive substance mentioned in S. 4 (*b*) of Act VI of 1908 need not be such as to enable a person by means thereof alone, without the aid of other substances, to cause danger to life or injury to property. [P. 203, C. 2.]

Any part of any apparatus, machine or implement intended to be used or adapted for causing or aiding in causing any explosive substance, is included in the term 'explosive substance' as used in S. 4 (*b*). [P. 203, C. 2.]

(t) Criminal trial — Duty of prosecution—Prosecution must place all available evidence before Court—Its duty is not only to secure conviction.

To place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined, and not to secure a conviction, is the main duty of the prosecution. 42 Cal. 422, ref. to. [P. 204, C. 2.]

(u) Criminal trial — Offence — Prosecution must prove its case to the hilt and it is not for accused to prove his intention or explain.

The offence charged against the accused must be proved by those who made the charge, and the accused stands only to hear the evidence that is given against him and, therefore, he is not bound to show at all, or in any way whatever, what his real object or design in doing any act or acts undoubtedly done by him was. *Rex* v. *Frost*, (1839) 9 Car. & P. 129, ref. to. [P. 208, C. 2 & P. 209, C. 1.]

(v) Explosive Substance Act (6 of 1908), S. 4 (b)—Knowledge and consent in possession is essential in charge under S. 4 (b).

In a charge under S. 4 (*b*) of the Explosive Substances Act, 1908, possession to be punishable must also be possession with knowledge and assent. [P. 209, C. 2.[

(w) Indian Penal Code (45 of (1860), S. 120-B—When offence cannot be proved it is inexpedient though legal to charge for conspiracy which involves proof of the offence.

When the prosecution fails, on the evidence, to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime. *Rex* v. *Boulton*, (1871) 12 Cox. C. C. 87 and 38 Cal. 559, ref. to. [P. 209, C. 2.]

(x) Evidence Act (1 of 1872), S. 54—Proof of bad character cannot prove guilt—It is inadmissible.

It is not by proof of his character but by proof of the facts that a man's guilt is to be established. [P. 211, C. 2.]

(y) Evidence Act (1 of 1872), Ss. 143 and 154—Defence can put leading question to elicit facts though irrelevant in their favour—Prosecution can re-examine their own witness on matters elicited by defence.

In the course of cross-examination by the defence for the purpose of eliciting facts in their favour from the prosecution witnesses, though those facts are irrelevant, the defence are entitled, in view of the generality of the provisions of S. 143 of the Indian Evidence Act, to ask leading questions. [P. 212, C. 2.]

The Court may in its discretion, under S. 154, Indian Evidence Act, permit the prosecution to cross-examine a witness, even though he had been originally called by them with regard to the matters elicited by the defence. [P. 212, C. 2.]

(z) Evidence Act (1 of 1872), S. 125—Prosecution witness—Source of information is privileged—Detective not protected.

In criminal prosecutions, the witnesses for the Crown are privileged from disclosing the channel through which they have received or communicated information. *Rex* v. *Watson* (1817) 32 St. Tr. 1, ref. to. [P. 213, C. 2.]

But the same privilege cannot be claimed by a detective, who cannot refuse on grounds of public policy to answer a question as to where he was secreted. [P. 213, C. 2.]

S. K. Sen, P. Banerji, Manmatha Nath Mookerjee, Birendra Kumar De, C. R. Dass, S. C. Roy, Kshitish Chandra Neogy Prokash Chandra Mazumdar, Bhudeb Chandra Roy, Asiranjan Chatterjee Bagram H. K. Ghose, Sasadhar Roy, K. B. Dutt, N. Sen and *Probodh Kumar Das*—for Appellants.

Pugh and *N. Gupta* and *Hemendra Nath Mitra* and *Nerode Chandra Chatterji*—for the Crown.

Mookerjee, J.—On the 21st November, 1913, during the early hours of the morning, in execution of warrant issued by the Deputy Commissioner of Sylhet, a search was made of a room, rented and occupied by one Sasankasekhar Hazra, *alias* Amritalal Hazra, at 296-1, Upper Circular Road, in the eastern suburbs of Calcutta. The search warrant authorised the Commissioner of Police to search the premises for explosives, letters, and documents in connection with a bomb outrage committed at Moulvi Bazaar on the 27th March, 1913. At the search, the Police arrested Sasankasekhar Hazra, as also three other persons, Dinesh Chandra Das Gupta, Chandrasekhar De and Sarada Charan Guha, who were found asleep inside the room. The Police found in the room various articles and papers, and amongst others, a tobacco-tin fitted with three iron discs (two inside and one outside) and four iron clamps, another tin of similar size, four clamps made to fit the second tin, and other discs and clamps, finished and unfinished. According to the prosecution, these articles were made for use as the envelope or shell of a lethal bomb. On the 23rd November, J. N. Ghose, the Police officer to whom the warrant had been endorsed for execution, gave the first information, in which it was alleged that the four persons arrested had committed offences under Ss. 4 and 5 of the Explosive Substances Act, 1908. On the 26th November, the District Magistrate transferred the case for disposal to Mr. Veitch. On the 6th December, one Kalipada Ghose, *alias* Upendralal Rai Chaudhuri, was arrested in College Street with ten copies of a seditious leaflet called *Liberty* leaflet, of which two were on pink paper and the other eight on white paper. On the 26th January, 1914, one Khagendranath Chaudhuri, *alias* Sureschandra Chaudhuri, was arrested in a house at Baranagore in the northern suburbs of Calcutta. Meanwhile, search warrants had been executed in various places and information gathered as to the antecedents of the persons in custody. The original proceedings, commenced on the 23rd November, were then withdrawn by the Public Prosecutor under S. 494, Criminal Procedure Code, and the four persons arrested on the 21st November were discharged on the 19th January, 1914. At the same time, a fresh complaint was made in which Sasanka, Dinesh, Sarada, Chandrasekhar, Kalipada and Khagen, along with one Hiranmoy Banerji, who had been, in the interval, arrested at Benares, were charged under Ss. 4, 5 and 6 of the Explosive Substances Act as also under S. 120-B of the Indian Penal Code. The consent of the Local Government required by S. 7 of the Explosive Substances Act, 1908, was also duly obtained. The Magistrate held that the case against Hiranmoy Banerji had not been established and discharged him. The other six accused were committed to take their trial in the Court of Session. The first charge against them was to the effect that Sasanka, Dinesh, Sarada and Chandrasekhar, on or about the 21st November, 1913, at 296-1, Upper Circular Road, had in their possession or under their control explosive substances, to wit, Exhibits I, V, VI, VII, and other exhibits, all materials for the creation of bombs, with intent by means thereof to endanger life, and had thereby committed an offence punishable under S. 4 (*b*) of the Explosive Substances Act, 1908. The second charge was to the effect that Sasanka, Dinesh, Sarada, Chandrasekhar, Kalipada, and Khagendra, between March 1911 and 21st November, 1913, at 296-1, Upper Circular Road, and other places in British India, had conspired, with one another and other persons, to wit, Biroja, Satischandra Chakrabarti, Bhupendranath Sen, Praphullaranjan Gupta, Jogeschandra Roy, Nirmal Kanta Roy and other persons, to make and keep explosive substances, with intent by means thereof to endanger life, or enable other persons to endanger life, an offence punishable under S. 4 (*b*) of the Explosive Substances Act, 1908, and had thereby committed an offence punishable under S. 120-B of the Indian Penal Code. The Sessions Judge, after an elaborate trial with the aid of Assessors, with whose opinion he disagreed, except in the case of Khagendra, came to the conclusion that Sasanka, Dinesh, Sarada and Chandrasekhar were guilty under S. 4 of Act VI of 1908, and that Sasanka, Kalipada, Dinesh, Sarada and Chandrasekhar were guilty under S. 120-B, Indian

Penal Code. Under S. 4 of Act VI of 1908, he sentenced Sasanka to transportation for fifteen years and each of the other three, Dinesh, Sarada and Chandrasekhar, to transportation for ten years. Under S. 120-B, Indian Penal Code, he sentenced Sasanka, Kalipada, Dines, Sarada and Chandrasekhar each to transportation for ten years. He further directed the sentences under the two sections to run concurrently. As regards Khagendra, he accepted the opinions of the Assessors and acquitted him. Against the order of the Sessions Judge, five appeals have been preferred, one by each of the accused persons who has been convicted. Another appeal has been preferred by the Crown against the acquittal of Khagendra. A Rule has also been obtained by the Crown for enhancement of the sentences upon the five accused who have been convicted by the Sessions Judge. The appeals and the Rule have been exhaustively argued in this Court during 32 days, and the questions of law and fact which arise therein have been discussed from every conceivable point of view. Since the close of the arguments, we have again minutely scrutinised the papers on the record, and we now proceed to record our decision.

On behalf of the five accused who have been convicted, the order of the Sessions Judge has been assailed as contrary to law and to the evidence on the record. We shall first examine the grounds upon which the legality of the trial has been called in question. But before we do so, it is necessary to set out the relevant portions of the sections under which the accused have been convicted.

S. 4 (*b*) of the Explosive Substances Act, 1908, is in these terms :—

"Any person who unlawfully and maliciously makes, or has in his possession or under his control, any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India, shall, whether any explosion does or does not take place, and whether any injury to person or property has been actually caused or not, be punished with transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added."

S. 120-A, which was introduced into the Indian Penal Code by Act VIII of 1913, is in these terms :—

"When two or more persons agree to do, or cause to be done, (1) an illegal act, or (2) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy :

"Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act, besides the agreement, is done by one or more parties to such agreement in pursuance thereof.

"Explanation :—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

S. 120-B provides the punishment for criminal conspiracy.

In the *first* place, it has been argued on behalf of the accused, that the charge under S. 4 (*b*) of Act VI of 1908 is materially defective, inasmuch as it omits to state, *first*, that the accused were in possession of explosive substance or had them under their control, "unlawfully and maliciously," and, *secondly*, that it was the intent of the accused to endanger life in "British India." In our opinion, the defects in this charge have not vitiated the trial and conviction, and that the case is covered by S. 225 and by Clause (*a*) of S. 537, Criminal Procedure Code. It is worthy of note that the objection was not taken before the Sessions Judge, and regard must be had to this circumstance, to determine whether the omissions mentioned have in fact occasioned a failure of justice. An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, for, unless he has this knowledge, he may be seriously prejudiced in his defence. In the present case, the law and the section of the law against which the offence is alleged to have been committed, were specifically mentioned in the charge, as required by Clause (4) of S. 221, Criminal Procedure Code ; and under clause (5), the fact that the charge was made was equivalent to a statement that every legal condition required by law to

constitute the offence charged was fulfilled in the particular case. The accused fully understood the nature of the offence with which they were charged and had clearly not been prejudiced by the omissions. The view we take is in accord with that adopted in *Reg.* v. *Munslow* (1) where Lord Russell, C. J., observed that it would be a deplorable, if not an absurd, state of the law if such an omission could not be cured by verdict. The first objection must consequently be overruled.

In the *second* place, it has been contended that the charge under S. 120-B, Indian Penal Code, is bad, because it does not specify the explosive substance which, it is alleged, the accused had conspired with one another and with other persons to make and keep. The substance of the argument is that to make and keep explosive substances generally is not an offence, which, it is contended, means, according to S. 4, Clause (*b*) of the Criminal Procedure Code, "any act or omission made punishable by any law for the time being in force," and, according to the second paragraph of S. 40, Indian Penal Code, denotes "a thing punishable under that Code or under any special or local law" as defined in Ss. 41 and 42. Reference has also been made to S. 10 of the Indian Evidence Act, where the expression is used, "two or more persons have conspired together to commit *an* offence or *an* actionable wrong." Reliance has been placed in support of the contention of the accused on the decisions in *Rex* v. *Biers* (2), *Reg.* v. *Parker* (3), *O'Connell* v. *Reg.* (4), *Rex* v. *Mason* (5) and *Reg.* v. *Mackenzie* (6). Stress has also been laid upon the cases of *Behari Mahton* v. *Queen-Empress* (7) and *Poresh Nath Sircar* v. *Emperor* (8). We are unable to accept as well-founded the contention of the accused that where the illegal act, charged under S. 120-B, is the unlawful and malicious possession of explosive substances within the meaning of S. 4 of the Explosive Substances Act, 1908, it is essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control. It is indisputable that a person may be guilty of criminal conspiracy, even though the illegal act which he has agreed to do or caused to be done, has not been done. As was observed by Cleasby, B., in *Reg.* v. *Hibbert* (9), conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself, until something is done amounting to the doing or attempting to do some act, to carry out that intention: conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not. We very often get facts sufficient to establish the guilt of parties to a conspiracy other than acts which have been done in pursuance of it. Baron Cleasby then gives an example: "There may be a conspiracy to set fire to London at different places at once, and that conspiracy may be fully proved, though no part of London has in fact been set on fire, inasmuch as the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means": *Quinn* v. *Leathem* (10). Reference may also be made to the decision in *Reg.* v. *Most* (11), where it was ruled that the accused who had published an inflammatory article in a newspaper not addressed to any individual, in which he recommended the murder not of any specified individual, but of crowned or uncrowned heads of States from Constantinople to Washington, was guilty of misdemeanour under S. 4 of 24 and 25 Vict., c. 100. If the contention of the accused in the case before us were well-founded, there could be no prosecution for a conspiracy to commit murders or dacoities till a murder or a dacoity had been actually committed in pursuance of the conspiracy, though it might be conclusively proved that the conspiracy had been formed, even before a single overt act was done. The gist of the offence is in the conspiracy or agreement, and if the offence goes no further, it may not be possible to say what murders or dacoities it is proposed to commit, or, in a case such as that before

(1) (1895) 1 Q. B. 758.
(2) (1834) 1. A. & E. 327=3 N. & M. 475.
(3) (1842) 3 Q. B. 292.
(4) (1844) 11 Cl. & F. 155.
(5) (1788) 2 T. R. 581.
(6) (1892) 2 Q. B. 519.
(7) (1885) 11 Cal. 106.
(8) (1906) 33 Cal. 295.
(9) (1875) 13 Cox. C. C. 82.
(10) (1901) A. C. 495.
(11) (1881) 7 Q. B. D. 244.

us, what particular explosives the accused intend to obtain [See Russell on Crimes, 1909, Vol. 1, page 187, foot-note (*g*)] The decisions to which our attention has been drawn do not assist the contention of the accused. In *Rex* v. *Biers* (2) the objection to the indictment was upheld on the ground that it misrecited an Act of Parliament (2) Hawkins P. C. Bk. 2, Chap. 25, S. (104). *Rex* v. *Mason* (5) is an authority for the proposition that an indictment for obtaining property by a false, pretence must not only expressly allege that the pretence was false, but also set out the false pretence sufficiently; *Reg.* v. *Oates* (12), *Reg.* v. *Henshaw* (13). But it is worthy of note that although an indictment, which omits to set out the particular false pretence alleged, is held bad, where the objection is taken before verdict, if no such objection is taken and there is a verdict of guilty on such an indictment, the defect is deemed cured by verdict: *Reg.* v. *Goldsmith* (14), *Heymann* v. *Reg.* (15). It is further well-settled that it is not necessary to set out the false pretences in an indictment for a conspiracy to obtain goods by false pretences or for receiving goods obtained by false pretences; in other words that the indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but that in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed [*Rex* v. *Gill* (16), *Reg.* v. *Kenrick* (17), *Reg.* v. *Blake* (18), *Sydserff* v. *Reg.* (19), *Reg.* v. *Gompertz* (20), *Reg.* v. *Aspinall* (21), *Taylor* v. *Reg.* (22)]. *Reg.* v. *Parker* (3) is an authority only for the proposition that where the indictment charged the accused with conspiracy to obtain by false pretences divers goods and merchandise, the prosecutor was bound to state whose the goods and merchandise were, as otherwise he might make an indefinite statement and lie in wait for whatever might come out in the evidence. In *O'Connell* v. *Reg.* (4), Tindal, C. J., observed as follows:—"The crime of conspiracy is complete, if two, or more than two, should agree to do an illegal thing, that is, to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent or even lawful..It has accordingly been always held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not." The Lord Chief Justice then proceeded to state, with reference to two of the counts to which exception had been taken, that in the opinion of the Judges those counts did not state the illegal purpose and design of the agreement entered into between the defendants with such proper and sufficient certainty, as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. The act imputed to the defendants was "intimidation," and with reference thereto, the Lord Chief Justice observed that as the word was not a technical term, not *vocabulum artis*, having a necessary meaning in a bad sense, it was essential to make clear from the context what species of fear was intended or upon whom such fear was intended to operate. This view was confirmed by the House of Lords. Lord Campbell observed that the counts of the indictment which stated generally conspiracies to effect changes in the Government and repeal of the legislative union by intimidation and display of physical force, were bad, because they gave the defendants no information of the specific offences which they had to answer. In *Reg.* v. *Mackenzie* (6), where a person was prosecuted under Ss. 7, 38 and 39 Vict., Chap. 6, for intimidating another person with a view to compel him to abstain from doing an act which that other person had a legal right to do, it was held that the conviction was bad, as the summons did not set out the particular acts alleged to be illegal. The cases reviewed are clearly distinguishable and do not support the contention that when the illegal act contemplated by S. 120-A, Indian Penal Code, is the possession of explosive substances under S. 4 (*b*) of the Explosive Substances Act, 1908, it is essential to specify

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(12) (1855) Dears, C. C. 459.
(13) (1864) L. & C. 444.
(14) (1873) 2 C. C. R. 74.
(15) (1873) 8 Q. B. 102.
(16) (1818) 2 B. & Ald. 204.
(17) (1843) 5 Q. B. 49.
(18) (1844) 6 Q. B. 126.
(19) (1847) 11 Q. B. 245.
(20) (1846) 9 Q. B. 824.
(21) (1876) 2 Q. B. D. 48.
(22) (1895) 1 Q. B. 25.

in the charge the particular substance which the accused have conspired to make or have in their possession or under their control. There is, further, plainly no analogy between the case before us and the class of cases of which *Behari Mahton* v. *Queen-Empress* (7) and *Poresh Nath Sircar* v. *Emperor* (8) may be taken as the types, where it has been ruled that the charge in a prosecution for unlawful assembly must specify the common object. We are clearly of opinion that the conspiracy charge is not open to objection on the ground that it does not specify the explosive substances for the preparation or possession whereof the alleged conspiracy was formed. We observe, however, that the charge does not follow the language of S. 4 (*b*) of Act VI of 1908, and uses the expression "make and keep" explosive substances, while it omits the expression "unlawfully and maliciously" and "British India." It is a wholesome rule that the Court should adhere to the language of the Statute, as far as practicable, when a charge is drawn up; nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge. We hold accordingly that there is no force in the second contention, which must accordingly be overruled.

It has been argued, in the *third* place, that the conspiracy charge under S. 120-B, Indian Penal Code, is bad, inasmuch as it assigns a wrong date for the commencement of the period during which the conspiracy charged against the accused lasted. The charge specified the period as contained between March 1911 and the 21st November, 1913. It is pointed out that Ss. 120-A and 120-B did not find a place in the Indian Penal Code before the 27th March, 1913 when Act VIII of 1913 became law. It is obvious that the period should have been restricted between the dates 27th March and 21st November, 1913. Under S. 222 (1), Criminal Procedure Code, particulars as to the time of the alleged offence were necessary, and the prosecution should have been careful in this respect. No objection to the charge on this ground was, however, taken at the trial till a very late stage of the proceedings, in fact, only in the course of the final arguments, and the error cannot be deemed to have affected the legality of the trial. No doubt, the accused cannot be convicted, unless the prosecution establishes that the accused were members of the conspiracy after the 27th March, 1913, but this involves an investigation of the merits of the case. The third ground thus turns out to be unsubstantial and must be overruled.

In the *fourth* place, the legality of the trial has been questioned on the ground of misjoinder of charges. The substance of the argument is that while four of the accused persons are charged with an offence under S. 4 (*b*) of Act VI of 1908, all the six accused are charged with conspiracy under S. 120-B, Indian Penal Code, and it is contended that a joint trial of all these persons for the two offences charged is illegal, on the authority of the decision of the Judicial Committee in *Subramania Ayyar* v. *King-Emperor* (23). It cannot be disputed that if misjoinder of charges is established, the trial must be deemed illegal, because held contrary to an express provision of the law relating to the mode of trial. The real question in controversy is, whether there has been a misjoinder of charges in the case before us. On behalf of the accused, it has been contended that the same individual cannot be simultaneously charged with an offence as also with conspiracy to commit that offence, and much less can he be tried jointly with other persons alleged to be his co-conspirators. In support of this view, reliance has been placed upon *King-Emperor* v. *Tirumal Reddi* (24). This decision is, however, of no real assistance to the accused; it is an authority only for the proposition that a man cannot be cumulatively charged with the commission of an offence as also of abetment by conspiracy or otherwise of the very same offence; it is, besides, a decision given before S. 120-B, Indian Penal Code, was enacted. In our opinion, the legality of the trial in the present case must be determined with reference to the language of S. 239 of the Criminal Procedure Code, which so far as it is relevant to the question before us, is in these terms: "when more persons than one are accused of different offences committed in the same transaction, they may be charged or tried together or separately as the Court thinks fit." No useful purpose would be served by an elaborate examination of

(23) (1902) 25 Mad. 61 = 28 I. A. 257.
(24) (1901) 24 Mad. 523

the judicial decisions in which the expression "same transaction" has been interpreted, although reference has been made at the Bar to many of the recent cases on the point: *Queen-Empress* v. *Fakirapa* (25), *Emperor* v. *Sharufalli* (26), *Emperor* v. *Jethalal Harlochand* (27), *Emperor* v. *Datto Hanmant* (28), *Emperor* v. *Hari Raot* (29), *Emperor* v. *Ganesh Narayan* (30), *Nga Tha Gyi* v. *Emperor* (31), *Ishar Das* v. *Emperor* (32), *Emperor* v. *Ghulam* (33), *Pulin Behary Das* v. *Emperor* (34) and *Choragudi* v. *Emperor* (35) It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are, proximity of time, unity or proximity of place, continuity of action and community of purpose or design. To take one illustration: *A* and *B* conspire to cheat *X*: in pursuance of that conspiracy and in fulfilment of its object *A* cheats *X* on a specific occasion. The position may clearly be maintained that the two different offences of conspiracy to cheat committed by *A* and *B* and the offence of cheating committed by *A* alone, have been committed in the same transaction. This view is in accord with that adopted in two recent decisions of this Court, from which we see no reason to dissent in this respect: *Superintendent and Remembrancer of Legal Affairs* v. *Manmohan Roy* (36) and *Harsha Nath Chatterjee* v. *Emperor* (37). We hold accordingly that if *A*, *B* and *C* conspire to make or have in their possession or under control an explosive substance within the meaning of the Explosive Substances Act, and if in pursuance of such conspiracy, *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under S. 120-B, Indian Penal Code, and S. 4 (*b*) of Act VI of 1908. The fourth ground must accordingly be overruled as unsustainable.

The *fifth* ground on which the legality of the trial is questioned, is that persons who are alleged to be conspirators in the charge have not been prosecuted, although their names and addresses were known to the prosecution. Reference, has, in this connection, been made to *Emperor* v. *Lalit Mohan (Noni Gopal)* (38), where it was ruled by Jenkins, C. J., that in a conspiracy case the accused can be charged with conspiracy with persons unknown, but that if they are charged with conspiracy with persons known, then such persons must be named in the charge. It is not necessary for our present purpose to determine whether the rule so stated is not too widely formulated; but it may be observed that a different view has sometimes been maintained. Thus, in *Rex* v. *Stoddart* (39), the legality of a conviction for conspiracy was questioned on the ground that though the prosecution knew that one Klinge was an alleged conspirator, he was not named in the indictment. In support of this objection, reliance was placed on *Rex* v. *Walker* (40), *Reg* v. *Thompson* (41) and *Rex* v. *Robinson* (42), but it was overruled by the Court of Criminal Appeal. That judicial opinion on the point has not been quite uniform is obvious from an examination of the cases mentioned, as also *Rex* v. *Deakin* (43), *Reg* v. *Campbell* (44), *Reg* v. *Stroud* (45), *Reg* v. *Caspar* (46), *Rex* v *Bush* (47), *Reg* v. *Esdaile* (48); 2 East Pleas of the Crown, 651, 781; I Chitty on Criminal Law, 213: Russell on Crimes, (1909) 186, 187, 1292, 1478. The question has also been the subject of elaborate discussion in the Courts of

(25) (1891) 15 Bom. 491.
(26) (1903) 27 Bom. 135.
(27) (1905) 29 Bom. 449.
(28) (1906) 30 Bom. 49.
(29) (1906) 2 N. L. R. 147.
(30) (1912) 17 I. C. 705.
(31) (1912) 15 I. C. 485.
(32) (1908) 18 P. W. R. 1908 Cr.
(33) (1907) 1 S. L. R. 73
(34) (1912) 16 I. C. 257.
(35) (1910) 33 Mad. 502=5 I. C. 847.
(36) (1915) 26 I. C. 307.
(37) (1915) 26 I. C. 313.
(38) (1911) 38 Cal. 559=10 I. C. 582.
(39) (1909) 2 Cr. Ap. R. 217.
(40) (1812) 3 Camp. 264.
(41) (1851) 16 Q. B. 832.
(42) (1817) Holt. 595.
(43) (1800) 2 Leach. C. C. 862.
(44) (1843) 1 Car. & K. 82.
(45) (1842) 1 Car. & K. 187.
(46) (1839) 2 M. C. C. 101.
(47) (1818) R. & R. 372.
(48) (1858) 1 F. & F. 213.

the United States. In *People* v. *Mather* (49), the charge of the indictment was of a conspiracy to abduct William Morgan, who was supposed to have revealed the secrets of the Masonic fraternity. The indictment was of Mather alone and the charge of the indictment was that Mather with "other persons unknown" had conspired, etc., although it was a fact that many of the other persons were well-known. The Court held, on the authority of *Reg* v. *Herne* (50), mentioned in the case of *Rex* v. *Kinnersley and Moore* (51), and *Anonymous* case (52), that the indictment against Mather alone was good: there was a conviction and a new trial was denied. Marcy, J., observed: "In a charge of conspiracy, it seems no more necessary to specify the names of the defendant's co-adjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass." The view thus taken in *People* v. *Mather* (49) was approved in *People* v. *Richards* (53) and *United States* v. *Miller* (54). Let us assume, however, that the strict rule formulated in *Emperor* v. *Lalit Mohan (Noni Gopal)* (38) is well-founded on principle and is supported by balance of authorities; that rule is clearly of no assistance to the accused in this case. That decision does not show that if all the known co-conspirators named in the charge are not placed on their trial, the trial of some without the others is vitiated. It is, indeed open to the Court to place the co-conspirators on their trial separately: *Rex* v. *Kinnersley and Moore* (51), *Rex* v. *Oxford* (55), *Rex* v. *Nichols* (56), *Reg* v. *Ahearne* (57), *People* v. *Richards* (53) and *United States* v. *Miller* (54), Russell on Crimes, (1909) 149, 180; 3 Chitty on Criminal Law, 1141; Bishop on New Criminal Procedure, Volume I, Ss. 464 and 1022, Volume II, S. 225; McClain on Criminal Law, Volume II, S. 981. This might, in certain circumstances, be an obvious advantage to the persons actually placed on trial; they would be at liberty, if they so desired, to call the alleged co-conspirators as witnesses, a course which could not possibly be adopted, if all the co-conspirators were tried jointly. But it has been argued that if persons are allowed to be named as co-conspirators in the charge and are yet not placed on their trial, there may be an inducement to the prosecution to mention the names of persons as co-conspirators indiscriminately, with a view to let in evidence under S. 10 of the Indian Evidence Act, which would otherwise be inadmissible. This apprehension is, in our opinion, groundless, for whenever evidence is attempted to be made admissible under that section, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together. We are unable to hold accordingly that the omission of the prosecution to proceed against the alleged conspirators in this case has vitiated the trial of the other persons. The fifth ground, consequently, fails.

The *sixth* ground on which the legality of the trial has been assailed is that the facts disclosed, if believed, indicate that the accused have committed an offence punishable under S. 121-A, Indian Penal Code, and should have been tried accordingly. The contention in substance is that the prosecution has been commenced under S. 120-B, Indian Penal Code, and S. 4 (*b*) of Act VI of 1908, with a view to evade the requirements of S. 196 of the Criminal Procedure Code, compliance wherewith, as was ruled in *Barindra Kumar* v. *Emperor* (58), is imperative in prosecutions for offences against the State. In our opinion, there is no basis for this contention. No doubt, evidence has been adduced on behalf of the prosecution to show that revolutionery literature was in possession of some of the accused persons; no foundation, however, has been laid to establish that the accused had conspired to commit an offence punishable under S. 121-A, Indian Penal Code. But even if it be assumed that the accused could have been successfully prosecuted under S. 121-A, it does not follow that it was obligatory upon the Crown to prosecute them under that section. If the accused

(49) (1830) 4 Wendell 229.
(50) (1709) Unreported.
(51) (1719) 1 Strange 193.
(52) (1635) Cro. Car. 380.
(53) (1885) 67 Cali. 412.
(54) (1878) 3 Hughes 553.
(55) (1811) 13 East 411.
(56) (1742) 13 East 412*n*.
(57) (1852) 2 Ir. Com. L. R. 381.

(58) (1910) 37 Cal. 467=7 I. C. 359.

have committed an offence under S. 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences, irrespective of the question of the ultimate design of the alleged conspiracy. On the other hand, the accused might legitimately contend that the trial should proceed strictly on the lines of charges framed and that evidence, such as would have been appropriate to support a charge under S. 121-A, should not be admitted in the disguise of evidence in support of a prosecution under S. 120-B. The sixth ground must thus be overruled as untenable. We shall now proceed to examine the merits of the case.

The fundamental question on the merits, which has led to protracted discussion in this Court as in the Court below, relates to the true nature of Exhibits I, V, VI and VII. On behalf of the prosecution, the view has been maintained that these Exhibits constitute materials for the preparation of bombs, while, on behalf of the accused, the theory has been vigorously supported that these articles were used by Sasanka in experiments towards the construction of a cheap acetylene generator. In support of their position, the prosecution have adduced in evidence specimens of bombs, exploded and unexploded, for instance, the Dalhousie Square bomb, dated the 2nd March, 1911, the Midnapore bomb, dated the 13th December, 1912, the Delhi bomb thrown at the Viceroy on the 23rd December, 1912, the Moulvi Bazaar bomb dated the 27th March, 1913, the Lahore bomb, dated the 17th May, 1913, the Mymensingh bomb, dated the 30th September, 1913, and the Bhadreswar bomb, dated the 31st December, 1913. Of these, the bombs mentioned first and last did not explode and are practically intact, although the explosive substances contained therein have been removed; all the other bombs exploded and caused destruction of life. The bombs which have been exhibited are obviously all of the same type, and there is expert testimony to this effect. Colonel Muspratt Williams says that the design of these bombs is the work of one controlling mind not that they had necessarily been made by one man. He adds that he had never met with a bomb of a similar construction before his examination of the series of bombs exhibited in this case. Major Turner says that the series of bombs from Dalhousie Square to Bhadreswar all belong to the same family and that he had never before come across this kind of bomb. The system adopted appears to have been to use for the shell of the bomb a tin of the kind in which tobacco, cigarettes, or condensed milk is sold, and with it to use iron discs and iron clamps. Exhibit I is made up of a similar tin, similar discs and similar clamps. Exhibits V and VI taken together make up another complete shell of a bomb, which consists of a tin case with three discs and four clamps. The total aggregates to 2 tins, 11 discs, 8 completed clamps and several others in various stages of preparation. The similarity of these articles to the tins, discs and clamps actually used in the bombs exhibited is remarkable and is calculated to strike the intelligent observer, without the aid of expert testimony. Two points of difference, however, have been emphasised on behalf of the defence. It has been argued, in the *first* place, that whereas the discs found in the room of Sasanka were made of ordinary iron, the discs used in the bombs exhibited were, in some instances, at least, made of galvanised iron. With reference to this circumstance, it has been contended that discs so made could not be used for the purpose of a bomb, as an explosion would take place as soon as the discs came into contact with picric acid. The obvious answer is that, as in the case of the bombs exhibited, these discs, before they could be used in an actual bomb, would have to be lacquered, and lacquer was in fact found in the room. It may also be pointed out that the inner surface of the tin case itself should, for safety, be protected in the same way as the discs, to avoid the formation of picrate of tin which, according to Colonel Muspratt Williams, is a highly sensitive substance. In the *second* place, it has been argued, that as there is a slight difference in the thickness of the iron used for the discs and clamps found in the room and those used in some of the actual bombs exhibited, the articles suspected could not have been intended for use in the construction of a bomb. There is no force in this contention, for, as Major Turner

says, inspite of the fact that some of the parts are lighter, the principle remains the same. After careful examination of the tin cases, discs and clamps found in the room and a comparison therewith of the corresponding parts of actual bombs, we have arrived at the same conclusion as the Sessions Judge, namely, that these articles found in possession of Sasanka were suitable for use as bomb shells. This leads us to the question, whether they could have been intended for innocent use. This inquiry is essential, because it is an elementary rule that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As Alderson, B., says in *Reg* v. *Hodges* (59), to enable the Jury to bring in a verdict of guilty, it is necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw. What, then, is the reasonable hypothesis which has been offered as an explanation of the articles found in possession of Sasanka? The theory he puts forward for acceptance is that at the suggestion of one Jogendra Nath Dutt, he was engaged in experiments for the manufacture of a simple and cheap acetylene gas lamp, which could be used as a substitute for the native *kupies*, and that Exhibit I was only a part of the generator made by him under instructions from Jogendra Nath Dutt, to whom were due the details of the lamp, namely, the tin, discs, clamps and general construction. This theory, however, is not consistent with the admitted facts of the case. In the *first* place, if Sasanka was still engaged in experiments for the construction of a cheap lamp, how is it that he was in possession of so many completed discs and clamps? In the *second* place, for the purpose of an experiment in the construction of a lamp, it would be essential to have holes on the side of the shells, into which a tube could be inserted for the passage of the gas generated. But no tube, no burner, no carbide—nothing except a solitary cock—was found in the room; nor was there any hole on the side of either of the two tin cases, in which a tube could have been inserted. In the *third* place, for the purposes of a lamp, even at the experimental stage a disc with a pinhole through which water could pass slowly from one of the chambers to the other, where the carbide would be kept, would be essential, but none such was found. On the other hand, several discs were found with large perforations, precisely as in the case of discs used in actual bombs. In the *fourth* place, this theory of an acetylene generator, was not suggested till a very late stage of the trial. Mr. Lowman, who was presented at the search, asked Sasanka what Exhibit I was, as soon as it came into his hands. The only answer which Sasanka gave was "look and see for yourself." Sasanka was subsequently asked the same question by Mr. Tegart and Mr. Denham, but he declined to give any explanation as to the articles found. More than this, there was not the remotest suggestion that he was engaged in experiments on the construction of an acetylene generator, during the entire period that the trial lasted in the Court of first instance, from the 19th December, 1913 to the 21st February, 1914. In the *fifth* place, if Sasanka, as he stated before the Sessions Judge, was still engaged in experiments at the time of his arrest, how was a model lamp, such as he had in contemplation, prepared and got ready for use under his instruction while he was under arrest? The generator theory was first put to Colonel Muspratt Williams in course of cross-examination on the 6th April, 1914. Mr. Craig of the Linde Ice Factory, under whom Sasanka had worked in the oxy-acetylene department, was examined on the 24th April, 1914, and the generator theory was again put to him in cross-examination. But these experts pronounced the idea to be impracticable. It now transpires from the evidence that, in the interval, on or about the 16th April, 1914, a model lamp had been prepared by a tinsmith under instructions from Sasanka conveyed through his Pleader. With the article so constructed, Sasanka gave an exhibit in Court on the 14th May, 1914, and demonstrated that the gas, generated by contract of the water with the carbide, when carried through a tube affixed to the side of the tin shell, and ignited with a match, gave a tolerably bright light. The exhibition

(59) (1838) 2 Lewin, C. C. 227

was repeated in this Court by Counsel for the accused. It is not necessary to discuss whether what was exhibited as a lamp was capable of practical use as such ; the answer would depend upon various factors which have not been investigated, for instance, the total cost of construction of the article, the price of the carbide consumed, the time during which the light would burn, the strength of the generator to keep the gas intact, and other like matters. Let us assume, however, that the article exhibited was fit for use as a lamp and negatives the confident opinion to the contrary given by expert witnesses. The question inevitably arises, when did Sasanka complete his investigation, as according to his own statement, he was still in the experimental stage when he was arrested and the articles were seized? The truth is that the theory of a generator is an ingenious after-thought of a well-skilled mechanic employed in the oxyacetylene department of the Linde Ice Factory. In the *sixth* place, if Sasanka was engaged in experiments upon the construction of a chief generator, one might, not unnaturally, have expected to find in his library books and papers on acetylene and on generators ; on the other hand, what was found in his possession was seditious literature which advocated the use of bombs for the attainment of revolutionary ideals. Upon a review, then, of all the circumstances of the case, the conclusion appears irresistible that Exhibit I and other exhibits similar to its component parts were intended for use, not as acetylene generators, but as bomb-shells. The fact that they were kept in a room, apparently without any attempt at secrecy, is explained by the circumstance that they were not calculated to attract the attention, much less to excite the suspicion, of persons not familiar with the mechanism of this particular type of bombs and their construction. We are not unmindful that, as has been strenuously argued by Counsel for the defence, in criminal cases there can be no conviction, unless guilt is established with very great clearness. This presumption of innocence signifies no more than this that if the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt; in other words, as Thayer points out, (Evidence at the Common Law, page 558) "the whole doctrine when drawn out is, *first*, that a person who is charged with a crime must be *proved* guilty, that according to the ordinary rule of procedure and of legal reasoning *praesumitur pro reo*, that is, *neganti*, so that the accused stands innocent until he is proved guilty ; and *second*, that this proof of guilt must displace all reasonable doubt." When we test the case in the light of these principles, we feel no doubt that the exhibits in question were intended for use in the construction of bomb-shells.

The *next* important question of fact, which requires determination, is whether the prosecution has proved the existence of a conspiracy to make explosive substances or to possess them or to have them under control, with intent by means thereof to endanger life or to cause serious injury to property in British India. The question may be appropriately considered at this stage, because it is well settled that in a charge of conspiracy, general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the defendants took part in it ; *Rex* v. *Sidney* (60), *Queen's* case (61), *Rex* v. *Hunt* (62), *Rex* v. *Frost* (63), *Reg.* v. *Shellard* (64), *Reg.* v. *Desmond* (65), and *Reg.* v. *Deasy* (66). It is now admitted that Sasanka manufactured and was in possession of the articles which, in concurrence with the Sessions Judge we have found, were intended for use in the manufacture of bombs. The question is, whether Sasanka had confederates or associates in the design and its accomplishment. An answer in the affirmative is the only solution admissible in view of incontestable facts. The circumstance that bombs of this particular type have been used in various places in British India, as widely separated from each other, as Calcutta, Lahore, Delhi, Sylhet, Mymensingh and Midnapore, points to the conclusion that more than one person is engaged in these transactions : the bombs are not the handiwork of one

(60) (1683) 9 St. Tr. 817.
(61) (1820) 2 Brod. & Bin. 284.
(62) (1820) 3 B. & Ald 566.
(63) (1839) 9 Car. & P. 129.
(64) (1840) 9 Car. & P. 277.
(65) (1868) 11 Cox. C. C. 146.
(66) (1883) 15 Cox. C. C. 334.

individual though they may be the work of one controlling mind. This inference is confirmed by the contents of at least one revolutionary document found in the room of Sasanka, which advocates the realization of the independence of India with the aid of heroic patriots by bloodshed and assassination. This aspect of the case does not, in our opinion, stand in need of elaboration, and the only substantial question for consideration with regard to each of the accused persons, is the extent, if any, to which his complicity in the conspiracy charged and proved has been established beyond reasonable doubt. Before we deal, however, with the cases of the individual accused persons, it is necessary to decide an important question of admissibility of evidence, which turns upon the true construction of the terms of Ss. 14 and 15 of the Indian Evidence Act.

At the trial before the Sessions Judge, evidence was adduced by the prosecution to establish that some of the accused had associated with Pulin Behary Das in 1908 or 1910 and that they had been seen from time to time in the premises of the Dacca Annusilan Samity whereof Pulin Behary Das was the leader. Exception was taken on behalf of the defence, to the admissibility of this evidence, but the objection was overruled. The objection has been reiterated in this Court, and we have been invited to pronounce a decision on the point. Evidence has been adduced to prove that Pulin Behary Das and some of his associates were convicted in 1912 of offences under S. 121-A of the Indian Penal Code, but no evidence has been given as to the nature of the activities of the Samity, of the different grades of its members and of the extent of their participation in the ultimate aims and purposes of the society; proof in these respects, could, indeed, be hardly attempted without reproduction of the voluminous evidence adduced at the trial of the Decca Conspiracy case. The defence, however, have elicited in cross-examination of the prosecution witnesses that the activities of the Anusilan Samity were not known to have been in any way connected with bombs. In these circumstances, we have to decide whether evidence was admissible to prove that some of the present accused had in 1908 or 1910 associated with Pulin Behary Das and had been seen engaged in *lathi* play or in other innocent pursuits on the Samity premises. In our opinion, the evidence was inadmissible and should have been excluded. The prosecution has relied upon S. 14 of the Indian Evidence Act, which is in these terms: "Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant." But, on behalf of the prosecution, the first explanation to the section, which is absolutely fatal to their argument, has been completely overlooked: "A fact relevant as showing the existence of a relevant state of mind must show that *the state of mind exists, not generally, but in reference to the particular matter in question.*" We invited the Counsel for prosecution to explain how evidence of association with Pulin Behary Das in 1908 or presence in his Samity could have any relevancy with reference to the particular matter in question before us, namely, the intention with which the first four accused had assembled in the room, rented by Sasanka, on the night of the 20th November, 1913; but not even a plausible answer was attempted. Illustrations (*i*), (*j*), (*o*) and (*p*) also plainly indicate that the contention of the prosecution is not well-founded. Nor can the prosecution derive any assistance from S. 15 of the Indian Evidence Act, which is in these terms: "Where there is a question, whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of *similar* occurrences, in each of which the person doing the act was concerned, is relevant." Reference, however, was made to a number of judicial decisions which throw light upon the questions in controversy, and particularly to *Makin* v *Attorney-General for New South Wales* (67), *Blake* v. *Albion Life Assurance Society* (68). *Reg* v. *Rhodes* (69), *Rex* v. *Wyatt* (70), *Rex* v. *Bond* (71),

(67) (1894) A. C. 57.
(68) (1878) 4 C. P. D. 94.
(69) (1899) 1 Q. B. 77.
(70) (1904) 1 K. B. 188.
(71) (1906) 2 K. B. 389.

Rex v. *Fisher* (72), *Rex* v. *Ellis* (73), *Rex* v. *Ball* (74), *Rex* v. *Rodly* (75), *Rex* v. *Shellaker* (76), *Rex* v. *Hunt* (62), *Reg* v. *Geering* (77), *Reg* v. *Garner* (78), *Reg* v. *Cotton* (79), *Reg* v. *Jones* (80) and *Reg* v. *Ollis* (81). No useful purpose would be served by an analysis of the special facts of each of these cases, but the principles deducible therefrom, as to the law administered in England, may be briefly formulated. Facts similar to but not part of the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general, inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character, and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. The view we take is consistent with the decisions in *Empress* v. *Vyapoory* (82), *Mankura Pasi* v. *Queen-Empress* (83), *Baharuddin Mandal* v. *Emperor* (84), *Girdhari Lal* v. *Emperor* (85) and *Emperor* v. *Debendra Pershad* (86). With reference to the case last mentioned, it may be noted that the Court properly declined to follow *Reg* v. *Holt* (87), which is no longer authority: *Rex* v. *Smith* (88). We hold, accordingly, that the evidence of association with Pulin Behari Das and the Anusilan Samity is irrelevant, for the purposes of proof of the conspiracy charged in this case, and should not have been admitted.

In the consideration of the individual cases, Sasanka, who has been the central figure in this trial, naturally arrests our attention first. We have already held that he made and was in possession of articles intended for use in the construction of bombs. These articles are manifestly "explosive substances" within the meaning of that expression as defined in S. 2 of the Explosive Substances Act, 1908. For the purposes of the Act, the expression "explosive substance" is deemed to include any materials for making any explosive substance, also any apparatus, machine, implement or material used or adapted for causing any explosion in or with any explosive substance, also, any part of any such apparatus, machine or implement. This comprehensive definition obviously covers the articles made by Sasanka and found in his possession. The point for consideration is, whether all the elements essential to sustain a conviction have been established. Here, three points require examination, namely, *first*, were these articles made and possessed by the accused "unlawfully and maliciously"; *secondly*, can it be said that the accused intended, "by means thereof," to endanger life or cause serious injury to property, when it is plain that, in the absence of explosives, the articles are harmless; and *thirdly*, is it proved that the articles were intended for use in "British India" with a view to endanger life or injure property? It is worthy of note that S. 4 of Act VI of 1908, which we are called upon to interpret, substantially reproduces the provisions of S. 3 of 46 and 47 Vict., Chapter III (Explosive Substances Act, 1883).

In the solution of the *first* question, we may, consequently, interpret the

(72) (1910) 1 K. B 149.
(73) (1910) 2 K. B. 746.
(74) (1911) A. C. 47.
(75) (1913) 3 K. B. 468.
(76) (1914) 1 K B. 414.
(77) (1849) 18 L. J. M. C. 215.
(78) (1864) 4 F. & F 346.
(79) (1873) 12 Cox. C. C. 400.
(80) (1877) 14 Cox. C. C. 3.
(81) (1900) 2 Q. B. 758.
(82) (1881) 6 Cal. 655.
(83) (1900) 27 Cal. 139.
(84) A.I.R. (1914) Cal. 589=22 I. C. 187.
(85) (1910) 6 I. C. 964.
(86) (1909) 36 Cal. 573=2 I. C. 601.
(87) (1860) Bell, C. C. 280.
(88) (1905) 20 Cox. C. C. 804.

expression "unlawfully and maliciously" in the sense in which it is familiarly used in the criminal law of England. The term "unlawfully," as is plainly indicated by S. 5 of the Act VI of 1908, which reproduces the provisions of S. 4 of 46 and 47 Vict., Chapter III, signifies "not for a lawful object." The term "maliciously" signifies "intentionally and without justification or excuse or claim of right," *Reg.* v. *Clemens* (89): *Miles* v. *Hutchings* (90). Blackburn, J., observed in *Rex.* v. *Ward* (91) that a man acts maliciously when he wilfully does that which he knows will injure another in person or property. This accords with the statement of Littledale, J. in *Macpherson* v. *Daniels* (92), "malice, in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse," which is identical with the language used by Bayley, J., in the earlier case of *Bromage* v. *Prosser* (93). The dictum of Bayley, J., was quoted with approval by Brett, L. J., in *Clark* v. *Molyneux* (94) and by Halsbury, L. C., and Lord Watson and Lord Herschell in *Allen* v. *Flood* (95); the dictum of Littledale, J., was on the other hand, adopted by Martin, B, in *Johnson* v. *Emerson* (96). Blackburn, J., had the matter again under consideration in *Reg.* v. *Pembliton* (97), in which he observed that "where any person wilfully does an act injurious to another, without lawful excuse, he does it maliciously." To the same effect is the language used by Bowen, L. J., in *Mogul Steamship Co.* v. *McGrekor* (98): "maliciously means and implies an intention to do an act which is wrongful, to the detriment of another; the term wrongful, imports, in its turn, the infringement of some right." Reference may also be made, in this connection, to the definition of the term "maliciously" given in the Laws of England, Edited by Halsbury, Volume IX, page 768, Article 1499, as also to the observations of Lord Coleridge, C. J., in *Rex* v. *Martin* (99) of Lord Lindley in *South Wales Miner's Federation* v. *Glenmorgan Coal Co.* (100), and of Collins, M. R., in *Read* v. *Friendly Society of Operative Stonemasons* (101). There can be no question, in the case before us, that the bomb, on the construction whereof Sasanka was engaged, was not intended for a lawful object and there can be no controversy also that his act was intentional.

In the solution of the *second* question, namely, the precise import of the expression "by means thereof" we are assisted by a decision in *Rex* v. *Charles* (102), which turned upon the construction of Ss. 3, 4 and 9 of 46 and 47 Vict. Chap. 3. It is plain that the "explosive substance" mentioned in S. 4 (*b*) of Act VI of 1908 need not be such as to enable a person by *means thereof alone*, without the aid of other substances, to cause danger to life or injury to property. If this view were not adopted, the comprehensive definition contained in S. 2 would be nugatory. The term "explosive substance" as used in S. 4 (*b*) includes *any part* of any apparatus, machine, or implement intended to be used or adapted for causing or aiding in causing any explosive substance. The definition is of wide generality, and in the case of *Rex* v. *Charles* (102), it was ruled that any part of a vessel which, when filled with an explosive substance, or adapted for causing an explosion, is itself an explosive substance within the Statute. The articles found with the prisoners in that case were a lead bolt. a fuse, a brass bolt, a screw, a brass casting, and evidence was given to show that these were various parts of a vessel, which, when filled with chlorate of potash or other explosive substance, formed a bomb of a highly dangerous character. The articles found in the present case must, consequently, be deemed "explosive substances" within the meaning of the Statute.

In the solution of the *third* point, we have to bear in mind that the evidence on the record furnishes no indication that the activities of the members of the conspiracy extend beyond the limits of British India; all the bombs produced at the trial have been found in different parts of British India. The articles

(89) (1898) 1 Q. B. 556.
(90) (1903) 2 K. B. 714.
(91) (1871) 1 C. C. R. 356.
(92) (1829) 10 B. & C. 263.
(93) (1825) 4 B. & C. 247.
(94) (1877) 3 Q. B. D. 237.
(95) (1898) A. C. 1.
(96) (1871) 6 Ex. 329.
(97) (1874) 2 C. C. R. 119.
(98) (1889) 23 Q. B. D. 598.
(99) (1881) 8 Q. B. D. 54.

(100) (1905) A. C. 239.
(101) (1902) 2 K. B. 732.
(102) (1892) 17 Cox. C. C. 499.

themselves were found in a house in the suburbs of Calcutta. From the circumstances, the inference of fact may legitimately be drawn that the "explosive substances," made and possessed by Sasanka, were intended for use in British India. We must hold accordingly that all the elements necessary to sustain a conviction under S. 4 (*b*) of the Explosive Substances Act, 1908, have been established in the case of Sasanka. The elements essential for a conviction under S. 120-B, Indian Penal Code, have also been made out. Consequently, his conviction under both the charges must be upheld.

We have next to consider the individual cases of the group of three persons found in the room of Sasanka on the morning of the 21st November, 1913, namely, Chandra sekhar, Sarada and Dinesh. We shall discuss them in the order just named.

Chandrasekhar appears to have made the acquaintance of Sasanka in Dacca for the first time in the year 1908, but there is no evidence to show that any communications had passed between them during the five or six years which had elapsed since then. He is proved to have been employed for some time past in the Kohinoor Printing Press at Chittagong owned by his brother, and the record of his attendance there shows that he had not left Chittagong for at least two years prior to his arrest in Calcutta. On the 15th November, 1913, he left Chittagong for Calcutta, on business connected, it is alleged, with the press. He arrived at Calcutta on the evening of the 16th November, and is shown to have spent the night in the house of Babu Khitish Chandra Sen, a Vakil of this Court, who comes from Chittagong. Next day he went to the place of his cousin, Sarada Charan Dey, with whom he remained until the evening of the 20th November; he left that evening at about 8 or 8-30, saying that he was to visit a friend who had invited him. In the interval he is proved to have paid a visit to the firm of Messrs. S K. Lahiri & Co., in connection with the printing of question papers for the Chittagong Municipal School. He asserts that one of the objects of his visit to Calcutta was to expedite the printing and despatch of these question papers. His second object, he alleges, was to visit the firm of Messrs. Erasmus Jones and Co., for the purchase of fancy cards and coloured paper for his press. It is not shown, however, that he visited the latter firm, and it is doubtful whether he went to their premises; at any rate, it is proved that he did not meet the proprietor of the firm or the head clerk. In the early hours of the morning of the 21st November, 1913, when the door was opened by Sasanka in response to the demands of the Police, Chandra Sekhar was one of the three persons found asleep in the room. To account for his presence in the room, he alleges that on 18th or 19th November, he had met Sasanka (whom he knew by his real name Amrita Lal) at the Ram Krishna Book Depot, where he himself had gone to purchase some books. Sasanka invited him to his place one evening for a chat, so he went there on the evening of the 20th November, and as it grew late, he was asked to spend the night there. He stayed, and early in the morning he was arrested by Police. There is nothing inherently improbable in this story. On the other hand, any possible theory that he had come down to Calcutta from Chittagong at the invitation of Sasanka for the purposes of a criminal conspiracy, is negatived by two significant facts. In the *first* place, when arrested, the return half of a railway ticket was found in his possession; this was produced by the prosecution after considerable effort on the part of the defence and was even then not made an exhibit. The defence has suggested that, in this respect, the prosecution was designedly obstructive. The precise attitude of the prosecution in this matter cannot be very clearly made out from the record. But we desire to emphasise the view expressed by Jenkins, C. J., in *Ram Ranjan Ray* v. *Emperor* (103) in conformity with the ruling in *Reg* v. *Holden* (104), that it is the duty of the prosecution, not so much to secure a conviction, as to place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined. This return ticket shows that Chandrasekhar, when he left Goalando on his way from Chittagong to Calcutta, intended to return within six days. In the *second*

(103) (1915) 42 Cal. 422=27 I. C. 554.
(104) (1838) 8 Car. & P. 608.

place, he had started from Chittagong with the very small sum of Rs. 10; out of this, he left one-half with Babu Khitish Chandra Sen in Calcutta. It could hardly have been his intention, with this small sum at his disposal, to prolong his stay in Calcutta or to engage in a conspiracy for the manufacture of explosives. In fact, the only circumstance against him is his presence in the room of Sasanka on the morning of the arrest; of this, as we have stated, he has offered a not improbable explanation. The Sessions Judge was, as appears from his judgment, considerably influenced in his opinion against this accused by the evidence of his association with Pulin Behary Das and the Anusilan Samity in 1908. That evidence, as we have already held, was inadmissible and should not have been admitted. We further observe that the Sessions Judge mentions that this accused had, on the 20th November, 1908, taken out a seditious book *Mookti Kone Pathey*, from the Samity Library. This evidence is not quite trustworthy, and had it not been inadmissible, would have been entirely valueless; more than this, the book mentioned has not been exhibited, and no proof whatever has been adduced as to the character of its contents. In our opinion, the evidence on the record is not sufficient to sustain the conspiracy charge against the accused Chandrasekhar.

Sarada Charan Guha, the second of the three persons arrested in the room of Sasanka, comes of a family of some means and respectability, resident at Mulgaon in the District of Faridpore. Sarada is the third of the four sons of his father. His second brother, Tara Charan, is demented and is confined in a lunatic asylum. His youngest brother, Debendra, had, notwithstanding the protest of his father, taken in marriage a girl of an inferior caste and had on this account been disinherited. Sarada himself had, as is amply proved by the evidence on the record, incurred the displeasure of his father and of other members of his family by reason of what they considered to be excessive devotion to his wife. The correspondence between the members of the family, which has been produced, shows that his conduct at the time of the annual Puja festival had excited unmistakable bitterness of feeling; he was charged not only with the neglect of his father during his illness but also with misappropriation of family funds; the imputation of misconduct in this respect, as appears from the evidence, was, however, a much exaggerated one, if not wholly unfounded. In these circumstances, he is shown to have left Faridpore on the 16th November, and reached Calcutta on or about the morning of the 17th November. He states that although he had relations in Calcutta, he did not on his arrival put up with them, but preferred to go to an acquaintance who lived at 88, Upper Circular Road. The next day he happened to meet Sasanka who lived in the same street. Some evidence was adduced to show that he had known Sasanka in 1908; he had at that time a shop at Gosainhat near Mulgaon in Faridpore. Sasanka was then in the employ of the Bajitpur *zemindars* and had often to come to the Settlement Camp at Gosainhat Bazar. This is said to be how Sarada and Sasanka first became acquainted with each other. There is no evidence, however, to show that any communication had passed between the two since Sasanka left the place about the year 1910. Not only is there no trace of any correspondence between them, but the evidence makes it clear that Sarada had not been for at least ten years in Calcutta, where Sasanka was continuously employed since 1910. In these circumstances, after the lapse of several years, Sasanka and Sarada met again on or about the 18th November, 1913. Sarada says that he mentioned to Sasanka how he had quarrelled with his family and left them; he also told him that he had not much money with him and had, on arrival in Calcutta, been taken ill with fever. Sasanka offered to put him up in his own room till he got well, and this, according to Sarada, explains his presence in that room at the time of the search on the morning of the 21st November. There has been much animated discussion in this Court on the question, whether Sarada was in fact ill at the time. His jail history ticket shows that after his arrest on the 21st November, he was, on the 25th November, placed in hospital; his temperature was high, and according to Dr. Mulvany, who wrote to the Magistrate on the 26th November, Sarada apparently had fever for some days and was very weak then. Dr. Makhan Lal Mandal,

who attended on him in jail, states that Sarada was at the time suffering from fever, possibly from about a week before. This fits in precisely with the evidence that Dr. Sen Gupta had seen Sarada and had prescribed medicine for him for fever on 17th November. These facts render it extremely probable that Sarada was ill on or about the 17th November and that his illness continued up to the time he was taken to the jail hospital on the 25th November, though there is no direct evidence to show the precise extent of his illness at the time of his arrest. The events so far narrated do not indicate any criminal act on the part of Sarada or tend to connect him with a criminal conspiracy. But, at the search, five letters were found, written by him on Sunday the 16th November, 1913, though not posted at the time of his arrest. One of these is addressed to his brother Debendra, who had misconducted himself and had been disinherited, and another is addressed to his uncle Bepin. Two letters are addressed to two elder sisters of his wife, Sarojini and Hemangini; another letter is addressed to his wife, Charuhasini. Much controversy has centred round these letters. and it has been vigorously urged by the prosecution that they have a very sinister significance. In these letters Sarada announced to his various relations that he had made up his mind to apply himself to the practice of *yoga* and that he would accordingly remain *incognito* for a time; he also pressed them to induce his father to alter his testament and to disinherit him. He further stated that he would probably return in six months or a year and referred to the many difficulties in the way of practice of *yoga*. He exhibited great anxiety for the welfare of his wife and child in the interval. In one passage he said: "let me see how *mayer lila* (the inscrutable ways of the mother) ends." It has been suggested on behalf of the prosecution that Sarada was about to embark on a very dangerous enterprise and that he was in fact the person selected by anarchist conspirators to throw the next bomb. This is nothing more than a suggestion; no evidence has been directed to establish this view, and we are unable to hold that the letters are sufficient to support the theory propounded. The language used in the letters is, no doubt, in some places, peculiar, but on the whole they appear to us to be not very unlike letters such as might be written by a man who had quarrelled with his family and who realised fully, as he himself says, in one of these letters, that he had to give up all hopes of paternal property unless he could act in obedience to the orders of his elders. Much stress has also been laid by the prosecution on the use of the expression *mayer lila*. That expression has in itself no evil significance, and is frequently used by a person in distress who finds all efforts unavailing and realises how inscrutable are the ways of the Providence. At the same time, there can be no question that, by a grievous and perverse misapplication of language, —an act of sacrilege which merits the strongest condemnation of all right-minded people – revolutionaries have applied the expression to describe anarchical outrages as if they were deeds sanctioned by the great Mother of the Universe. We have carefully considered the letters of Sarada, and with the knowledge we possess of the circumstances which very probably inspired them, we are unable to say that the expression *mayer lila* used therein has any sinister import. Reference has also been made to the difficulties mentioned in the practice of *yoga* and to the dangers involved therein. This does not, in our opinion, necessarily indicate any criminal purpose in view, for the practice of *yoga* by persons not fully qualified for such work has sometimes been attended with danger. There has been also much discussion as to the purpose Sarada had in view, when he wrote these letters; it is possible that he never seriously intended to practise *yoga* and that his only object was to write a series of what looked like farewell letters to all his relations, so as to excite their sympathy and make them intercede with his father with a view to bring about reconciliation between the old man and his undutiful son. There has also been some discussion as to why the letters were never posted; it may be that Sarada changed his mind; it is also not improbable that as he was taken ill on his arrival in Calcutta, he could not post the letters. We may add that a desperate effort was made by the prosecution to interpret the term *yoga* in these letters in the light of a paper on *yoga* philosophy found in the room of Sasanka. No connection whatever

has been established between the two. But even if Sarada was shown to have been aware of the contents of the *yoga* pamphlet, it would not in any way alter his position. The laborious attempt made by Counsel for the prosecution to interpret the *yoga* pamphlet, in a sinister sense, was not attended with success. An abstract philosophical disquisition on *yoga* cannot rightly be cut up into isolated sentences and edited so as to furnish a possible text for revolutionary spirits, without positive proof that it was so used. At the same time, one cannot overlook the lamentable fact that the revolutionary literature, brought to light in this instance and in other cases previously reported, does suggest that such principles as the religious principle of absolute surrender to the Divine Will—a doctrine common to many religions—are empolyed by designing and unscrupulous men as a potent means to influence and unbalance weak-minded persons and thus ultimately bend them to become instruments in the commission of nefarious crimes, from which they might otherwise recoil with horror. After a minute scrutiny, however, of the letters found in possession of Sarada, we are of opinion that, taken as a whole, they do not admit of the interpretation suggested by the prosecution and do not connect him with the conspiracy charged. Reference has also been made to the circumstance that Sarada undoubtedly gave a false name and incorrect addresses to the Police, but he has offered a not unreasonable explanation of his conduct. He had been treated by the Police for a long time as a political suspect, and his movements had been constantly watched, a position which even Mr. Tegart admits is not very pleasant. Such attentions on the part of the Police are very irksome and Sarada may well have tried to evade observations. Besides, some foundation has been laid in the evidence to support the allegation of Sarada that he found himself in this unfortunate position, because of a quarrel with an influential Panchayet, Akshay Kumar Guha, who gave information to the Police and had him placed under surveillance. It also transpires from draft petitions, found in his possession at the time of his arrest, that he was about to move the Police authorities to have his name removed from the list of political suspects, and to invite an inquiry into the mode of life he led. No weight can also be attached to the fact that when he left Faridpore, he mentioned to a Pleader's clerk an untrue reason for his visit to Calcutta; this may well be explained by a not unnatural reluctance to disclose to every person his family quarrels. On the whole, then, there is really no substantial evidence to connect Sarada with the conspiracy. But, as appears from the judgment of the Sessions Judge, he was to some extent influenced in his opinion against Sarada by evidence of his association with Pulin Behary Das and the Annusilan Samity many years ago. This evidence, as we have held, is inadmissible, but it is also really of the vaguest description and, even if admitted, does not throw any light on the case. Our conclusion is that the conspiracy charge against Sarada has not been established.

Dinesh Chandra Das Gupta forms the third member of the group of persons arrested in the room of Sasanka on the morning of the 21st November, 1913. His antecedent history has been determined with considerable approach to precision. During the years 1910-12, Dinesh was a student in the Dacca College. On account of ill health, his attendance at lectures fell short of the required minimum, and he left the College towards the close of the Session 1911-12. He appears to have lived with his parents at Faridpore during the next twelve months. In July, 1913, he took his admission into the Krishnanath College at Berhampore, where he stayed till the 21st August, 1913. He then took a transfer certificate, came down to Calcutta, and, failing to obtain admission elsewhere, joined the Ripon College. He could not secure a seat in a licensed mess or hostel; he stayed accordingly first with a friend in College Street and then in 86/2, Mechua Bazaar Street (apparently an unlicensed mess where students resided), from where he intended ultimately to remove to the place of his brother-in-law at 74, Sookea Street. While resident at the Mechua Bazaar Street mess, he became acquainted with one Jogesh Chandra Ray, who lived there and who, at the instance of the prosecution, has been named as a co-conspirator in the charge in this case; but Jogesh Chandra Ray has not only not been placed on his trial, but no evidence even has

been adduced to prove his participation in the conspiracy. In September 1913, while still resident at the Mechua Bazaar Street mess, Dinesh joined in the relief works undertaken to alleviate distress of persons affected by the Damodar floods. It was here at Burdwan that he first became acquainted with Sasanka through Jogesh Chandra Ray. He got an attack of malaria in Burdwan, returned to Calcutta and went to his parents at Faridpore in the first week of October. He had a fresh attack of malaria there and could not return to Calcutta till the 12th November 1913, sometime after his College had re-opened. Next day, he attempted to remove from the Mechua Bazaar Street mess to the place of his brother-in-law, but was informed that no room was available there. Consequently, he continued to live in the Mechua Bazaar Street mess. He asserts that, on the 20th November, Sasanka came into the mess and asked for his help, as Sasanka had a sick friend (Sarada Charan Guha) in his own room who required to be nursed. Dinesh acceded to this request, accompanied Sasanka, stayed in his room during the night, and was arrested early in the morning by the Police. There is nothing intrinsically improbable on the face of this account. The only person, who could speak to the alleged incident of Sasanka's visit to the Mechua Bazaar Street mess on the 20th November, was Jogesh Chandra Ray; the prosecution alleged him to be a co-conspirator but did not prosecute him. When the defence took out summons to cite him as a witness on their behalf, he was reported to have died. We are thus left with the undoubted fact that Dinesh was found in the room and his explanation as to how he was brought there. We have, in the *next* place, evidence adduced to show that Dinesh and Sasanka knew each other, and that Dinesh possibly now and then visited Sasanka. But nothing really turns on this evidence, because admittedly Dinesh came to know Sasanka in September 1913, on the occasion of the Damodar relief works; yet it is worthy of note that no previous connection whatever between the two has been traced or suggested. Considerable stress, however, has been laid by the prosecution upon a list of names in cipher, found in the breast-pocket of a coat claimed by Dinesh as his during the search of the room of Sasanka. The handwriting of this document has not been identified. The cipher list was not put to Jatindra Chandra Majumdar, who had been called to prove the handwriting of Dinesh on two post cards; but it transpired that the document had been shown by the Police to the witness outside Court. Upon this, the defence made the legitimate comment that the document had not been put to the witness in Court, because he had failed to recognise the handwriting when it was shown to him outside. We observe, however, that notwithstanding these circumstances, the Sessions Judge proceeded, in his judgment, to compare the document with the writing on the post cards, with a view to determine whether it was in the handwriting of Dinesh. This is a course, which has not commended itself to high authority: *Barindra Kumar* v. *Emperor* (58), *Kurali Prasad Misser* v. *Anantaram Hajra* (105). Whether the cipher list, however, was or was not written by Dinesh himself, is not very material for the present inquiry. It has been deciphered and turns out to be a list of names of persons, who apparently paid a small monthly subscription for some purpose undisclosed. The defence has suggested that this was probably a list of subscribers to the library which Sasanka kept in the room; it has also been urged that, in any event, the list does not connect Dinesh with any criminal conspiracy. This is perfectly true; yet one cannot but observe that it would have materially helped the case for the defence, if Dinesh had offered a true explanation of the real nature and purpose of this apparently harmless document, instead of suggesting the very improbable theory that it had been planted in his coat pocket by an unscrupulous Police spy. In this connection reference may usefully be made to the following observations made by Tindal, C. J., in *Rex* v. *Frost* (63): "On the part of the prisoner, the learned Counsel who appear for him state, and I think they are justified in so stating, that he is not bound to show what was the object or purpose or intent of the acts that were undoubtedly done by the prisoner at the Bar. His Counsel say, the offence charged against him must be proved by those who made the charge, that he stands only to hear the evidence that is given against him, and,

(105) (1871) 16 W. R. 16 (P. C.).

therefore, he is not bound to show at all, or in any way whatever, what his real object or design was. Undoubtedly, the proof of the case against the prisoner must depend for its support, not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing, and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence." In this particular case, however, as we have already said, the document, though in cipher and thus calculated to excite suspicion does not, when deciphered, incriminate the accused in whose possession it was found. Reference has *lastly* been made to the fact that the name of Dinesh appears in a list found at the search of the house of one Madan Mohan Bhowmik. This evidence is obviously valueless, but the Sessions Judge has also correctly held that it is not admissible against the accused. Nothing is known of Madan or of his activities, except that his name appears among some disconnected memoranda contained in a note-book found in Sasanka's room, and the mere fact that Madan had chosen to enter the name of Dinesh in a list prepared by him for some unknown purpose, is obviously irrelevant for the purposes of this trial. On a review of the entire evidence, it is plain that the conspiracy charged against Dinesh cannot be supported.

We have next to consider the charge under S. 4 (*b*) of the Explosive Substances Act, 1908, against Chandra sekhar, Sarada and Dinesh, against whom, as we have just found, the conspiracy charge has failed. It is obvious, indeed this was conceded by the Counsel for the Crown, that the charge under the Explosive Substances Act must necessarily fall along with the conspiracy charge. Reference was made to a number of judicial decisions to show under what circumstances a person may be deemed to be in possession of a movable: *Queen-Empress* v. *Sanghan Lal* (106), *Emperor* v. *Gajadhar* (107), *Kashi Nath* v. *Emperor* (108), *Ashruf Ali* v. *Emperor* (109), *Emperor* v. *Hamid Ali and Government of Eastern Bengal & Assam* v. *Serajuddin* (110), *Jogjiban Ghose* v. *Emperor* (111), *Peary Mohan* v. *Weston* (112), *Weston* v. *Peary Mohan* (113), *Kali Charan Mukherjee* v. *Emperor* (114) and *Nga Pu* v. *Emperor* (115). No useful purpose would be served by an analysis of the circumstances of the various cases discussed at the Bar. It is sufficient to say that while it is not necessary to prove manual possession of the explosive substance by the accused, it must be proved that it was in his power or control; possession to be punishable must also be possession with knowledge and assent. The mere fact that Chandrasekhar, Sarada and Dinesh were in the room, does not show that they were in possession of all or any of the things contained therein; it is not shown that they were even aware of the existence of the tin cases, discs, and clamps, or that they were acquainted with their nature and purpose. We hold accordingly that the charge under S. 4 (*b*) of Act VI of 1908 fails against each of these persons, quite as much as the conspiracy charge. This result is in conformity with the well-settled principle that when evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime: *Rex* v. *Boulton* (116), *Emperor* v. *Noni Gopal* (*Lalit Mohan*) (38).

We have to examine, in the next place, the case of Kalipada, who was arrested in College Street on the 6th December, 1913 with ten copies of the *Liberty* leaflet in his pocket. The only charge against him is that of conspiracy under S. 120-B,

(106) (1893) 15 All. 129.
(107) (1903) 25 All. 262.
(108) (1905) 32 Cal. 557.
(109) (1909) 36 Cal. 1016=4 I. C. 699.
(110) (1910) 37 Cal. 24=5 I. C. 555.
(111) (1909) 2 I. C. 681.
(112) (1912) 13 I. C. 721.
(113) A. I. R. (1914) Cal. 396=40 Cal. 898=23 I. C. 25.
(114) A. I. R. (1914) Cal. 473=41 Cal. 537=22 I. C. 148.
(115) (1912) 13 I. C. 778.
(116) (1871) 12 Cox, C. C. 87.

Indian Penal Code; there is no substantive charge against him under S. 4 of the Explosive Substances Act, 1908. As regards this accused, there has been prolonged discussion on the question, how he came to be in possession of the *Liberty* leaflets. Counsel on his behalf contended that the leaflets were planted in his pocket by a Police spy, with a view to create evidence of conspiracy against him. This theory, which, in our opinion, has not been placed above the level of a bold hypothesis and has certainly not been established by the evidence, has been indignantly repudiated by the prosecution; the Crown has further sought to prove affirmatively, that the leaflets were printed by Kalipada himself at the Loke Nath Press where he was admittedly employed as a compositor. The evidence shows that Kalipada, whose real name is Upendra Lal Ray Choudhury, belongs to a respectable family, resident at Benotia in the District of Faridpore. Their circumstances have altered for the worse, and Upendra found himself driven to earn his livelihood in Calcutta, where he came about the middle of the year 1912. He used to reside at 119/4, Upper Circular Road and obtained employment as a compositor in the Loke Nath Press. He alleges that he adopted the name of Kalipada Ghose, because he felt that his humble occupation might bring discredit upon his family. He was employed in the press from October 1912 to 6th October, 1913 on a regular monthly wage. Work in the press was thereafter temporarily suspended and his services were terminated. He was re-employed, however, on a daily allowance from the 10th to 16th November, 1913. There is internal evidence to show that the *Liberty* leaflet was written after the 30th September, 1913, as it makes mention of the College Square outrage, which took place on the 29th September, and the Mymensingh Bomb outrage, which happened on the following day. If, therefore, the leaflet was printed at the Loke Nath Press, it might then have been printed between the 1st and the 6th October or between the 10th and the 16th November. Elaborate evidence of a circumstantial character has been adduced by the Crown to show that the leaflet was printed at the Loke Nath Press. A minute comparison has been made of the types required to print the leaflet with the types found in the press, and quite a number of remarkable coincidences has been discovered. All the types necessary to print the leaflet were found in the press; but the most striking fact in this connection is the presence of a damaged T, which must have been used to print some of the copies of the leaflet. The damage to this type was obviously caused by a pin which fell accross the face as the printing was in progress. It is extremely improbable that a similar accident to a similar type should have happened in some other press. More than this, coincidences almost equally remarkable have been noticed in the case of types of other letters which had either been damaged or had some special feature, some peculiarity in form or shape. This part of the case does not require much elaboration, because we agree in the conclusion of the Sessions Judge that the evidence though circumstantial, is practically conclusive. We hold then that the *Liberty* leaflets, found in the possession of Kalipada, were printed at the press where he was employed as a compositor, and it is probable that they were printed by him. There is also indisputable proof that during the whole of the period that Kalipada was employed as a compositor, he was on friendly terms with Sasanka. They regularly took their meals at the same eating-house; there is also evidence to show that Sasanka guaranteed regular payment by Kalipada whom he introduced to the hotel-keeper; it is further clear that as Sasanka moved from one hotel to another, Kalipada followed him. The question, consequently, arises, how far this association between Sasanka and Kalipada carries the case against the latter. In this connection, it must not be overlooked that there is no evidence to show that the "*Liberty* leaflets" were printed by Kalipada, at the instance or under the direction of Sasanka, and that when the leaflets were first found in his possession, Sasanka had already been in custody for two weeks. But it has been suggested on behalf of the Crown, that they must have been actually printed before Sasanka was arrested. If it be assumed, however, that they had been printed by Kalipada under the direction of Sasanka, it is remarkable that no copy was found when his room was searched on the 21st November. But even if the theory be accepted that the leaflets were

printed by Kalipada under the direction of Sasanka, the case against Kalipada is not materially advanced. No doubt, the leaflet is a seditious document of an inflammatory character and advocates the use of bombs for purposes of assassination. But it does not follow that even if Sasanka employed Kalipada to print and disseminate seditious literature, he confided to him all his secrets and took him in as a member of the conspiracy to make and possess explosive substances. There is also no evidence to show that Kalipada was in any way an assenting party to the conspiracy in which Sasanka was engaged, or that he was even aware of its existence. There is a further circumstance which militates against such an hypothesis. According to the prosecution, the conspirators had assembled on the night of the 20th November to hold an important conference; if this assumption be well founded, it is remarkable that Kalipada should have been absent from that meeting. In fact, when all the circumstances come to be analysed, the two outstanding facts proved against Kalipada are that he was on friendly terms with Sasanka, and that a fortnight after the arrest of Sasanka he was arrested in College Street with copies of a revolutionary leaflet in his pocket, which had been printed most probably by himself at the press where he was employed as a compositor. In our opinion, whatever suspicious one may entertain as to the mental tendencies of Kalipada, there is not sufficient evidence to connect him with the particular conspiracy charged.

We have next to consider the appeal preferred by the Crown aginst the acquittal of Khagendra Nath Choudhury. Evidence was, adduced in the Sessions Court to prove that his real name was Khagendra Nath Choudhury and that he had assumed the name of Suresh Chandra Choudhury for a dishonourable purpose. Suresh, his fellow-student and co-villager, had passed the Intermediate examination whilst he himself was unsuccessful; but he passed himself off as Suresh to enable him to secure the appointment of a teacher in a school at Bhastara in the District of Hooghly. On behalf of the defence, it was contended that this evidence was inadmissible under S. 54 of the Indian Evidence Act, but the objection was overruled. In our opinion, as it was admitted that Khagendra had assumed a false name, evidence should not have been allowed to prove the dishonourable purpose for which the false name had been assumed, a purpose in no way connected with the conspiracy charged against him. It is an elementary rule that a man's guilt is to be established by proof of the facts and not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt. As Stephen observed in his General View of the Criminal Law of England [Edition 1863, page 309], "a man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons; if general bad character is too remote, *a fortiori* the particular transcations of which that general bad character is the effect, are still further removed from proof; accordingly, it is an inflexible rule of English Criminal Law to exclude evidence of such transactions." We must consequently take no account of the circumstances under which Khagendra assumed the name of Suresh. When we come to examine the evidence relevant to the conspiracy charge, we find this much established that he was acquainted with both Sasanka and Kalipada; he appears to have come down on more than one occasion from Bhastara to Calcutta on account of illness and to have stayed in the room of the one or the other in Upper Circular Road; in fact, in each of these rooms medicine prescribed for him and partially used was found. But the mere fact that Khagendra was acquainted with Sasanka and Kalipada and was possibly on friendly terms with them, is obviously insufficient to connect him with the alleged criminal conspiracy. Considerable stress, however, has been laid upon a letter written by one Biroja from Calcutta on the 17th November, 1913 and found in the room of Khagendra at Bhastara. In this letter, Biroja promises to send "new paper" in a few days. On behalf of the Crown it has been suggested that the "new paper" mentioned in the letter refers to the *Liberty*

leaflet : the suggestion, however, can take rank only as an unproved hypothesis. More than this, there is no evidence to show who this Biroja was, although, at the instance of the Crown, he was named as a co-conspirator in the charge. We know nothing about his activities, and although an attempt was made by some of the prosecution witnesses to prove that a man named Biroja lived with Kalipada for a few days, that evidence when scrutinised turns out to be contradictory and unreliable. We agree with the Sessions Judge that the evidence is not sufficient to connect Khagendra with the particular conspiracy charged.

We may here conveniently deal with four important questions of law raised and discussed before us in connection with the procedure adopted in the Court below, with regard to the examination of the witnesses and of the accused.

It appears that, in more than one instance, when the prosecution had called a witness to prove a particular point, (for instance, witnesses Rai Mohan Ray and Atul Chandra Das Gupta), the defence directed the cross-examination to matters wholly unconnected with the examination-in-chief, but yet relevant for the purposes of the trial. Two questions thereupon arose, *first*, whether in a cross-examination of this description, leading questions could be put to the witness, and *secondly*, whether the prosecution was entitled to test, by way of cross-examination, the veracity of their own witnesses with regard to the matters elicited by the defence in cross-examination. The answer to these questions must depend upon the provisions of the Indian Evidence Act. S. 138 is in these terms: "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then, (if the party calling him so desires) re-examined."

"The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

"The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if, new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter:"

S. 143 provides as follows :—"Leading questions may be asked in cross-examination."

S. 154 is in these terms: "The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party." It is consequently plain that the accused were entitled, in cross-examination, to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified on their examination-in-chief. It is also plain that, in course of cross-examination of this character, the defence were entitled, in view of the generality of the provisions of S. 143, to ask leading questions. It is finally obvious that the Court might, in its discretion, under S. 154, permit the prosecution to cross-examine the witness, even though he had been originally called by them, with regard to the matters elicited by the defence. Indeed, in such circumstances, it would be generally an improper exercise of discretion to refuse the prosecution an opportunity to cross-examine the witness for the purpose indicated. This view is in accord with the law as administered in England. It has been ruled there that though leading questions may, in strictness, be put in cross-examination, even though the witness be favourable to the cross-examiner [*Parkin* v. *Moon* (117)], yet when a vehement desire is betrayed to serve the interrogator, it is certainly improper, and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back: *Rex* v. *Hardy* (118). Again, as the cross-examination is not limited to the matters upon which the witness has been examined-in-chief, but extends to the whole case, it would be obviously unfair to allow the evidence brought out in cross-examination to pass unchallenged: *Morgan* v. *Bridges* (119), *Rex* v. *Murphy* (120). The question was elaborately reviewed by Shaw, C. J., in *Moody* v. *Rowel* (121) where the learned Chief Justice summed up his

(117) (1836) 7 Car. & P. 409.
(118) (1794) 24 St. Tr. 755.
(119) (1818) 2 Stark 314.
(120) (1841) 1 Arms. M. & O. 206.
(121) (1835) 17 Pickering 490.

opinion as follows :—" There is one authority directly in point, where the objection was taken, and it was decided by Lord Kenyon that such leading question is admissible : *Dickinson* v. *Shee* (122). So in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes and may be fully cross-examined as to the whole case, and no distinction is suggested as to the mode of cross-examination : *Morgan* v. *Bridges* (119) and *Rex* v. *Brooke* (123). The weight of authority is in favour of the right to put leading questions under the circumstances stated, and this is confirmed by practice and experience ". As is pointed out in Taylor on Evidence (Article 1432), in the United States the difficulty is avoided by the adoption of the logically consistent rule that a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his examination-in-chief, and if he wishes to examine him respecting other matters, he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause. [See the judgment of the Supreme Court of the United States delivered by Mr. Justice Story in *Philadelphia and Trenton Railroad Co.* v. *Stimpson* (124).] The view we take is to some extent supported by the decision of the Judicial Committee in *Kalagurla Suryanarayana* v. *Yarlagadda Naidoo* (125). It may finally be added, that the matter is eminently one in the discretion of the trial Judge, and his decision is practically conclusive : *Price* v. *Manning* (126) and *Rice* v. *Howard* (127).

In the course of the trial before the Sessions Judge, a persistent effort was made by the defence to elicit from individual prosecution witnesses whether he was a spy or an informer, and also to discover from Police officials the names of persons from whom they had received information. The Sessions Judge disallowed questions of this character, and, in our opinion, the course he adopted was correct. In *Reg* v. *Bernard* (128), when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy, Lord Campbell allowed the objection to prevail, on the ground that the question was not relevant, and that the witness was really called upon to draw an inference from facts within his knowledge. Again, in *Rex* v. *Smith O'Brien* (129), it was ruled that disclosures made by informers to the Government, the Magistracy or the Police, with the object of detecting and punishing offenders were privileged. Reference was made to the general rule formulated by Eyre, C. J., in *Rex* v. *Hardy* (118) : " It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner ; but there is a rule, which has universally obtained on account of its importance to the public for detection of crimes, that those persons, who are the channel, by means of which that detection is made, should not be unnecessarily disclosed ; if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it." It may now be taken as settled rule that witnesses for the Crown In criminal prosecution undertaken by the Government are privileged from disclosing the channel through which they have received or communicated information : *Rex* v. *Watson* (130), *Rex* v. *Richardson* (131), *Attornay-General* v. *Briant* (132) and *Marks* v. *Beyfus* (133), but it has been ruled that a detective cannot refuse on ground of public policy to answer a question as to where he was secreted : *Webb* v. *Catchlove* (134).

A question has been raised here as to the procedure provided in S. 360, sub-S. (1), of the Criminal Procedure Code. The Sessions Judge appears to have strictly carried out the provisions of the section, which require that the evidence of each witness, as it is completed, shall

(122) (1801) 4 Esp. 68.
(123) (1819) 2 Stark 472.
(124) (1840) 14 Peter 448.
(125) (1902) 6 C. W. N. 513. (P. C.).
(126) (1889) 42 Ch. D. 372.
(127) (1885) 16 Q. B. D. 681.
(128) (1858) 1 F. & F. 240
(129) (1849) 7 St .Tr. (N. S.) 2.
(130) (1817) 32 St. Tr. 1.
(131) 3 F. &. F. 693,
(132) (1846) 15 M. & W. 169.
(133) (1890) 25 Q. B. D. 494.
(134) (1886) 3 T. L. R. 159.

be read over to the witness in the presence of the accused, if in attendance or of his Pleader, if he appears by a Pleader. This procedure appears to have occupied considerable time; but in view of the decisions in *Mohendra Nath Misser* v. *Emperor* (135) and *Jyotish Chandra Mukerjee* v. *Emperor* (136), which are in accord with the case of *Kamatchinathan Chetti* v. *Emperor* (137) and were binding on the Sessions Judge, it must be ruled that the procedure he followed is not open to criticism. We may add that in a case of this description, where every possible point was likely to be contested, a strict compliance with the statutory provisions was manifestly desirable.

A question has been raised in this Court as to the propriety of the procedure adopted by the Sessions Judge when he accepted written statements from the accused, and our attention has been drawn to *Emperor* v. *Ansuiya* (138). It is sufficient to state that no objection was taken by the Crown in the Court below when the statements were tendered and received. The procedure followed in this case is in accordance with what we believe is the universal practice in the Courts of this Province, and we do not feel pressed by the doubt suggested in the case mentioned. But it is desirable to state explicitly that such a written statement dnes not take the place of evidence nor of such examination of the accused as is contemplated by the Code.

Only one other question now requires consideration, namely, the question of sentence upon Sasanka. Counsel on his behalf pressed for a reduction of the sentence, should our ultimate conclusion be in favour of conviction. The Crown, on the other hand, has obtained a Rule for enhancement of sentence. After anxious consideration of the matter, we have formed the deliberate opinion that the order of the Judge should not be touched in this respect. The offences, of which Sasanka has been proved to be guilty, are of the gravest character, and their heinousness is, if possible, accentuated by the fact that the bombs under construction, if completed, would have been employed for the destruction of human life. The demands of justice, consequently, require a deterrent sentence. At the same time, we are of opinion that the maximum sentence should be reserved for offences of even a worse description, which, it is not difficult to imagine, might fall within the scope of the Explosive Substances Act. From these points of view, the sentences passed on Sasanka by the Sessions Judge are appropriate and should not be disturbed.

The result of our decision may now be summarised. Appeal No. 587 of 1914, preferred by Amrita *alias* Sasanka is dismissed, Appeals Nos. 588, 589, 590 and 598 preferred by Dinesh, Sarada, Chandra Sekhar and Upendra *alias* Kalipada are allowed. The convictions and sentences upon each of these persons are set aside, and we direct that they be released from custody. Appeal No. 4 of 1914, preferred by the Crown against the acquittal of Khagendra *alias* Suresh, is dismissed. Rule No. 1293, issued at the instance of the Crown, for enhancement of sentence is discharged.

V.B./R.K.

Appeals Nos. 587 *&* 4 *dismissed;*
Appeals Nos. 588, 589, 590 *and* 598 *allowed;*
Rule No. 1293 *discharged.*

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(135) (1908) 12 C. W. N. 845.
(136) (1909) 36 Cal. 955=4 I. C. 416.
(137) (1905) 28 Mad. 308.
(138) (1903) A. W. N. 1.

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SHARFUDDIN AND COXE, JJ.

Joy Mongala Debi Misrani—Plaintiff—Appellant.

v.

A. J. Shillingford—Defendant—Respondent.

Appeal No. 385 of 1911, decided on 1st February, 1915, from the original decree of Sub-Judge, Purnea, dated 30th June, 1911.

(a) Evidence Act (1 of 1872), S. 19—Decree-holder purchaser—Wrong description in sale proclamation and sale certificate—It is admission and cannot be used in his favour.

Where a decree-holder purchaser causes a number of plots to be described in the sale proclamation as *milik* of his judgment-debtor and after the sale they are described as such in the sale-certificate, it is in the nature of an admission and as such cannot be used as evidence on behalf of the purchaser or his successor-in-interest. 31 Cal. 380, foll. [P. 218, C. 1.]

(b) Bengal Patni Regulation (8 of 1899), S. 11—*Patni* can only be sold for arrears of rent

under the regulation—Purchaser under S. 11 gets the property free of all incumbrances—He is not bound by the previous adverse decisions obtained against previous owner.

A *putni* can only be sold for rent under Regulation VIII of 1819 and the fact that the sale-certificate was given on a printed form for certificate sales will not convert the *putni* sale into a certificate sale. [P. 219, C. 2.]

A purchaser of a *putni* tenure at a sale under Regulation VIII of 1819 is not privy in estate to the defaulting proprietor and he does not derive his title from him as under S. 11 of the Regulation he acquires the property free of all incumbrances. A claim by such purchaser, therefore, is not barred by *res judicata* by reason of the failure of suit by the previovs *putnidar* and he is entitled to avoid all incumbrances upon the property. 15 I. C. 869; 19 Cal. 787; 22 Cal. 244 and 26 Cal. 460, ref. to. [P 220, C. 2.]

(c) Bengal Patni Regulation (8 of 1819), S. 11—Encroachment and adverse possession by trespasser is incumbrance within S. 11.

An encroachment by a trespasser and adverse possession against the defaulting *putnidar* is an incumbrance within the meaning of S. 11 of Regulation VIII of 1819. 25 Cal. 167, ref. to. [P. 220, C. 2.]

(d) Bengal Patni Regulation (8 of 1819), S. 11—Defaulting proprietor means any, and is not restricted to that particular proprietor for whose default putni is sold.

The expression "defaulting proprietor" in S. 11 of Regulation VIII of 1819 means the proprietor of the tenure in default, and these words are not intended to be restricted to the particular proprietor for whose default the *putni* is brought to sale. 21 Cal. 702, ref. to. [P. 221, C. 1.]

Jacob and *Lal Mohan Ganguly*—for Appellant.

Nagendra Nath Mozumdar and *D. N. Bagchi*—for Respondent.

Sharfuddin, J.—This is an appeal against the judgment and decree passed by the Subordinate Judge of Purnea on the 30th June, 1911. The appeal is on behalf of the plaintiff. The plaintiff claimed the lands in suit as her *milik lakheraj* lands, which have been recorded in the Record of Rights as the *mal* lands appertaining to the *putni talook of Mouza* Sowria. The plaintiff is the widow of Ghanasyam Misser and claims the lands in suit as having been purchased by her husband on the 7th June, 1904 and 2nd July, 1907 in execution of his own decree passed against Chatrapat Singh. She says that her husband was put in possession of the lands in suit by Court and that he was in peaceful possession of the same till the preparation of the Record of Rights, in which the lands in suit were entered as belonging to the *putni* tenure of the defendant 1st party, whereupon her husband instituted two suits for the correction of the entries in the record, which were withdrawn by him with liberty to institute a fresh suit. That he having died, the plaintiff has brought the present suit. Her case is that in *Mouza* Sowria Raja Rajendra Narain Roy had 977 *bighas* of *lakheraj milik* lands which were sold in execution of a decree obtained by Rai Lachmipat and purchased by him on the 6th December, 1872. That after the above sale *Musammat* Saraswati Misrani and others, widows and heiresses of Sobh Nath Misser who was a relative of Raja Rajendra Narain, instituted two suits (No. 78 of 1873 and No. 11 of 1874) against Rai Lachmipat and others for setting aside that sale, on the allegation that the lands were *mal* lands of *Mouza* Sowria, but these suits were dismissed and the lands were declared to be the *milik* land of Raja Rajendra Narain. This judgment was upheld by the High Court on appeal. It is important to note here that Mr. Shillingford, defendant 1st party, was no party to any of these suits. The plaintiffs of those suits were said to have been the *putnidars* of the *mal* lands of *Mouza* Sowria. The defendant 1st party was at first a *dar-putnidar*, but subsequently he became the *putnidar* by purchase at a public auction-sale. That Ghanasyam Misser, late husband of the plaintiff, obtained a decree against Chatrapat Singh, son of Lachmipat, and others, heirs and representatives of Lachmipat, and put up to sale the whole of the said *miliks* and sold and purchased the property in execution of his decree on the 7th June, 1904 and the 2nd July, 1906, and after obtaining possession through Court remained in possession until the preparation of the Record of Rights. The Settlement Officer, however, under his orders dated the 4th July, 1907 (Exhibit 4/6) ordered the lands in suit to be entered as *mal* lands appertaining to the Sowria *putni* of the defendant first party. The second party defendants are the landlords and the third party defendants are the tenants.

Plaintiff prays that the lands in suit be declared to be her *milik lakheraj* lands and that if the Court finds that these lands are the *mal* lands of the *putni* Sowria, her suit should be decreed on the

ground of adverse possesion for more than 12 years before the suits.

The suit is really contested by the defendant first party and the defendants second party support him. His defence is that Raja Rajendra Narain was never a *milikdar*, he was a tenant of some *mal* lands in Sowria and the lands in suit were never the *milik* lands of the Raja, nor were they purchased by Lachmipat. That the heirs of Sobh Nath never instituted any suit with regard to the lands in suit, and if so, those suits should be held to be collusive and fraudulent. That Chatrapat was never in possession of these lands. That adverse possession is an incumbrance and Mr. Shillingford, the purchaser of the *putni talook*, under the Putni Regulation VIII of 1819. purchased the *putni* free of all incumbrances created by the proprietor of the defaulting *putni*.

The Subordinate Judge has dismissed the suit and hence the present appeal by the plaintiff.

In the present suit three important questions are involved: (1) whether the lands in suit claimed as *milik* were the *milik* lands of Raja Rajendra; (2) whether these lands were purchased by Lachmipat as the *milik* lands of the Raja and whether after purchase Lachmipat and after him his son, Chatrapat, were in possession; (3) if these are not the *milik* lands, does the adverse possession of Lachmipat and Chatrapat and the Plaintiff's husband's possession create and establish any right and title in favour of the plaintiff?

Let us now see if the Raja ever had any *milik* land. Exhibit C is the *thak* map and Exhibit D is the *khasra* of 1846. A translation of the *khasra* is in the printed paper-book. The original is in *Hindustani*. In this *khasra* a number of plots are mentioned, the holders' names and areas of each plot are also given. The last column gives a description of the plots. There are only two kinds of lands mentioned in the last column. They are either *milik* or *mal* lands. There are, however, many plots without any description. The question is whether the plots with no description are *mal* or *milik* lands. Raja Rajendra's name appears against a number of plots without any description. It has been contended that these lands are *milik* lands. The method adopted in the preparation of this *khasra* appears to us to have been this. It appears that out of 165 plots only two, namely, Nos. 4 and 80 are mentioned as *milik* and the succeeding plots, Nos. 5 and 81 are, recorded as *mal*. No. 4 is *parti* land and No. 80 is described as the holding of one Kabutar. It seems that the writer of this *khasra* at the beginning of each page gave the description of the land till he came to a plot which was *milik*. The first item in the first page is *mal* land and the 4th is *milik*. The rest on this page is not described as *milik* or *mal*. Similar arrangements are found on every page. It seems to us that all the plots except Nos. 4 and 80 are *mal* lands. The Raja's name, no doubt, appears against various plots, but these have not been described either as *milik* or *mal*. From the method followed in the *khasra* we are of opinion that all the plots mentioned therein are *mal* lands except those that are described as *milik*. It follows, therefore, that when this *khasra* was prepared Raja Rajendra had no *milik* land at all. Whatever he had was *mal* lands. If he had no *milik* land, how could any *milik* land be sold in execution of Lachmipat's decree? That Raja Rajendra had *milik* land was set up, it seems, for the first time when Lachmipat in execution of his decree against the Raja put up some lands for sale as his *milik* lands and purchased them on different dates under four sale-certificates, *viz.*, Exhibit 1/3, Exhibit 1/4, Exhibit 1/5 and Exhibit 1/6. The present claim is confined to the plot of Exhibit 1/3, 1st plot of Exhibit 1/4, 2nd plot of Exhibit 1/5 and four plots in the second sale of Exhibit 1/6. Exhibit 1/6 refers to two sales and the four plots claimed are of the second sale. These plots comprise an area of 291 *bighas*.

After the purchase made by Lachmipat on the 6th December, 1872, to which apparently none of the certificates relate, the heirs of Sobh Nath Misser instituted two suits, of which one was for possession of 305 *bighas* by reversal of the sale.

The 2nd suit was transferred to the Subordinate Judge's Court and both the suits were tried in that Court together and both were dismissed on the 16th April, 1874, on the ground that the form of the suit was defective, with permission

to the plaintiff to sue afresh by one suit. The Suit No. 78 alone survived. It related to 305 *bighas* claimed as *mal* land. This suit was heard on the merits and dismissed by the Subordinate Judge on the 18th January, 1875 and his decision was upheld by the lower Appellate Court as well as by this Court. This suit was dismissed on the ground of limitation, it being held that the plaintiffs or their predecessors never held possession by receipt of rent within twelve years before the suit.

The plaint of this suit is Exhibit 3 and it shows the lands for which this suit was brought. The defendant 1st party is Mr. Shillingford. He took a *dar-putni* of *Mouza* Sowria in 1891. He subsequently became a *putnidar* having purchased the *putni* in a public auction-sale. It appears since the time defendant 1st party became a *dar-putnidar* there have been disputes between him and Chatrapat with regard to possession of the lands which the latter claims as *milik* lands. On the other hand the defendant 1st party alleged that these lands were *mal* lands of Sowria.

Ghanasyam Misser, the husband of the plaintiff, had a money decree against Chatrapat and in execution of that decree he put up to sale all the lands known as *milik* lands of Chatrapat and himself purchased in June 1904 and July 1906 under sale-certificates Exhibit 1/1 and Exhibit 1/2.

In 1904 Settlement operations commenced and in the Settlement proceedings dispute between the parties arose. The Settlement Officer decided the dispute in favour of the defendant 1st party [*vide* Exhibit 4 (6)] and the Record of Rights was finally published in November, 1907.

Two suits were then instituted by Ghansyam Misser against defendant 1st party, one in 1907 and the other in 1908. In the first suit claim was laid for 977 *bighas* without specification of boundaries and *khasra* numbers. This suit was withdrawn. The second suit was instituted in 1908 and in this boundaries in accordance with the sale-certificates and *khasra* numbers were given. In this second suit Sham Behari Tewari, Amin (D. W. No. 2), was deputed as a Commissioner to compare the disputed lands with the boundaries in the sale-certificates and to prepare a map. He has been examined in the present suit and his map has been exhibited. According to him except plot No. 9 of the plaint none of the other plots is covered by the sale-certificates. After the submission of his report the second suit was also withdrawn.

In the present suit 100 more *khasra* numbers have been added and four plots claimed in the former suit have been given up.

In the present suit the Civil Court Amin, Syed Zamin Ali, was appointed a Commissioner to report on the identity of the plots claimed in the suit with the plots mentioned in the sale-certificate and also to prepare a map. He has done so, but his map differs in many respects from the map of Sham Behari. The reason of this appears from his own evidence. In order to show the worthlessness of his report and map it is enough to quote a few passages from his deposition in the present suit. He says: "Plot *Khasra* No. 267 has been shown as disputed land in plot No. 5 of the plaint. This has not been shown as disputed land in my map. *Khasra* Nos. 62, 66, 58, 2, 3, 4, 5, 6 and 10 are claimed in the plaint as *milik* lands. These have been excluded from the disputed lands because the plaintiff's *amlas* did not point them out to me as disputed lands. I ought to have shown these lands in my map. *Khasra* Nos. 606, 607 and 177 have not been claimed in the plaint, but I have shown them in my map as disputed lands, *Khasra* Nos. 390-394 have been claimed as parts of plot No. 4 of the plaint. All the above plots excepting No. 391 have been omitted in the map." Again he said: "No. 391 has also been excluded. I have shown *khasra* No. 397 as disputed, though it is not in the plaint. *Khasra* No. 494 has been shown in the map as disputed, though this is not claimed in the plaint.....*Khasra* Nos. 548 in part and 549 to 551 have been claimed in the plaint as disputed in plot No. 3 of the plaint, but I have excluded them from the map because not claimed by the plaintiff's *amlas* on the spot. I have shown *Khasra* No. 668 in my map though not claimed in the plaint." From the above extract from the deposition of Amin Zamin Ali it is clear that no reliance can be placed on his map.

Ghanasyam's purchase was within twelve years before the present suit: he cannot claim more than what may appear

in the sale-certificate of Lachmipat, the father of Chatrapat. The real point for our decision, therefore, is whether the lands in suit are covered by the sale-certificate, namely, Exhibits 1/3, 1/4, 1/5 and 1/6 granted to Lachmipat. If they do not, the suit has been rightly dismissed and if they do, we have to see whether they are really *milik* lands of Raja Rajendra, in which case the plaintiff would be entitled to a decree and if they are not *milik* lands and were sold as such by Lachmipat, whether he and his successors-in-interest have been in possession for more than twelve years and whether this adverse possession gives them a title which cannot be cancelled by reason of the purchase of the *putni* by Mr. Shillingford, which ordinarily would be free of all incumbrance under S. 11 of the Regulation VIII of 1819.

The above are the facts which give the various aspects of the case.

We have already observed that there is no documentary evidence on the record to show that Raja Rajendra had any *milik* land in Sowria except the sale-certificate granted to Lachmipat in execution of his decree against the Raja and the sale-certificates of Ghanasyam Misser. For the first time the Raja was alleged to have been in possession of *milik* lands in the execution proceedings taken by Lachmipat. It appears that no inquiry was made as to the nature of the lands advertised for sale. The sale was made and the decree-holder, *viz.*, Lachmipat, was given possession over some land, on the strength of the sale-certificates.

If Lachmipat in the sale proclamation caused a number of plots to be described as *milik* of his judgment-debtor and after the sale in the sale-certificate they were described as such, it will be in the nature of an admission and as such cannot be used as evidence on behalf of Lachmipat or his successor-in-interest. It was so held in the case of *Ramani Pershad Narain Singh* v. *Mahanth Adaiya Gossain* (1). It is clear that the sale-certificates granted to Lachmipat, Exhibits 1/3, ¼, 1/5 and 1/6, cannot be conclusive in his favour. Exhibits 1/1 and ½ are sale-certificates granted to Ghanasyam Misser (husband of the plaintiff) similarly cannot be conclusive on his behalf. If we eliminate these sale-certificates from our considerations there remain, nothing on the record to show that the lands now in dispute are *milik* lands except the oral evidence of witnesses examined by the plaintiff. The most important witness for the plaintiff is Garibullah (P. W. No. 1). He says he was the *Patwari* of the *milik* lands. He has attempted to prove a number of *kabuliats* and *wasil bakees*, but it appears to us that he is a most unreliable witness for various reasons. He was examined in the Munsif's Court at Kathihar with reference to this very dispute. He has throughout his deposition contradicted himself. In his examination-in-chief he proves himself to be a man of most extraordinary memory. He is no doubt a *Patwari*, as he says, of long standing, but it is so improbable that a *Patwari* should remember the details of boundaries of a number of plots, but in cross-examination he shows what a faithless memory he has. He was asked a number of questions with regard to other plots. He has failed even to say that in his previous deposition before the Munsif of Kathihar he had given details of these plots. We give here a few of his statements by way of sample :—"The above block of 4 or 5 *bighas* is not the *milik* of Ahmad Malik." On being asked if he had made such a statement in his previous deposition says, "I cannot state if such a statement is true or false." "I do not know if any block of land of 10 *bighas* was sold by Denai Hazam to Delwar Malik." His attention having been drawn to his previous statement at Kathihar says, "I cannot say if I made such a statement. I cannot say if Delwar Malik has any land in *Mouza* Sowria." On his attention being drawn to his previous statement says, "I cannot say if I made such a statement." Certain boundaries of a plot were given to the witness and he was asked if the land within those boundaries was in possession of Ahmad Malik, he said, "I do not know any such land." On his attention being drawn to his previous statement he said, "I do not know if I made such a statement." There are several more such statements.

He has proved a number of *kabuliyats* granted to various tenants. But the lands mentioned in these *kabuliyats* cannot be identified with any of the plaint lands and in the course of arguments it was

(1) (1904) 31 Cal. 380.

conceded by the plaintiff's Counsel that these lands cannot be so identified.

There are certain *wasil bakees* on the record and this witness (Garibullah) has been examined also to prove these *wasil bakees*. But let us see if he proves them. He says, "in regard to all the above persons whose handwritings I have attested, I cannot identify their handwritings unless the signature is shown to me." On Exhibit 10 (15) there is the signature of one Botal Poddar. He identified the signature and handwriting as those of Botal, but when he was shown only the handwriting said, "I cannot say whose handwriting they were." Such a witness we cannot believe.

Gunjar Ali (P. W. No. 17) says he is a tenant on the *milik* land. He has also proved the handwritings of certain individuals on *wasil bakees*, but when put to test he also said that he could not identify the handwritings without seeing the signatures. The rest of the witnesses are the tenants of the plaintiff, except Sher Ali (P. W. No. 19) who says he is a *naib patwari*.

It is the plaintiff's case that the defendant 1st party is trying to take possession of the lands in dispute, on the allegation that they are *mal* lands and form part of his *putni*. It is also admitted that the dispute culminated in a proceeding under S. 107, Civil Procedure Code, in which defendant 1st party was bound over to keep the peace, but on a motion to this Court the order was set aside.

It is a matter of common knowledge that when two *zemindars* begin to fight with regard to possession the tenants reap a rich harvest. It is not, therefore, surprising that a number of tenants have attorned to one or to the other. We are not, therefore, prepared to place any reliance on the evidence of the tenant witnesses when there is no documentary evidence to prove that Raja Rajendra had any *milik* land which is said to have successively come into the possession of Lachmipat, Chatrapat and Ghanasyam. There is, no doubt, of all the plots mentioned in the plaint it is only No. 9, which, on the evidence, has been identified with the sale-certificate of Lachmipat, but still the question remains whether this plot is *milik* land. Sham Behari, Amin, (D. W. No. 2) says:—"I was supplied with a *thak* map from the side of the defendant, Mr. Shillingford. That *thak* map (Exhibit C) and *khasra* (Exhibit D) were supplied to me. By comparison with the *thak* map and the locality I found the disputed lands in that suit to be *mal* lands. I held the inquiry in the presence of both parties." Sham Behari's map and report were prepared in the previous suit. We now come to the question of possession. If Raja Rajendra had no *milik* lands and if Lachmipat, on the allegation of the disputed lands being the Raja's *milik*, sold them in execution of his decree and purchased them and obtained possession over them through Court and after him his son, Chatrapat, and after him Ghanasyam, the plaintiff's husband, held possession thereof, while as a matter of fact these were *mal* lands, the question of adverse possession arises. The defendant, Mr. Shillingford's case is that granting that there was adverse possession of Lachmipat and others, when he purchased the *putni* under Regulation VII of 1819, he purchased the *putni* in question free of all incumbrances under S. 11 of the Regulation and that adverse possession is an incumbrance and hence the plaintiff's contention that she and before her her predecessors-in-interest were in adverse possession, cannot avail her.

The plaintiff for the first time in this Court contends that the sale to Mr. Shillingford was not under the Regulation. It was first attempted to show that the sale took place in execution of a decree in a suit and it was so done because of certain expressions in the sale-certificate (Exhibit E) dated 11th December, 1901. We find it stated therein that the sale was made "in execution of decree in this suit." From these words it was argued that the sale of the *putni* was in execution of a decree in a suit. On the Court pointing out that the sale-certificate shows that the sale was made by the Collector and the officer granting the certificate was a Certificate officer, because under his signature we find C. O. *i. e.*, Certificate Officer, it was then contended that at any rate it was a sale under the certificate procedure and not under the Regulation and hence S. 11 of that Regulation has no application. A *putni* can only be sold for rent under the Regulation. It is nobody's case that the *putni* was not sold for rent. The sale-certificate, it appears, was given on a printed form, after filling up the gaps, kept in the Certificate Office. This, we think, will not convert the *putni* sale into a certificate-sale. We

understand from the pleadings that in the lower Court the plaintiff's case was not that the sale was not effected under the Regulation. We find it from the wording of issue No. 5, which is: "Are the lands in suit *milik lakheraj* of the plaintiff and are the defendants 3rd party tenants in the said lands, and if so, what effect has the sale of *putni*-tenure under Regulation VIII of 1819 on it?" This shows clearly that the plaintiff had acquiesced in the sale having been under the Regulation. The only dispute was as to its effect. We do not find in the plaint any allegation that the sale was not under the Regulation, nor do we find in the memorandum of appeal any distinct allegation that the sale in question was not under the Regulation, although the lower Court distinctly held that it was so. Grounds Nos. 14, 15, 16 rather go to show that it was accepted by the plaintiff that Sobh Nath Misser and his heirs were the defaulting *putnidars* when the *putni* was sold and purchased by defendant 1st party. For the above reasons there can be no doubt that the sale of the *putni* took place under the Regulation and the purchaser took it free of all incumbrances. This also disposes of the question of *res judicata*. It was contended, as observed before, that when in a previous suit it was held that the disputed lands were *milik* and the judgment was upheld by this Court, the present suit is barred by the rules of *res judicata*. In the course of arguments it was conceded by the plaintiff's Counsel that if the sale to Mr. Shillingford was a sale under the Putni Regulation the question of *res judicata* does not arise. We have already held that the sale was under the Regulation and hence no question of *res judicata* can arise. We now turn to the question whether adverse possession is an incumbrance within the meaning of S. 11 of Regulation VIII of 1819. The authority relied upon by the appellant is the case of *Taraprasad Mittra* v. *Ram Nursingh Mittra* (2). In this case it was held that "the purchaser of an under-tenure sold at the suit of landlord acquires rights higher than those of an ordinary purchaser by private contract, only to the extent conferred by express terms of law. The purchaser of a *putni talook* is not entitled to set at naught all decisions arrived at against the defaulting *putnidar*." But we have several more recent cases that have held otherwise. In the case of *Nuffer Chandra Pal Chowdhry* v. *Rajendra Lal Goswami* (3), it was held that "an encroachment by a trespasser comes within the meaning of an incumbrance and adverse possession against the defaulting *putnidar* is an incumbrance."

In the case of *Khantomonee Dasi* v. *Bijoy Chand Mahatab Bahadur* (4), it was held that a purchaser at a sale under Regulation VIII of 1819 was unaffected by any adverse possession of land appertaining to the *putni talook* which had been encroached upon.

The same view was taken in the case of *Karmi Khan* v. *Brojo Nath Das* (5).

In the case of *Gobinda Natha Shaha* v. *Surja Kanta Lahiri* (6), it was held that "the purchaser at a sale under Regulation VIII of 1819 is entitled to avoid any incumbrance created by the defaulting proprietor and is not bound by any adverse possession held against the latter."

In the case of *Satish Chandra Sinha* v. *Munjanali Debi* (7), it was held "that although the position of a purchaser at a sale under Regulation VIII of 1819 may not be precisely that of a purchaser at a sale for arrears of revenue, yet he is not privy in estate to the defaulting proprietor and he does not derive his title from him, as under S. 11 of the Regulation he has acquired the property free of all incumbrances that might have been created by the act of the defaulter, his representatives or assignees and consequently a claim of rent by such a purchaser is not barred by *res judicata* by reason of the failure of a suit for rent by a previous *putnidar* on the ground that the relationship of landlord and tenant between the then plaintiff and the defendants was not established."

The above authority establishes, first, that the judgment in the suit mentioned above instituted by the then plaintiffs against Lachmipat for establishing that the lands purchased by the latter in execution of his decree against Raja Rajendra were *mal* lands and not *milik* lands of the Raja, does not operate as *res judicata* and that if the possession, of Lachmipat and his successors-in-interest was adverse possession then the defendant 1st party as a purchaser of the defaulting *putni* can avoid the incumbrance

(2) (1870) 14 W. R. 283=6 B. L. R. App. 5.

(3) (1898) 25 Cal. 167.
(4) (1892) 19 Cal. 787.
(5) (1895) 22 Cal. 244.
(6) (1899) 26 Cal 460.
(7) (1912) 15 I. C. 869.

of adverse possession. The words " is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor " in S. 11 of the Regulation require a little explanation. By the words " defaulting proprietor " is meant the proprietor of the tenure in default and these words are not intended to be restricted to the particular proprietor for whose default the *putni* was brought to sale. It was so held in the case of *Gopendro Chunder Mitter* v. *Mokaddam Hossain* (8).

For the above reasons we are of opinion that there is no legal evidence to show that the disputed lands had ever been the *milik* lands of Raja Rajendra and that the lands in dispute in the present case have not been identified with the plots mentioned in the sale-certificate of Lachmipat, except plot No. 9 of the plaint and that there having been no *milik* lands of the Raja, such possession as Lachmipat and his successors-in-interest may have had would only be an incumbrance within the meaning of S. 11 of Regulation VIII of 1819 and the purchase of the *putni* having been under this Regulation, the purchaser, Mr. Shillingford, purchased it free of all incumbrances. Plot No. 9 of the plaint, although identified with plots in the sale-certificates of Lachmipat, it cannot be treated as a *milik* land. It may have been in possession of Lachmipat and after him of his successor-in-interest, but this possession having been adverse to the then *putnidar* was an incumbrance and hence avoidable.

The appeal for the above reasons is dismissed with costs.

Coxe, J.—I agree that the appeal should be dismissed. The fact that the suit was twice withdrawn, and the proceedings at the time of the Record of Rights and before the *amins*, who have inquired into the matter, show conclusively that the plaintiff has no real idea what lands were covered by Lachmipat's purchase in the seventies. In this Court although the appeal has been pending for years, and although the parties have now known for a considerable time that the case was about to be taken up, yet the learned Counsel, who appeared for the appellant, made no real attempt to identify the land claimed with the lands purchased by Lachmipat. So utterly vague and indefinite is the claim that, though a mass of evidence has been directed to proving that the land claimed is identical with the land covered by the sale-certificates, yet learned Counsel devoted the greater part of his argument to contending that his client was at any rate entitled to the area of 305 *bighas*, covered by the suit No. 78 of 1873, which was a suit brought to set aside a sale of the 6th December, 1872, to which none of the certificates relate. The oral evidence is quite worthless. The principal witness is one Garibulla, who declines to adhere to any previous statements he has made with regard to this land, and would doubtless be equally willing to repudiate his present statements to-morrow if he thought it advisable.

Assuming that plot No. 9 is identified as included in Lachmipat's purchase, I agree that any rights thus acquired were avoided by the *putni* sale. I entirely agree that the appellant is not entitled in appeal to take for the first time the plea that the sale was not a *putni* sale, when that question was never put in issue in the lower Court.

V.B./R.K.

Appeal dismissed.

(8) (1894) 21 Cal. 702.

A. I. R. 1916 Calcutta 221

TEUNON AND NEWBOULD, JJ.

Bhuben Behari Nag Mazumdar—Auction-Purchaser—Petitioner.

v.

Dhirendra Nath Banerjee and *others*—Opposite Parties.

Civil Rules Nos. 1083 and 1084 of 1913, decided on 28th March, 1916, against the order of Sub-Judge, Khulna, in C. Misc. Appeals Nos. 16 and 12 of 1915.

(a) Civil P. C. (5 of 1908), O. 9, R. 9 and O. 21, R. 90—Application under O. 21, R. 90—O. 9, R. 9 is applicable.

O. 9, R. 9, Civil Procedure Code, applies to applications made under O. 21, R. 90 for setting aside sales. 29 I. C. 395 and 7 I. C. 241, foll. [P. 222, C. 2.]

(b) Civil P. C. (5 of 1908), S. 2, O. 21 R. 90 and O. 43, R. 1 (c)—Application to set aside sale is suit within meaning of O. 43, R. 1 (c).

Semble.—An application to set aside a sale is a proceeding which may terminate in an adjudication such as is referred to in S. 2 of the Civil Procedure Code and as such it is a suit within the meaning of O. 43, R. 1, Clause (*c*). [P. 222, C. 2.]

Jadu Nath Kanjilal—for Petitioner.

Sarat Chandra Roy Chowdhury—for Opposite Parties.

Judgment.—These two applications arise out of proceedings for the setting aside of a certain Court sale.

The sale was held on the 22nd April, 1912 and was confirmed on the 23rd of May of that year.

Sometime towards the close of 1913 the judgment-debtor applied under O. 21. R. 90, to have the sale set aside.

This application came on for hearing on the 25th July, 1914 when both parties, *i. e.*, the judgment-debtor and the auction-purchaser applied for time. Both applications were rejected, and the petitioner taking no further steps his application was dismissed for default.

On the 28th July, the petitioner applied that the order should be reviewed and his application for setting aside the sale restored. This application for review or restoration was dismissed or rejected on the 15th January, 1915.

Against both orders of rejection or dismissal appeals were preferred to the District Judge. Both appeals were decreed on the 25th July, 1915.

The auction-purchaser has now obtained the present Rule calling upon the opposite parties to show cause why the District Judge's orders should not be set aside on the ground that in neither case did an appeal lie.

In support of the Rule, it is *first* contended that the order dismissing the application to set aside the sale was made in the absence of both parties. If so, and if the provisions of O. 9 apply, the order was one under O. 9, R. 3, and the application to have it set aside was one under O. 9, R 4. Against an order rejecting an application under O. 9, R. 4, O. 43 provides no appeal.

We are unable to accede to his contention. No doubt in the first Court's order of the 28th July dismissing the application for setting aside the sale, it is stated that both parties had been in default. But by part of the same order an application made by the opposite party (the auction-purchaser) is rejected. The inference is that he was present. No suggestion to the contrary appears to have been made in the Court of Appeal and on what after all is a question of fact we do not think that we should differ from the District Judge.

It follows that if the provisions of O. 9 apply to applications for setting aside sales, the application in the present case was dismissed under O. 9, R. 8, and the application to have that dismissal set aside was made and rejected under O. 9, R. 9.

The question in the Rule then is whether by virtue of the provision of O. 9, R. 9, and of O. 43, R. 1, Clause (*c*) an appeal lies against an order refusing to restore an application made under O. 21, R. 90, and dismissed for default.

We can see no reason in principle why O. 9, R. 9 should not be held applicable to applications for setting aside sales and in support of the view that the rule does apply in such cases we have direct authority in *Diljan Nichha Bibi* v. *Hemanta Kumar Roy* (1) and in *Safdar Ali* v. *Kishan Lal* (2). We, therefore, hold O. 9, R. 9, to be applicable.

The *next* question then is whether O. 43, R. 1, Clause (*c*), confers a right of appeal against an order made under O. 9, R. 9, refusing to restore an application for the setting aside of sale. In other words, the question is whether for the purpose of O. 43, R. 1 (*c*), an application for the setting aside of a sale is a suit.

There can be no doubt, we think, that an application to set aside a sale is a proceeding which may terminate in an adjudication such as is referred to in S. 2 of the Code, and if the question had been *res integra* we should have been prepared to hold that it was a suit within the meaning of O. 43, R. 1, Clause (*c*).

But in a series of cases of which the latest is *Charu Chandra Ghosh* v. *Chandi Charan Roy* (3) the contrary view has been taken, and, in the present case, as it is open to us to interfere under S. 115 of the Code, we are not disposed to make a reference to the Full Bench.

From the order of the District Judge it is clear that in dismissing and again in refusing to restore the application, the Munsif erred in attributing to the applicant a default or laches which was in fact the default or laches of the Court and its officers. Proceeding, therefore, in our revisional jurisdiction we adopt as our own the order made by the Subordinate Judge on the 22nd July, 1915, in so far as it sets aside the orders made by the Munsif on the 25th July, 1914 and 15th January, 1915, and direct that the Munsif do now proceed to hear the application for setting aside the

(1) (1915) 29 I. C. 395.
(2) (1910) 7 I. C 241.
(3) (1915) 27 I. C. 492.

sale, and determine the same on the merits. Costs in all Courts will abide the result. We assess the hearing fee in this Court at two gold *mohurs*.

V. B./R. K.

Case remitted.

A. I. R. 1916 Calcutta 223

N. R. CHATTERJEA AND NEWBOULD, JJ.

Imam Ali Patwari—Plaintiff—Appellant.

v.

Arfatunessa and *another*—Defendants—Respondents.

Appeal No. 834 of 1914, decided on 14th January, 1916, from Appellate Decree of Dist. Judge, Noakhali, dated 3rd January, 1914.

(a) Muhammadan Law—Divorce—*Kabinnama*—Condition giving right to wife to divorce husband if he does not reside in her father's house is void.

The condition in a *kabinnama* that the husband should live with the wife in her father's dwelling house and on the breach of this condition she would be entitled to divorce him is void under the Muhammadan Law. [P. 223, C. 2.]

(b) Muhammadan Law—Restitution of conjugal rights—Suit for—Husband having co-wives paying prompt dower and providing separate residence for defendant—Husband held entitled to decree.

Where in an appeal against the dismissal of a suit by the plaintiff for restitution of conjugal rights, on the grounds that the plaintiff had not paid the prompt dower and that the defendant (the wife) could not be compelled to live in the plaintiff's house with the other co-wives, it was represented to the Appellate Court that the plaintiff had deposited the amount of the prompt dower in the lower Court and that he had set apart a separate hut within his compound for the residence of the defendant:

Held, that under the circumstances there was no reason why the plaintiff should not be given a decree for restitution of conjugal rights. [P. 223, C. 2.]

Romesh Chandra Sen—for Appellant.

Gunada Charan Sen—for Respondents.

Judgment.—This appeal arises out of a suit for restitution of conjugal rights brought by the plaintiff, who is a Muhammadan, against his wife.

The defence was that at the time of the marriage it was agreed by a *kabinnama* that the husband would reside with the wife in her parent's house and that in case he did not act according to the agreement, she would have the power to divorce him. Now, the condition in the *kabinnama* that the husband should live with the wife in her father's dwelling house and if he broke this condition she would be entitled to divorce him, is void under the Muhammadan Law. It was so held by this Court in the suit brought by the respondent against the appellant for a declaration that a divorce made by her was valid, and for recovery of the dower money. [See the case of *Imam Ali Patwari* v. *Arfatunessa* (1)]. It is contended that that case merely decided that the condition as to divorce is illegal; but that decision was based upon the ground that the condition that the wife shall be at liberty to live with her parents is void. We may also refer to Macnaghten's Principles and Precedents of Muhammadan Law, in which it is laid down that "according to the Muhammadan Law such an agreement is illegal and, therefore, it is not incumbent on the husband to abide by it, and he has full power to carry his wife to his own house provided he shall have paid the amount of her dower, but in the event of his not having done so, she is at liberty to object until the amount is paid." In Wilson's Digest of Anglo-Muhammadan Law, S. 56, the law is stated thus: "A condition that the wife shall, though adult, be at liberty to live in the house of her parents, is void, and the husband is entitled notwithstanding it to insist on the wife residing with him in his own house, provided he has paid the dower, or the prompt portion of it." That being the law the defendant is bound to reside with her husband.

The learned District Judge, however, has dismissed the suit on two grounds, the *first* being that the plaintiff has not paid the prompt dower, and *secondly* that the defendant cannot be compelled to live in the same house with the other co-wives.

It is represented to us on behalf of the appellant that he has already deposited the amount of the prompt dower in the Court in which execution of the decree (obtained by the defendant) was pending; and it is also stated that he has set apart a separate hut within his compound for the residence of the defendant. Under these circumstances, we do not see any reason why the plaintiff should not be given a decree for restitution of conjugal rights.

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(1) (1913) 21 I. C. 87.

It is next contended on behalf of the defendant that although according to Muhammadan Law the wife may be bound to reside in her husband's house, the Court may, on a proper case being made out, select a proper place of residence for the wife other than her husband's house. We are pressed to exercise our discretion in the matter of residence of the defendant and to direct that she be allowed to reside in her father's house and not in the house of her husband where he is living with his two other wives. It appears, however, that before the institution of this suit she had for some time lived with her husband, the plaintiff, in his house with another co-wife without any objection. The plaintiff, we are informed, is her third husband; and having regard to the fact that she did once reside with her husband in his house with another co-wife, we are unable to hold that the plaintiff's house is not a proper and fit place of residence for her.

The decree of the lower Appellate Court is, therefore, set aside and a decree is passed against defendant No. 1 for restitution of conjugal rights. Before, however, the plaintiff is allowed to execute the decree he must satisfy the Court of first instance that he has paid the amount of the prompt dower into Court, and that he has also set apart a suitable house for separate residence of defendant within the compound of the plaintiff's own house.

We order that each party must bear its own costs in all the Court.

V. B./R. K.

Appeal allowed.

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N. R. CHATTERJEA AND GREAVES, JJ.

Narendra Chandra Lahiri — Decree-holder—Appellant.

v.

Afifanessa Bibi and *others*—Judgment-debtors—Respondents.

Appeals Nos. 288 to 293 of 1912, decided on 13th January, 1915, from the order of Dist. Judge, Rangpore, dated 15th March, 1913.

(a) Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 6—Art. 6 as amended by Act (1 of 1908), governs execution application of decree detained by co-sharer for his share of rent.

The special limitation provided by Article 6 of Schedule III of the Bengal Tenancy Act, as amended by Act 1 of 1908, Eastern Bengal and Assam Tenancy Act, governs an application for execution of a decree obtained by a co-sharer landlord for his share of the rent in a suit to which the other co-sharers were not parties, the decree being for a sum of money not exceeding Rs. 500. 3 I. C. 389, foll. 17 I. C. 207, diss. from. [P. 224, C. 2 & P. 225, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 6—Art. 6 applies only where at least some provisions of the Act are applicable to the tenant judgment-debtor.

Article 6 is applicable when the decree has been made in a suit between landlord and tenant *to whom* (and not *to which*) the provisions of the Act are applicable, it being immaterial that all the provisions of the Act are not applicable. 20 I. C. 833 foll. [P. 225, C. 2.]

Nagendra Nath Ghose—for Appellant.

Judgment.—The question raised in these appeals is, whether an application for execution of a decree obtained by a co-sharer landlord for his share of the rent, in a suit to which the other co-sharers were not parties, the decree being for a sum of money not exceeding Rs. 500, is governed by the special limitation provided by Article 6 of Schedule III, of the Bengal Tenancy Act, as amended by Act I of 1908, Eastern Bengal and Assam Tenancy (Amendment) Act.

Under that Article an application for execution of a decree made in a suit between landlord and tenant to whom the provisions of the Act are applicable, and not being a decree for a sum of money exceeding Rs. 500, must be made within three years of the date of the decree. The decree in each of these cases did not exceed Rs. 500 and was made more than three years before the date of application for execution, and the question, therefore, is whether the decrees were made in suits between landlord and tenant, to whom the provisions of the Bengal Tenancy Act are applicable.

Now, a co-sharer landlord is a landlord, though he may be in separate collection of his share of the rent under an arrangement with the tenant. The suits, therefore, were between landlord and tenant. Then, some of the provisions of the Act are applicable to a co-sharer landlord, though not all, so that unless it is necessary that all the provisions of the Act should apply, the cases come within the purview of Article 6 of Schedule III of the Act. It has, however, been held that it is sufficient, if some of the provisions apply.

The question has been considered in several cases by this Court. In *Thakomoni Dassi* v. *Mohendra Nath Dey* (1), Mookerjee and Vincent, JJ., held that an application for execution of such a decree obtained by a co-sharer landlord is governed by Article 6. In a later case, *K. B. Dutt* v. *Gostha Behary Bhuiya* (2), Brett and Sharfuddin, JJ., held that the Article does not apply to a decree obtained by co-sharer landlords. The learned Judges, however, observed :— "The suit was not one brought by the present petitioners as co-sharer landlords under the provisions of S. 148-A or S. 158-B of the Bengal Tenancy Act, and, in such circumstances, the decree which they obtained was a simple money-decree, and, so far as we can ascertain from the materials before us, there is nothing to indicate, that, in that decree, the petitioners invoked the application of the provisions of any section of the Tenancy Act. In our opinion, the present case is distinguishable from the case of *Thakomoni Dassi* v. *Mohendra Nath Dey* (1), on which the lower Courts relied, so that, even if we were prepared to follow the decision in that case, as to which it is not necessary for us in this case to express any opinion, it would not, in our opinion, be applicable to the facts of the present case." The distinction relied upon apparently was that in the earlier case two provisions of the Act were applied for the benefit of the landlord, *viz.*, that a decree for damages was made at the full rate mentioned in S. 68, and Article 2(*b*) of Schedule III was applied to enable the landlord to obtain a decree for rent for four years, whereas if the provisions of the Act were inapplicable, he could have obtained a decree for rent only for three years, and interest only at the contract rate. In the present cases also, it appears that damages at the full rate mentioned in S. 68 were awarded in some of the suits, and some of the suits were decreed for rents for four years. So the distinction relied upon by Brett, J., exists in these cases also.

K. B. Dutt's case (2) has not been followed in subsequent cases. In *Khetra Mohan Chatterjee* v. *Mohim Chandra Das* (3), Carnduff and Beachcroft, JJ., said that they were disposed to follow the views expressed in *Thakomoni Dassi* v. *Mohendra Nath Dey* (1) rather than the later ruling of Brett and Sharfuddin, JJ., in *K. B. Dutt* v. *Gostha Behary Bhuiya* (2). In a still later case, *Mrityunjoy* v. *Bhola Nath* (4), Mookerjee and Beachcroft, JJ., declined to follow *K. B. Dutt's* case (2), and pointed out that, that case overlooks the fundamental fact, that Article 6 is applicable where the decree has been made in a suit between landlord and tenant *to whom* (and not 'to which') the provisions of the Act are applicable. They observed : "The vital point to determine is, consequently, whether the provisions of the Act are applicable to the landlord and tenant between whom this suit has been instituted : it is immaterial that all the provisions of the Act are not applicable to the suit," and following *Thakomoni's* case (1) held that the decree was barred by limitation. Again, in Appeal from order No. 562 of 1912 (decided on the 26th January, 1914) *K. B. Dutt's* case (2) was not followed and the view taken in *Thakomoni Dassi* v. *Mohendra Nath Dey* (1) and *Mrityunjoy* v. *Bhola Nath* (4) referred to above was accepted as correct. In *Kedar Nath Banerjee* v. *Ardha Chundur Roy* (5), Banerjee, J., in discussing Article 6 of the Act, as it stood before the amendment, pointed out "that the Article speaks not of decrees for rent, nor of decrees in suits between landlord and tenant, but of decrees made under the Act." In the Article as amended, the words are "decree or order made in a suit between landlord and tenant to whom the provisions of this Act are applicable."

We are of opinion that the Article as amended applies to the decrees in the present cases. The appeals must, accordingly, be dismissed.

V.B./R.K.

Appeals dismissed.

(1) (1909) 3 I. C. 389.
(2) (1912) 17 I. C. 207.
(3) (1913) 18 I. C. 595.
(4) (1913) 20 I. C. 833.
(5) (1902) 29 Cal. 54.

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WALMSLEY AND ROE, JJ.

Raj Gobind Singh—Plaintiff—Petitioner.

v.

Behari Pathuk and *another*—Defendants—Opposite Parties.

Civil Rule No. 319 of 1915, decided on 4th June, 1915, against the Order of Munsif, 3rd Court, Chapra.

(a) Civil P. C. (5 of 1908), O. 9, R. 13—Application to set aside *ex parte* decree to lower Court when appeal is preferred by other judgment-debtors and lost does not lie.

In a mortgage suit a judgment-debtor against whom an *ex parte* decree had been passed submitted an application under O. 9. R. 13, Civil Procedure Code asking to have the *ex parte* decree set aside, and with the consent of both the parties the decretal amount was deposited in Court by the judgment-debtor, but afterwards the decree-holder objected to this deposit. The Munsif overruled his objection and passed an order declaring the validity of the deposit and granted the application for re-hearing the suit. The other judgment-debtors who had appealed had appealed from the decree but had failed:

Held, that the Munsif had no longer jurisdiction to entertain an application under O. 9, R. 13, Civil Procedure Code. 30 Mad. 535 and 38 Cal. 394, ref. to. [P. 226, C. 1 & 2.]

(b) Civil P. C. (5 of 1908), S. 47—In *ex parte* mortgage-decree deposit by consent of parties was made along with application to set aside decree—Application was untenable—Judgment was free to enforce the agreement of parties.

Held, further, that the judgment-debtor was entitled to take such steps as he was advised to enforce the agreement. [P. 227, C. 1.]

Niron Narayan Singh—for Petitioner.

Rajendra Prosad—for Opposite Parties.

Walmsley, J.—The facts out of which this application arises are as follows:—The petitioner obtained a mortgage-decree on the 20th August, 1908 on contest against one Behari and *ex parte* against defendant No. 2, Ramdhani, who is now the opposite party. Behari appealed to the District Judge but his appeal was dismissed. The decree-holder then applied to have the decree made absolute and after securing an order to that effect, he took out execution proceedings and caused the mortgaged property to be sold. He purchased it himself and was put in possession on the 15th September, 1914. On the 30th November, 1914, Ramdhani, against whom the decree had been passed *ex parte*, submitted an application under O. 9, R. 13, Civil Procedure Code, asking to have the *ex parte* decree set aside. On the 30th of January, some sort of agreement was arrived at between the parties to the effect that Ramdhani should pay into Court the decretal amount: and on that being done, the decree-holder should relinquish his claim to the property. Ramdhani deposited in Court the decretal amount as set out in the original decree which had been passed some six or seven years earlier. The decree-holder objected to this deposit and on the 10th March, the learned Munsif heard Pleaders on both sides and recorded the following order:—"In this view of the case the deposit made should be considered to be good. The re-hearing petition should be granted after setting aside the decree. After this the necessary orders will be passed on the applicant moving the Court." The decree-holder obtained a Rule from this Court on the opposite party to show cause why the order just mentioned should not be set aside on the grounds stated in the petition.

It has been urged before us on behalf of the decree-holder, *firstly*, that the Munsif had no jurisdiction to entertain an application under O. 9, R. 13; *secondly*, that he acted with material irregularity in not requiring from the judgment-debtor compliance with the requisition of O. 9, R. 13, Civil Procedure Code; and *thirdly*, that the judgment-debtor's application was barred by limitation.

With regard to the first contention, the argument on behalf of the decree-holder is that inasmuch as the defendant, Behari, appealed to the District Judge against the original mortgage-decree and that appeal was dismissed, the Munsif had no jurisdiction to entertain an application under O. 9, R. 13; and our attention has been drawn to the case of *Sankara Bhatta* v. *Subraya Bhatta* (1). That case seems to me authority for holding that the Munsif had no longer jurisdiction to entertain an application under O. 9, R. 13, in respect to the mortgage-decree. The same view was taken in the case of *Kumud Nath Roy Chowdhry* v. *Jatindra Nath Chowdhry* (2). I think, therefore, that the Munsif's order restoring the original mortgage suit was made without jurisdiction.

It has been urged, however, by the learned Vakil for the judgment-debtor that this is a case in which we should not interfere. It appears to me, however, that the order passed by the learned Munsif has left matters in such confusion that if it is allowed to stand, the parties may be put to extremely contentious litigation. I find it impossible to understand what the Munsif really intends to do. Another reason which influences me is this: the judgment-debtor alleges that there was a binding compromise between the parties that if the amount due under the decree at the date on which it was originally made were deposited by the

(1) (1907) 30 Mad. 535.
(2) (1911) 38 Cal. 394=9 I. C. 189.

judgment-debtor, the decree-holder would give up the property. The decree-holder, however, denies that the compromise was exactly in these terms. He says that what he stipulated for was the amount due under the decree at the time when he purchased the property. The only piece of evidence is the order recorded by the Munsif and I think that as the decree-holder differs regarding the exact terms of the compromise, he should be allowed an opportunity of proving that the terms were as he states. That is the second reason for thinking that the case, is not one in which we should decline to interfere. I, therefore, make the Rule absolute, reverse the order of the Munsif setting aside the original decree and restoring the original suit. Under the peculiar circumstances of the case, I make no order as to costs.

Roe, J.—I agree, for the reasons given by my learned brother, that the *ex parte* decree could not be set aside by the Munsif. There being no application on the record to set aside the sale, that sale must stand good. The judgment-debtor may take such steps as he may be advised to take for enforcing the compromise arrived at between the parties on the date of the Munsif's order.

V.B./R,K.

Rule made absolute.

A. I. R. 1916 Calcutta 227

RICHARDSON AND IMAM, JJ.

Mejajennessa Bibi—Defendant—Appellant.

v.

Sheikh Didary—Plaintiff—Respondent.

First Appeal No. 273 of 1915, decided on 24th November, 1915, against the Order of Dist-Judge, Dacca, dated 16th March, 1915.

(a) Civil P. C. (5 of 1908), O. 41, R. 10, (2)—Order refusing to set aside order rejecting appeal under O. 41, R. 10, (2) is not appealable.

No appeal lies from an order refusing to set aside an order rejecting an appeal under O. 41, R. 10, Clause (2), Civil Procedure Code, 1908. 30 All. 143, appr. [P. 228, C. 2.]

(b) Civil P.C. (5 of 1908), S. 115, O. 41, R. 10, (2)—Order refusing review of order rejecting appeal—High Court should not interfere in revision.

A High Court ought not to interfere in revision with the order of a lower Appellate Court determining that in its view there was no good ground for a review of its order rejecting an appeal under O. 41, R. 10, Clause (2), Civil Procedure Code, 1908. [P. 228, C. 2.]

(c) Civil P. C. (5 of 1908), O. 41, R. 10 (2)—Appeal rejected under O. 41, R. 10, (2)—Application for restoration may be treated as one for review of order rejecting appeal.

Semble.—An application for restoration of an appeal rejected under O. 41, R. 10, clause (2), Civil Procedure Code, 1908, may be treated as an application for review of the order rejecting the appeal. [P. 227, C. 2.]

Rajendra Chandra Guha—for Appellant.

Surendra Nath Guha—for Respondent.

Judgment.—This matter arises out of an appeal which was filed in the lower Appellate Court on the 9th September, 1914. On a subsequent date the respondent applied that the appellant should be directed to give security for costs and, on the 20th November, 1914, an order was made requiring the appellant to furnish security for the costs which had been incurred in the first Court and the costs which might be incurred in the Appellate Court. This security was directed to be furnished by the 30th November, 1914. As the learned Judge of the Court below observes in his order of the 16th March, 1915, practically six extensions of the time were given to the appellant to furnish the security required from him. However, the security was not furnished and on the 4th January, 1915, the Judge passed an order which is in effect an order rejecting the appeal under O. 41, R. 10, Cl. (2), Code of Civil Procedure. Then on the 18th February, 1915, the appellant presented an application for the restoration of the appeal to the file. That application, the learned Pleader who now appears for the appellant argues, is to be treated as an application for review of the preceding order of the 4th January, 1915. So far we may agree with him. Unfortunately the learned District Judge on the 5th February, 1915 without notice to the respondent passed an order restoring the appeal on condition that the appellant deposited the security demanded in cash. The requisite amount was afterwards deposited and on the 13th March, the appeal came on for hearing. On that day the respondent challenged the order of the 5th February on the ground that it had been made without notice to him. The learned Judge held, by the judgment complained of dated the 16th March,

that this contention was correct and regard being had to the terms of the first proviso of R. 4 of O. 47, Code of Civil Procedure, we are unable to say that the view taken by the learned Judge was wrong. The position there is that the order of 5th February, 1915 is not binding on the respondent. The argument on behalf of the appellant on that state of things comes to this that if the order is to be vacated as an order not binding on the respondent or is to be treated as null and void, he is entitled to a proper order on his application dated the 1st February 1915. He contends that the learned District Judge in the order of the 6th March did not deal with the merits but merely decided that he had no power to review the order of the 4th January, 1915 after that order had once been made and that that view was inconsistent with the decision of the Privy Council in the case of *Balwant Singh* v. *Daulat Singh* (1). Reading the order as a whole, however, it does not appear to us that the learned Judge intended to say that he had no power to review an order made under O. 41, R. 10, Clause (2), Code of Civil Procedure. In every case of course the power of a Court to review an order depends upon the circumstances of the case; that is to say, the circumstances may be such in a particular case that no application for review can be successfully made. In such a case it is possible for the Judge to say that he has no power to review the order, not because the jurisdiction is lacking but because there is no ground on which an order for review can be properly made. It seems to us that it was in that sense that the learned District Judge referred to his power of review in the present case. The conclusion at which he seems to have arrived is that he could find no good ground for reviewing his order of the 4th January, 1915. If that is the conclusion to which the learned District Judge came, it is a sufficient answer to the contention that no order has been passed on the merits of the application of the 1st February, 1915. The learned District Judge clearly had that application in his mind when he said that no reasons had been suggested before him for holding his order rejecting the appeal wrong in any way or liable to review. If the application of the 1st February, 1915 was not explicitly mentioned, the order made on the 16th March, 1915 was in substance an order determining that there was not good ground for acceding to that application. In that view of the matter, it is impossible to us now to make an order in the appellant's favour. The case comes to us in two ways. An appeal was filed on the 16th March, 1915 and at the same time a Rule was obtained from this Court upon the respondent to show cause why the order referred to should not be set aside. The appeal is clearly from an order refusing to set aside an order rejecting an appeal under O. 41, R. 10, Clause (2), Code of Civil Procedure. That no appeal lies from such an order was decided by a Bench of the Allahabad High Court in the case of *Firozi Begam* v. *Abdul Latif Khan* (2). We see no reason to differ from the view there taken and the appeal is accordingly dismissed. As to the Rule, if the order of the 16th March, 1915 is, as in our opinion it is, an order determining that in the view of the District Judge there was no ground for a review of the order of the 4th January, 1915, it is clearly an order with which this Court ought not to interfere in the exercise of its revisional jurisdiction. The Rule must consequently be discharged. We make no order as to costs either in the appeal or in the Rule.

V.B./R.K.

Appeal dismissed; Rule discharged.

(1) (1886) 8 All. 315=13 I. A. 57 (P. C.)

(2) (1908) 30 All. 143.

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CHAUDHURI, J.

National Bank of India, Ltd.—Plaintiffs.

v.

A. K. Ghuznavi—Defendant.

Appln. in Original Civil Suit No. 1152 of 1914, decided on 2nd August, 1915.

(a) Civil P. C. (5 of 1908), O. 21, R. 41—Application for examination of judgment-debtor can be made at any stage.

An application for examination of the judgment-debtor under O. 21, R. 41, Civil Procedure Code, can be made at any stage of the execution proceedings. [P. 229, C. 2.]

(b) Civil P. C. (5 of 1908), O. 21, R. 41—Examination of judgment-debtor under O. 21,

R. 41—Order may be made *ex parte* on verified tabular statement.

An order for examination of judgment-debtor under O. 21, R, 41 may be made *ex parte* on a verified tabular statement but it is open to the Court to hear the objections of the person summoned before he is actually examined. 17 Bom. 514, rel. on. [P. 229, C. 1 & 2.]

(c) Civil P. C. (5 of 1908), O. 21, R. 41—Examination of judgment-debtor under O. 21, R. 41—Application should be encouraged when it is necessary to prevent dilatory and expensive execution proceedings.

The application for examination of judgment-debtor under O. 21, R. 41, should be encouraged where it may be necessary to prevent unduly dilatory, troublesome and expensive execution proceedings. It is not compulsory on the decree-holder to exhaust all the usual methods of execution before applying under this rule, but this procedure must be resorted to only when there is any difficulty about obtaining sufficient particulars of the judgment-debtor's property. [P. 229, C. 2 & P. 230, C. 1.]

A. A. Avetoom—for Plaintiffs.

B. C. Mitter—for Defendant.

Judgment.—A question has arisen in connection with this matter as to the procedure to be followed and the requisites for obtaining an order under O. 21, R. 41, which corresponds to O. 42, R. 32 of the English Supreme Court Rules of 1883. In England an application has to be made by summons before a Master in Chambers. If the debtor has appeared to the writ by a Solicitor, the summons must be served at the address for service, and an affidavit to that effect is necessary. Although our O. 21, R. 41, is an amplification of S. 219 of Act VIII of 1859 modified by S. 267 of Act X of 1877, cases under it are rare. In fact careful search among the records of this Court has resulted in the discovery of three cases only. It appears that those applications were made on verified tabular statements in the form directed by O. 21, R. 11, sub-clause (2), and were *ex parte*. In the case of *In re Premji Trikumdas* (1), the application appears to have been made *ex parte*. Our Court has framed no special rules with reference to this matter, and I must, therefore, hold that the present application, which was made *ex parte* on a verified tabular statement, is in order.

The defendant has been served with the order for his examination, and has now appeared by Counsel and urges that the order should be set aside. As our procedure allows such an order to be made *ex parte*, I am of opinion that it is open to the Court to hear the objections of the person summoned, before he is actually examined. In the Bombay case above cited, the party ordered to be examined applied on summons to have the order set aside. I think that procedure should ordinarily be followed. I have, however, treated this as an application to set aside my original order, and, as the plaintiff Bank was prepared to go on with the matter on that basis, I have not required a formal written application.

Counsel for the judgment-debtor has urged that the order should be set aside, as the decree-holders have not shown what steps they have taken to enforce the decree and the result thereof; that in fact they have taken no steps at all; that the Court should not make such an order before the usual methods of execution are exhausted. He relied upon a passage in Edwards on Execution to that effect (Edition 1888), which does not appear to be based upon any reported decision. I find no such statement in Anderson on Execution (Edition 1889). I, therefore, look upon the passage cited as an expression of the writer's opinion. The object of the rule is to be obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money-decrees. It is a useful rule, but orders for discovery may operate harshly against the party directed to give discovery and ought not to be lightly made. An order for personal examination is likely to operate still more harshly and cause unnecessary harassment and obviously ought not to be made, unless the Court is satisfied about the *bona fides* of the application and urgent necessity for it. It appears to me that it can be made at any stage of the execution proceedings, and keeping in view the observations I have made, such applications ought not to be discouraged. They may perhaps be usefully encouraged to prevent unduly dilatory, troublesome and expensive execution proceedings. I do not agree with the view that it should only be made when all other methods have been exhausted.

Counsel for the judgment-debtor has strongly urged that the decree-holders do not appear to have taken any trouble to find out for themselves what properties

(1) (1893) 17 Bom. 514.

the defendant has, they have not shown that there is any difficulty in finding them out: that their allegations about his liabilities are vague: and that, upon the materials before the Court, their apprehension that the decree may prove infructuous, is baseless. I quite agree that the enquiries made by the decree-holders were perfunctory and that, without much trouble or expense, they could have got particulars. In connection with this point I must note the fact that I was not prepared to make the order on their tabular statement, which omitted to state the grounds of belief and sources of information. We do not accept such verification, and I, therefore, asked for fuller particulars, when an additional affidavit was filed. But even now it does not appear to me to be satisfactory. I have no reason to doubt the *bona fides* of the application, but I am not satisfied that there is any difficulty in obtaining sufficient particulars about the property belonging to the judgment-debtor by an inspection, for instance, of the Collectorate Records of Mymensingh. I think the application has been put forward hastily —perhaps in view of the approaching long vacation. The judgment-debtor has also urged, without questioning the jurisdiction of the Court to make such an order, that the defendant lives and has his properties outside the local jurisdiction of this Court, and as the decree must eventually be transferred to a District Court for execution, the application is premature. I do not think so. In order to obtain a transfer to a District Court the decree-holders have to swear that there are properties in that District, which is, to my mind, a ground for making such an application before applying for the transfer. The defendant has through his Counsel offered to give particulars of his property to the plaintiff Bank, and the Bank has offered to treat the information as confidential, but Counsel has asked me to decide his application on its merits without reference to the offer made. I have, in consideration of the facts before me, decided to withdraw the order at present. The defendant has not appeared personally, and we have not his personal affidavit. An affidavit by his agent that there is no reason to apprehend that his principal is likely to alienate his properties, is not satisfactory. Taking all the circumstances into consideration, I make no order for the costs of this application.

This order will not affect any future application, but I hope it will not be necessary.

V. B./R. K.

Order withdrawn.

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WOODROFFE AND MULLICK, JJ.

National Insurance and *Banking Co., Ltd.*--Defendants—Petitioners.

v.

Biswambar Chowdhury—Plaintiff and another—Defendants—Opposite Parties.

Civil Rule No. 40 of 1915, decided on 28th May, 1915, against the Judgment of Munsif, 1st Court, Patiya.

Provincial Small Cause Court's Act (9 of 1887), S. 25—Objection to jurisdiction can for the first time taken in revision.

A revision application based mainly on the ground that the Small Cause Court had no jurisdiction to try the suit, an objection which was never taken in the lower Court, has no merits and the High Court will not interfere.

[P. 230, C. 2.]

Ram Charan Mojumdar and *Nagendra Nath Ghose*—for Petitioners.

Probodh Kumar Das—for Opposite Parties.

Judgment.—It does not appear to us in this case that there are any merits which should induce us to interfere upon this application, which is mainly based upon the ground that the Small Cause Court had no jurisdiction to try the suit. No objection of this kind seems to have been taken in the lower Court and from the report which the learned Munsif has submitted to us, it would appear that no such objection was taken. He says that if such an objection had been taken, it would have been found mentioned in the findings or the judgment as is usually done in other cases. He further points out in his report that "it is significant that Bona Charan Nandi, who swore two affidavits on behalf of the petitioners, did not mention this fact in his first affidavit, and on receipt of intimation from Calcutta he swore a second affidavit to that effect."

We may point out, further, in this case, the disadvantage to which the plaintiff might be put by the absence of objection as to jurisdiction and the allowance of this application—in that, though his

claim was for Rs. 156 he abandoned Rs. 56 of that claim in order to bring the matter within the jurisdiction of the Court. In these circumstances, it appears to us that the matter being one of discretion we should not interfere and we accordingly discharge the Rule with costs. As this Rule has been three times argued, we assess the hearing fee at three gold *mohurs*.

V. B./R. K.

Rule discharged.

A. I. R. 1916 Calcutta 231

SHARFUDDIN AND COXE, JJ.

Beni Singh—Defendant—Appellant.

v.

Barhamdeo Singh—Plaintiff—Respondent.

Appeal No. 464 of 1912, with Order No. 6774 of 1912, decided on 22nd January, 1915, from the appellate order of Sub-Judge, Muzaffarpur, dated 4th December, 1911.

(a) Limitation Act (9 of 1908), Art. 181—Application for final decree after 3 years from the date of payment fixed is barred—Art. 181 applies to S. 89 of Transfer of Property Act.

Where a decree on a mortgage was passed on the 28th July 1905, fixing 28th January, 1906 as the date for payment and no payment having been made an application was made on the 31st May, 1909 to make the decree absolute:

Held, that the application to make the decree absolute was barred by Art. 181 of the first Schedule to the Limitation Act. [P. 231, C. 2.]

Art. 181 of the first Schedule to the Limitation Act applies to an application under S. 89 of Act IV of 1882. 37 Cal. 796, dist. A. I. R. (1914) P. C. 65 (P. C.). and A. I. R. (1914) P. C. 66 (P. C.), foll. [P. 232, C. 1.]

(b) Civil P. C. (5 of 1908), O. 34, R. 5 (2)—Application is governed by Art. 181 of Limitation Act.

Applications under O. 34, R. 5, Cl. 2, come within the scope of Article 181. 37 Cal. 796; 38 Cal. 913; 4 Mad. 172; 30 Bom. 415 and 19 Cal. 132 (F. B.), ref. to. [P. 233, C. 1.]

(c) Practice—Judgment—No application for giving judgment in pending suit is necessary.

A Court is bound to dispose of a pending suit, whether any application is made to it or not asking it to proceed to judgment. [P. 232, C. 2.]

(d) Limitation Act (9 of 1908), S. 14—Appeal against order of remand dismissed after expiry of limitation for appeal on order passed after remand by lower Court—S. 14 does not apply to appeals—Time is not extended.

Where an appeal was preferred to the High Court against a lower Appellate Court's order of remand but the proceeding continued in the first Court and was disposed of on the 19th September, 1910, and on the 21st April, 1911, the High Court dismissed the appeal, and on the 16th May, 1911, the plaintiff appealed to the lower Appellate Court, against the order of the 19th September, 1910:

Held, that the appeal to the lower Appellate Court was barred by limitation, as S. 14 of the Limitation Act had no application to appeals and the case did not come under S. 5 of the Act. [P. 231, C. 2.]

Mohendra Nath Roy and *Siva Nandan Roy*—for Appellant.

D. N. Mitra—for Respondent.

Coxe, J.—The plaintiff-respondent in this appeal obtained a decree on a mortgage on the 28th July, 1905. The date fixed for payment was the 28th January, 1906. On the 31st May, 1909, he applied, as the Courts below describe it, to make the decree absolute, and his application was granted the same day. The defendant appealed, and the appeal was decreed and the case remanded to the Court of first instance on the 7th March, 1910. An appeal was preferred to this Court against the order of remand probably about June 1910. The proceeding, however, continued in the first Court and was disposed of on the 19th September, 1910. The Court of first instance held that the application to make the decree absolute was barred by Article 181 of the Schedule to the Limitation Act. On the 21st April, 1911, this Court dismissed the appeal against the order of the 7th March, 1910, and on the 16th May 1911, the plaintiff appealed to the lower Appellate Court against the order of the 19th September, 1910. The appeal was decreed and the defendant has appealed to this Court.

It is contended on his behalf, *firstly*, that the appeal to the lower Appellate Court was barred by limitation and, *secondly*, that the application of May, 1909, was barred by Article 181 of the Schedule to the Limitation Act. It appears to me that the appeal must succeed on both grounds.

With regard to the first point, the Subordinate Judge has held that limitation is saved by S. 14 of the Act. That section, however, has no application to appeals, nor do I think that the case comes within S. 5. We are informed that the plaintiff protested against the continuance of the proceedings in the Court of first instance after the presentation

of his appeal to this Court. But the fact that this protest was overruled should have warned him that the lower Appellate Court also might take a similar view: and he ought, therefore, in my opinion, to have presented his appeal against the order of the 19th September, 1910, within the period allowed by law.

On the second point, the Judge has held that Article 181 does not apply to an application under S. 89 of Act IV of 1882, and relies on the case of *Madhab Moni Dasi* v. *Pamela Lambert* (1) as authority for holding that there is no limitation for such an application. This view evidently cannot be sustained. In the first place, in May 1909, when this application was presented, S. 89 of the Transfer of Property Act had been repealed. In the second place, the decision that there is no limitation to such an application can no longer be regarded as good law, having regard to the decisions in *Batuk Nath* v. *Musammat Munni Dei* (2) and *Abdul Majid* v. *Jawahir Lal* (3).

It remains to decide whether an application under O. 34, R. 5, Clause 2, comes within the scope of Article 181. On this point there appears to be some difference of opinion, one Bench of this Court in the case of *Madhab Moni Dasi* v. *Pamela Lambert* (1) having thought that it does not so come, while another Bench in the case of *Amolak Chand Parak* v. *Sarat Chandra Mukherjee* (4) having thought that it does, though neither judgment can be regarded as a definite decision on the point.

It appears to me that the question turns on the point whether the application relates to action which the Court ought to take of its own motion, whether the party applies or not. In the case of *Kylasa Goundan* v. *Ramasami Ayyar* (5), which was a case of the delivery of a certificate of sale to a purchaser, the Court observed: "The provisions of the Limitation Act relating to applications, though in their terms doubtless most extensive, must be held to apply to applications for the exercise, by the authority to which the application is addressed, of powers which it would not be bound to exercise without such application, and not to applications to the Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character," and in the case of *Balaji* v. *Kushaba* (6), it was held that if any act imposes on a Court a duty to do an act "which duty is in no sense conditional on an application being made for the purpose," the Limitation Act has no application. The matter was considered in the Full Bench case of *Puran Chand* v. *Roy Radha Kishen* (7), which was a case of an application to ascertain mesne profits, and there it was stated: "The same principle was laid down in the case of *Kylasa Goundan* v. *Ramasami Ayyan* (5) and *Vithal Janardan* v. *Vithojirav Putlajirav* (8), in which it was held that to make the provisions of Article 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief, an application must be made; but there is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound on the oral application of appellant's Pleader, indeed without any such application at all, to fix a date for the first hearing of the inquiry, and after hearing the parties and fixing such issues as might be necessary for the disposal of the subject-matter in dispute, to proceed with it as if it were dealing with a case based on a plaint." The principle laid down in this case was followed in the case of *Dwarka Nath Misser* v. *Barinda Nath Misser* (9), which related to an application for effecting a partition in accordance with a preliminary decree.

A Court is bound, in my opinion, to dispose of a pending suit, whether any application is made to it or not. In a

(1) (1910) 37 Cal. 796=6 I. C. 537
(2) A. I. R. (1914) P. C. 65=36 All. 284=23 I. C. 644 (P.C.).
(3) A. I. R. (1914) P. C. 66=36 All. 350=23 I. C. 649 (P.C.).
(4) (1911) 38 Cal. 913=11 I. C. 943.
(5) (1882) 4 Mad. 172.
(6) (1906) 30 Bom. 415.
(7) (1892) 19 Cal. 132 (F. B.).
(8) (1881-82) 6 Bom. 586.
(9) (1895) 22 Cal. 425.

case, for instance, of the assessment of mesne profits or of effecting a partition, the Court can, of course, adjourn the case under O. 17, R. 1, but otherwise must proceed with the case and dispose of it, whether any application is made to it or not. This duty seems to have been neglected in the case of *Dwarka Nath Misser* v. *Barindra Nath Misser* (9) above cited; but the proceedings in that case seem to me to have been wholly irregular. But under O. 34, R. 5, the Court, not only is not bound to proceed with the case, but cannot do so unless an application is made to it. The parties are at perfect liberty to drop the proceedings, and if the plaintiff prefers not to make an application, the Court has no jurisdiction to direct a sale. This consideration seems to me to distinguish a case of this nature from the cases I have cited above and I think, therefore, that the application mentioned in O. 34, R. 5, clause 2, is an application which comes within the scope of Article 181.

I would, therefore, decree the appeal and dismiss the application with costs of all Courts.

Sharfuddin, J.—I agree.

V.B./R.K.

Appeal decreed.

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CHATTERJEE AND BEACHCROFT, JJ.

Nasarat Khan—Plaintiff—Appellant,

v.

Manulla and *others*—Defendants—Respondents.

Appeal No. 69 of 1914, decided on 19th January, 1916, from the Appellate decree of Sub-Judge, Mymensingh, dated 23rd July, 1913.

Civil P. C. (5 of 1908), O. 17, Rr. 2 and 3—Suit dismissed for default—Decree drawn up—Order held to be one under O. 17, R. 2 and not appealable.

In disposing of a suit a Munsif passed the following order: "The plaintiff's Pleader says that he and his client would retire from the case as the plaintiff has no witness today, so the case is dismissed for default." A decree was, however, drawn up in the case:

Held, that the order was an order under O. 17, R. 2, and was not appealable. [P. 233, C. 2.]

Gopal Chandra Das—for Appellant.

A. K. Fazlul Haq—for Respondents.

Judgment.—In this case the plaintiff applied for time for the production of certain documents and witnesses. His application was rejected, upon which his Pleader said that he and his client would retire from the case and the order of the Munsif was: "The plaintiff's Pleader says that he and his client would retire from the case as the plaintiff has no witnesses to-day, so the case is dismissed for default." The Munsif evidently meant to pass this order under O. 17, R. 2. If he had meant to proceed under R. 3 of the said Order, he would have proceeded to decide the case upon the evidence that was on the record. But although he expressly dismissed the suit for default, his office drew up the decree in regular form as if the case was decided in the presence of both the parties. Against that decree there was an appeal to the Subordinate Judge, who held that no decree could have been framed and that it was a mistake of the office to frame one. He, therefore, did not entertain the appeal. We think that the learned Subordinate Judge is right in the view that he takes. We take it that the order of the Munsif was under O. 17, R. 2. In this case, if the order had been made as one under R. 2 of O. 17, the appellant would have had an opportunity of applying under O. 9 for re-hearing of the case. The appellant says that the drawing up of the decree misled him and that he could not make this application in the face of the decree which was in existence. That may or may not be. This is a matter with regard to which we do not express any opinion. The appellant had his remedy under O. 9, and if an application is now made, the Court will consider whether he is entitled to proceed with the application now and whether he was really misled.

In this view of the case, we dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 234

NEWBOULD, J.

Debendrabala Dasi and *another*—Defendants—Appellants.

v.

Lalit Mohan Ghose and *others*—Respondents.

Appeals Nos. 1661 and 2065 to 2069 of 1913, decided on 15th March, 1916, from the appellate decrees of Sub-Judge, Birbhum, dated 26th February, 1913.

(a) Chaukidari Act (6 of 1870)—*Patni* lease—Construction of—Resumption of land by Government—Special clause in lease held not applicable to land resumed.

Where a *patni* lease contained a specific clause to the effect that if any land or *jama* be excluded from the *patni taluk* under any law or order of Court, the *patnidar* shall not be competent to raise any objection to the payment of the stipulated *jama* on that account:

Held, that the words of the special clause would not be held to be applicable to lands resumed by the Collector under the Chaukidari Act (VI of 1870 B. C.). [P. 234, C. 2.]

(b) Chaukidari Act (6 of 1870)—Land in *Patni Taluk* illegally settled with *zamindar* after resumption—Suit by *Patnidar* against *zamindar* for recovery of lands—Cause of action—Tenant settled by a *zamindar* does not acquire status of *ryot*—Case is not governed by S. 27 of Specific Relief Act (1877).

The cause of action for a suit by a *patnidar* against the *zemindar* to recover lands comprised in the *patni taluk*, which have been illegally settled by the Collector under Act VI B. C. of 1870 with the *zemindar* after resumption, does not arise from the date of resumption but can only arise on the *zemindar's* showing by some act that he disputes the *patnidar's* right to those lands. In any case it cannot possibly arise before the re-settlement.

[P. 234, C. 2 & P. 235, C. 1.]

The *zemindar* by settling those lands with tenants cannot give them the status of *ryots* as against the *patnidar* who has obtained a right to these lands. 31 Cal. 703; 9 C. W. N. 571; 31 I. C. 249 and 34 Cal. 109, foll. [P. 235, C. 1.]

The provisions of S. 27 of the Specific Relief Act have no application to such a case.

[P. 235, C. 2.]

S. P. Sinha and *Girija Prasanna Roy Chowdhury*—for Appellants.

Karunamoy Bose and *Panchanan Ghose*—for Respondents.

Judgment.—In these six suits the plaintiffs claimed to recover possession of lands which were formerly *chowkidari chakran* lands of the village but had been resumed by Government. The plaintiffs are the *dar-patnidars* having all the rights that were leased to the *patnidars*. The defendants are the *zemindars* and the tenants in occupation of the lands.

At the hearing of these appeals, three points only have been argued, having reference to the rights of the *dar-patnidars* to these lands under their leases, the question of limitation and the right to eject the tenant-defendants. The *first* point turns on the construction of the *patni* lease, Exhibit VII. It is conceded that it cannot be argued that *chakran* lands were excluded by the general terms in which the lands of the *mauza* were described. Reliance is placed on the following special clause:—"That if any land or *jama* be excluded from this *patni taluk* under any law or order of Court you shall not be competent to raise any objection to the payment of the aforesaid *jama* on that account." In my opinion, the lower Appellate Court was right in holding that these words could not be held to be applicable to the lands resumed by the Collector under the Chowkidari Act VI (B. C.) of 1870. Lands so resumed are not really excluded from the *patni taluk*. Under the Act, after resumption, the Collector is bound to re-settle them with the *zemindar*, subject to all contracts therebefore made; that is to say, subject to the *patnidar's* rights. I do not think that it was the intention of the parties that these words in the lease should be made to refer to the mere temporary exclusion that occurs during the interval between the resumption by the Collector of the *chakran* lands and their re-settlement with the *zemindar*.

As regards limitation, the only point argued is that the cause of action must be held to have arisen on the date of the resumption. Admittedly, if it arose on the re-settlement or at any subsequent date, the suits were not barred. I cannot see how the resumption can be said to have given rise to the cause of action in these suits. By the resumption, the plaintiffs' right to these lands was in no way assaiied. As I have already stated, the Collector is bound by the Statute to recognise the *zimindar's* right and *zemindar* is also bound by the Statute to recognise the *patnidar's* right, if any, in the *chakran* lands. The cause of action could only arise on the *zemindar* showing by some act that he disputed the plaintiffs' right. In any case it

could not possibly arise before the re-settlement.

The *last* point which was very strongly pressed is that the tenant defendants in these cases cannot be ejected. In support of this contention, reliance is first placed on the well-known Full Bench ruling in *Binad Lal Pakrashi* v. *Kalu Pramanik* (1), the leading case on the subject. That case has been shown to be inapplicable to cases of this sort in the two decisions relied on in the judgment of the lower Appellate Court, namely, in *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (2) and *Shaikh Jonab Ali* v. *Rakibuddin Mullik* (3). For the appellants, reliance is also placed on the cases of *Surendra Kumar Basu* v. *Kunja Behari Singh* (4) and *Bepin Behari Mitter* v. *Tinkowri Pathak* (5). In my opinion, the two cases relied on by the learned Subordinate Judge are more applicable to the facts of the present case. In *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (2) the facts are the same on all the important points. In *Shaikh Jonab Ali* v. *Rakibuddin Mullik* (3) the facts are somewhat different; but the principles on which the decision is based are the same, namely, that the person whether the *patnidar* or the *zemindar* who obtained right to these lands has the right to decide whether they should be treated as *raiyatee* lands or not, and consequently the settlement by a person who has not this right cannot make the lands settled with tenants into *raiyatee* lands and, therefore, cannot give the persons settled on those lands the status of *raiyats*. Both these cases have been followed on this point, the former in a decision to which I was a party, namely, in *Hazari Lal Sarkar* v. *Khaunish Chandra Roy* (6) and the latter in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (7). Of the cases relied on by the appellants, the case of *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (8), though it has been followed more than once as regards the decisions relating to the terms of settlement between the *zemindar* and the *patnidar*, has never been followed as regards the decision that the tenants are entitled to remain in actual possession of the lands. The facts on which this decision is based are not stated at length and the case has been distinguished in the case of *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (2) already referred to. The facts of the case of *Bepin Behari Mitter* v. *Tinkowri Pathak* (5) are somewhat peculiar and were shown to be distinguishable from the cases of *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (2) and *Shaikh Jonab Ali* v. *Rakibuddin Mullik* (3).

It is further contended that, under Clause (*b*) of S. 27 of the Specific Relief Act, the tenants who have taken settlement of the land in good faith cannot be ejected by the plaintiffs when claiming their rights against their lessors. This section can have no application to the present cases which are not suits for the enforcement of contracts. The view that a suit by a *patnidar* for possession of *chowkidari chakran* lands is a suit to enforce a contract was taken in the case of of *Ranjit Singh* v. *Radha Charan Chandra* (9), but in the case of *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (10) this case was clearly dissented from and it was held that such an action was not one for specific performance of contract but for possession of *chakran* lands included in the *patni*. In fact, when arguing the point of limitation, the learned Counsel for the appellants admitted that he could not support the view that had sometimes been taken that a suit of this nature is a suit on the contract and governed by the law of limitation relating to suits on contracts. It necessarily follows, therefore, that the provisions of S. 27 of the Specific Relief Act can have no application to the present cases. It is further argued that though the section itself might not be applicable, the principles underlying that section are principles of equity of general application. No doubt hardship may arise in cases where tenants are settled on the lands by a person who has no title, specially if the person who has the title brings his suit just before expiration of the time allowed by the law of limitation, but the law is perfectly

(1) (1893) 20 Cal. 708.
(2) (1904) 31 Cal. 703.
(3) (1905) 9 C. W. N. 571.
(4) (1900) 27 Cal. 814.
(5) (1911) 9 I. C. 374.
(6) (1915) 31 I. C. 249.
(7) (1907) 34 Cal. 109.
(8) (1900) 4 C. W. N. 814.
(9) (1907) 34 Cal. 564.
(10) (1908) 35 Cal. 346.

clear that possession without title for less than the statutory period is no bar to the rightful owner recovering what he is entitled to recover. The appeals, therefore, fail, and are accordingly dismissed with costs. I allow only two sets of costs, namely, four gold *mohurs* as hearing fee in all these six appeals.

V.B./R.K.

Appeals dismissed.

A. I. R. 1916 Calcutta 236

HOLMWOOD AND MULLICK, JJ.

Chuni Ahir—Plaintiff—Appellant.

v.

Khem Chand Dusadh and *others*—Defendants—Respondents.

Second Appeal No. 879 of 1912, decided on 7th January 1915, against the decree of 2nd Sub-Judge, Arrah, dated 13th January, 1912.

(a) Landlord and tenant — Rent —Decree—Where separate holdings included in rent decree nothing but right, title and interest of judgment-debtor passes to purchaser.

Where several different holdings are included in one rent decree, the decree can only be executed as a money decree and nothing but the right, title and interest, if any, of the judgment debtor in the holdings can pass to a purchaser on sale of the holdings in execution of that decree. 34 Cal. 298, and 7. C. L. J. 96, foll.

[P. 236, C. 2.]

(b) Civil P. C. (5 of 1908), O. 21, R. 65—Purchaser from mortgagee not entitled to possession if mortgage is redeemed before suit for possession.

Therefore, a purchaser of the right, title and interest of a mortgagee is not entitled to *khas* possession if before his suit for possession the mortgage is redeemed. [P. 236, C. 2.]

(c) Civil P. C. (5 of 1908),—S. 100—New case cannot be set up in second appeal.

A party is not entitled to make a new case in second appeal. [P. 237, C. 1.]

Chundra Sekhar Prasad Singh—for Appellant.

J. W. Chippendale—for Respondents.

Judgment.—This second appeal arises out of a suit for recovery of possession of 1 *bigha* 8 *cottahs* of land. The plaintiff's allegation was that the defendant No. 7 held 8 *highas* 1½ *cottahs* of *kasht* land partly ancestral and partly by purchase in *Mouza* Shiritola, that the landlord brought a suit for rent of the various holdings which made up this 8 *highas* and odd, specifying them in his plaint, and that he got a decree and that the various holdings were sold and specified in the sale-certificate which was given to the plaintiff-purchaser. It appears that the land in dispute, on the finding of the Subordinate Judge in appeal, formed part of the *guzashta* holding of the defendants Nos. 1 to 6. That holding consisted of 3 *highas* and odd, of which 1 *bigha* 2 *cottahs* was admittedly sold to *Mussammat* Manbaran and has become apparently a separate holding in her hand, and 1 *bigha* 9 *cottahs* was given in usufructuary mortgage to defendant No. 7 in 1893. There remained, therefore, a considerable portion of defendants Nos. 1 to 6; original holding in their hands, and it cannot be said that the portion mortgaged to defendant No. 7 was anything more than a part of a holding. Moreover, several different holdings having been included in one rent-decree, on the authority of the cases of *Hridoy Nath Das Chowdhury* v. *Krishna Prosad Sircar* (1) and *Nanda Lal Mukherjee* v. *Sadhu Charan Khan* (2), the decree can only be executed as a money decree, and nothing but the right, title and interest of defendant No. 7, mortgagee, can have passed to the plaintiff.

The learned Subordinate Judge has held that the defendants redeemed the mortgage and are in possession of the land, and he, therefore, considers that the plaintiff is not entitled to *khas* possession, even if he be a *bona fide* purchaser about which he has strong doubts. We at one time thought that it might be necessary to remand the case to the lower Appellate Court for a more clear finding as to what he means by some reasons to suspect that there was collusion and that the defendant No. 7 had himself purchased the land in the name of the plaintiff. But in the view we take it is unnecessary to remand the case. The appeal must fail, on the simple ground that the plaintiff has purchased nothing more than the right title and interest of defendant No. 7 and that, that right, title and interest had at the time he brought this suit ceased to exist.

It is urged before us by the appellant that he is at least entitled to re-enter as usufructuary mortgagee, having purchased

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(1) (1907) 34 Cal. 298.
(2) (1908) 7 C. L. J. 96.

the right, title and interest of the former usufructuary mortgagee. But unfortunately for him he strenuously denied that there was any usufructuary mortgage at all, and we cannot, therefore, allow him to make this new case in second appeal.

The result is that the appeal is dismissed with costs.

V. B./R. K.

Appeal dismissed.

A. I. R. 1916 Calcutta 237 (1)

N. R. CHATTERJEA AND ROE, JJ.

Dina Nath Sarma Chowdhury and *others*—Plaintiffs—Appellants.

v.

Saran Ram Deb—Defendant—Respondent.

Second Appeals Nos. 2406 and 2704 of 1914, decided on 15th June, 1915, against the Decree of Sub-Judge, Sylhet, dated 16th May, 1911.

(a) Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 102—Scope—When appeal lies is stated—No appeal lies when question of amount of rent payable is only involved.

An appeal under S. 102 of Act VIII of 1869 (B. C.) lies only in cases in which a question of right to enhance or vary the rent of a *raiyat* or tenant or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto has been determined by the judgment. [P. 237, C. 2.]

No appeal lies under S. 102 in cases in which merely a question as to the amount of rent payable is involved. Case-law discussed. [P. 237, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), S. 153—S. 153 allows an appeal on decision of question of amount of yearly rent—This does not fall under S. 102, Act VIII of 1869 and hence no second appeal lies.

S. 153 of the Bengal Tenancy Act provides for an appeal in cases where there is a decision on a question of the amount of rent annually payable by a tenant. These words do not occur in S. 102 of Act VIII of 1869; and therefore no second appeal lies in the case governed by S. 102. [P. 237, C. 2.]

D. N. Chakravarti and *Kali Kinkar Chakravarti*—for Appellants.

Hemendra Nath Das—for Respondent.

Judgment.—This appeal arises out of a suit for rent valued at less than Rs. 100. A preliminary objection has been taken to the hearing of the appeal on the ground that no second appeal lies in this case, the only question being as to the amount of rent payable. The case comes from Sylhet and is consequently governed by Act VIII of 1869 (B. C.). An appeal under S. 102 of that Act lies only in cases in which a question of right to enhance or vary the rent of a *raiyat* or tenant or any question relating to a title to land or to some interest in land has between parties having conflicting claims thereto has been determined by the judgment. In several cases it has been held that no appeal lies under that section in cases in which merely a question as to the amount of rent payable is involved. See the cases of *Huro Pershad Chuckerbutty* v. *Sreedam Chunder Chowdhry* (1), *Hurish Chunder Chuckerbutty* v. *Sreemutty Huree Bewah* (2) and *Nurubdessur Pershad Roy* v. *Sheikh Jungole* (3). See also the case of *Satghuri* v. *Majidan* (4). S. 153 of the Bengal Tenancy Act (VIII of 1885) provides for an appeal in cases where there is a decision on a question of the amount of rent annually payable by a tenant. These words do not occur in S. 100 of Act VIII of 1869 (B C.). We are accordingly of opinion that no second appeal lies in this case. The appeal must, therefore, be dismissed with costs.

This judgment will govern the other appeal (Second Appeal No. 2704 of 1911) which is also dismissed with costs.

V.B./R.K.

Appeals dismissed.

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(1) (1873) 20 W. R. 15.
(2) (1873) 20 W. R. 16.
(3) (1875) 24 W. R. 49.
(4) (1888) 15 Cal. 107.

A. I. R. 1916 Calcutta 237 (2)

N. R. CHATTERJEA AND MULLICK, JJ.

Ananga Muhunchakraverty and *another*—Plaintiffs—Appellants.

v.

Bejoy Chandra Dutta and *another*—Defendants—Respondents.

Appeal No. 596 of 1912, decided on 23rd April, 1915, from the Appellate Decree of Sub-Judge, Pabna, dated 5th December, 1911.

Civil P. C. (5 of 1908), O. 41, R. 33—Suit against two defendants for contribution of rent paid by plaintiff—Relief claimed against either of them, who may be the owners—Decree against one—On appeal claim was totally dismissed

other being held to be the owner—*Held*, decree against the other should have been passed though plaintiff did not appeal.

In a suit against two defendants for contribution for arrears of rent realized from the plaintiff, the plaintiff prayed that a decree may be passed against both the defendants or against either of them who may be found to be the true owner. The first Court passed the decree against one defendant, who filed an appeal. The lower Appellate Court found that it was the other defendant against whom the decree ought to have been passed and as the plaintiff had not appealed, dismissed the suit:

Held, that under the circumstances the lower Appellate Court should have passed a decree against the other defendant and not dismissed the suit entirely. [P. 238, C. 1 & 2.]

Mohini Mohan Chakravarti and *Atul Chandra Gupta*—for Appellants.

Jotindra Nath Lahiri—for Respondents.

Judgment.—This appeal arises out of a suit for contribution. The plaintiffs and some of the defendants were co-sharers in a *jote* the rent of which was in arrears. Some of the co-sharer landlords obtained a decree for arrears of rent and attached the properties of the plaintiffs alone, whereupon the plaintiffs deposited the decretal amount in order to save their properties. They now sued the defendants for the proportionate share payable by them.

The Court of first instance held that the defendant No. 1 was the real owner of a certain share in the *jote* and that his wife, the defendant No. 2, was merely a *benamidar* for her husband and accordingly gave a decree against the defendant No. 1 alone. The defendant No. 1 appealed tothe lower Appellate Court, urging that it was not he but his wife, the defendant No. 2, who was the real owner of the share and that he, therefore, was not liable for any share of the rent. The learned Subordinate Judge has found that the defendant No. 2 was the real owner and he has reversed the decree of the Court of first instance and dismissed the suit of the plaintiffs entirely. The plaintiffs have appealed to this Court.

We are of opinion that the lower Appellate Court is wrong in dismissing the suit entirely. The plaintiffs prayed that a decree might be passed against both the defendants Nos. 1 and 2 or against either of them who might be found to be the true owner; and when the Subordinate Judge found that it was not the defendant No. 1 but the defendant No. 2 who was the true owner, he ought to have passed a decree against the latter although there was no appeal preferred by the plaintiffs who were the respondents before him. That the Court had the power to pass a decree against the defendant No. 2 would appear from the provisions of O. 41, R. 33, Code of Civil Procedure, which runs as follows:—"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." "Illustration:—*A* claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals and *A* and *Y* are respondents. The Appellate Court decides in favour of *X*. It has power to pass a decree against *Y*." Here both the defendants Nos. 1 and 2 were parties to the appeal and under the circumstances we think the lower Appellate Court ought to have passed a decree against the defendant No. 2.

It is pointed out, however, on behalf of the respondents that the defendant No. 2 set upon certain payments alleged to have been made by her to some of the other co-sharer landlords, namely, Umamoyee and Kanak Sundari, and that there was an arrangement under which the rent payable by the defendant No. 2 for her share of the *jote* was to be paid to these two ladies alone. Both the Courts below have disbelieved the story of this arrangement; and the question whether defendant No. 2 did pay any portion of the rent payable for the *jote* to those two ladies for their share of the rent was considered by the Court of first instance and was found against the defendant, that Court having disbelieved the *dakhilas* produced by her in support of the said payments. On appeal, the lower Appellate Court has not come to any definite finding as to whether there was really any payment by the defendant No. 2 to these two ladies. If there was

really any payment to them on account of the rent payable for the *jote*, then the defendant No. 2 would be entitled to get a proportionate reduction.

Under the circumstances, we think that the decree of the lower Appellate Court should be set aside and the case sent back to that Court in order that it may determine upon the evidence on the record whether any payment was made by the defendant No. 2 to the two ladies in respect of the rent payable for the entire *jote*, whether the plaintiffs were liable for the share of the rent, if any, paid by the defendant No. 2 to those two ladies and obtained the benefit of such payment; and, if it finds these questions in favour of the defendant No. 2, then it will allow her a deduction to the extent of the plaintiffs' share from the amount to which the plaintiffs were found entitled under the decree of the Court of first instance. With the exception of the points stated above, no other question will be gone into by the lower Appellate Court. Costs will abide the result according to the success of each party.

V.B./R.K.

Appeal allowed; Case remanded.

A. I. R. 1916 Calcutta 239

SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Kissendoyal Jitsaria and *others* — Defendants—Appellants.

v.

Askaran Chowthmull—Plaintiff - Respondent.

Appeal No. 70 of 1915, decided on 28th January, 1916, from Original Decree of Chaudhuri, J.

Vendor and Purchaser—Warranty of quality—Goods not in accordance with contract must be rejected within reasonable time—Burden of proving rejection within reasonable time is on purchaser—Contract Act (1872), S. 118.

Some bales of jute, warranted to be of a certain quality, were purchased by the defendants under a contract, which stipulated that the plaintiff-vendor was to receive 90 per cent, of the price when the defendants-vendees received documents from the Railway Company, and when the goods were actually delivered the balance of 10 per cent. was to be paid. The documents were received by the defendants on the 28th July and the goods were actually delivered to the defendants on the 31st July and were taken to their godown, where they remained until the plaintiff sued for the price at the contract rate. The goods being of inferior quality the defendants on the 22nd August wrote to the plaintiff rejecting the same and asking him to remove them from their godown: [P. 239, C. 2.]

Held, that the defendants were liable to pay the price, as their rejection of the goods three weeks after delivery, having not been within a reasonable time, could not be operative:

that inasmuch as the goods were delivered to the defendants, the onus was upon them to prove that they had in fact rejected them within a reasonable time. [P. 239, C. 2 & P. 240, C. 2.]

Gregory and *S.C. Bose* for Appellants.

A. N. Chowdhury and *N. Sirkar* – for Respondent.

Sanderson, C. J.—This is an appeal from the judgment of Mr. Justice Chaudhuri in which he gave judgment for the plaintiff.

The action was brought to recover the price of 125 bales of jute, and the defence was that the delivery of the jute was not in accordance with the contract, and that in consequence of the inferior quality of the jute the defendants rejected the jute.

Now, the contract was made on the 23rd of April, 1914 for 125 bales of jute. It was guaranteed to yield after cutting 70 per cent. good sacking warp, and the payment was to be made as follows: reimbursement 90 per cent. demand draft against documents and balance cash on delivery. That meant, and as I understand it was agreed to by both learned Counsel who argued this case, that when the buyers received the documents from the Railway Company, the plaintiff was entitled to receive 90 per cent. of the price, and when the goods were actually delivered then the balance namely, the 10 per cent., was to be paid.

Now, the documents were received by the defendants from the Railway Company on the 28th of July, and these documents, as I understand, included a bill made out by the plaintiff for 90 per cent. of the price. The goods were actually delivered to the defendants on the 31st July, and were taken to the defendant's godown where they remained until the time the action was brought.

The learned Judge has found first of all that the goods were *somewhat* inferior in quality. Speaking for myself, having read the evidence and carefully considered it, I think he was fully

justified in coming to that conclusion, and I am not sure that if I had been trying the case I should not have omitted the qualifying word *somewhat* and held that the goods were inferior in quality. I need not go through the evidence in detail, because I agree with the learned Judge upon that point. There clearly was evidence upon which he could come to that conclusion, and, in my opinion, he was right in arriving at that decision. Of course, that does not end the matter. The goods not being in accordance with the contract, the defendants, if they chose, could have rejected the goods, and the law in this respect is made by the terms of the section to which we have been referred, *viz.*, S. 118 of the Indian Contract Act. That section provides, "where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered."—(That does not apply to this case, because the defendants did not refuse to accept the goods when tendered.) "Or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them." On the 22nd of August, a letter was written by the defendants to the plaintiff in which they do say definitely that they rejected the goods on account of their inferior quality. But it is admitted by Mr. Gregory, Counsel for the appellant, that if the defendants had done nothing before the 22nd of August or rather that if they had not rejected the goods before the 22nd of August, they would not have rejected them *within a reasonable time*: and, if I may say so, he was perfectly right in making that admission, because nobody could suggest that business people with regard to a contract of this kind could sit still for three weeks after the goods were delivered taking no action with regard to them and then came forward after three weeks and say 'we reject the goods.' Therefore, the whole matter on this part of the case is reduced to this: Did the defendants reject the goods at sometime before the 22nd of August, and if they had rejected the goods, did they reject them within "a reasonable time"? The learned Judge has found that the defendants did not reject the goods before the 22nd of August. As I read his judgment, he said the verbal evidence upon that point was contradictory and he was not able upon the oral evidence to make up his mind either one way or the other, and, therefore, he said that reliance must be placed upon the documentary evidence.

Now, the only documentary evidence with regard to the rejection is the letter of the 22nd of August to which I propose to refer. That letter says this,—it was written by the defendants themselves to the plaintiff—"We beg to state that your 125 bales of Jobsa Jute under the above contract (*i. e.*, contract No. 432 of G. L. Dudhuria 125 bales) had already reached our godown, but we regret to inform you that the quality of the same is much inferior to that guaranteed by the contract. We cannot accept the same as a fair tender against the contract and must reject the lot, which please remove from our godown at once. In the meantime the bales are lying at your entire risk and responsibility. Furthermore you are liable for the godown rent. The matter was brought to your notice on several occasions verbally." The first thing I wish to say about this letter is that it is in answer to a letter of the 20th August written by the plaintiff pressing for payment of Rs. 4,950-10-0, which represented the 90 per cent. of the contract price. It is also to be observed that the last sentence "The matter was brought to your notice on several occasions verbally," upon which so much reliance was placed by the appellants' learned Counsel, is to my mind ambiguous. The defendants in that letter are referring to two things. They are referring to the fact that the goods were inferior to the quality guaranteed by the contract; they are also referring to the fact that they rejected the same. When they say that 'that matter was brought to your notice on several occasions verbally,' it may mean that 'on a previous occasion we told you that we rejected them,' or it may mean that 'we drew your attention to the fact that the goods were not in accordance with the contract quality.' Therefore, to my mind the letter is not conclusive either one way or the other.

Now, what is the position? The defendants accepted the goods in this

sense that they allowed them to be placed in their godown on the 31st of July. They say that they examined them either the next day or a day or two afterwards. What would one expect business people to do if the buyers found that the goods were not of the contract quality, and if they intended to reject them? I should have expected business people to put on record at once by writing to the sellers and saying that the goods were not in accordance with the contract quality, and that they rejected them. We cannot find the slightest trace of that in this case; the only letter which does in so many words say that they rejected these goods was written as late as the 22nd of August and then that was written in answer to a letter pressing them for payment. I must also say that inasmuch as the goods were delivered to the defendants, it is obvious that the onus of proving that they in fact rejected, lies upon them, and the learned Judge in effect says that the defendants have not satisfied him that they did in fact reject the goods. Of course, if the learned Judge took that point of view, he was perfectly right in saying that the defendants had not rejected the goods. Speaking for myself, I have read the evidence very carefully, and I am not satisfied upon the evidence which has been put before me that the learned Judge was wrong; and, that would be quite sufficient for me. I need not say any more because there was evidence both ways; the learned Judge was there to give his decision upon this question of fact, which is a pure question of fact and no matter of law is appertaining to it, and it is quite sufficient for me to say that I am not satisfied that the learned Judge was wrong. I may go further and say that I think it is quite possible that what happened was that there were conversations between the parties with regard to the quality of the goods, discussions as to what had been done and so on, but I am quite satisfied that the defendants have not given sufficient evidence to discharge the onus that they definitely rejected the goods before the 22nd of August.

For these reasons I think that the appeals should be dismissed with costs.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 241

MOOKERJEE AND ROE, JJ.

Harinath Chowdhury — Defendant—Appellant.

v.

Hara Das Acharja Chowdhury and *others*—Plaintiffs—Respondents.

Second Appeal No. 3656 of 1913, decided on 21st May, 1915, against the Decree of Sub-Judge, Mymensingh, dated 11th August, 1913.

(a) Civil P. C. (5 of 1908), O. 47—Rule that no suit lies for recovery of money recovered under legal process of Court though subsequently found to be incorrect does not apply in case where money is ordered to be deposited pending adjudication but paid out without decision.

The principle that, where money has been paid by the plaintiff to the defendant under compulsion of legal process which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received, cannot apply in a case where money was deposited by the plaintiff, *C*, on the faith of an order which stated explicitly that the money would be retained in Court pending the determination of the question whether the money belonged to *B*, the then judgment-debtor of *A*, or to *D*, the alleged creditor of the depositor C, but where without holding any inquiry and without notice to the depositor and his alleged creditor the Court paid it out to *A* on his application. Case-law discussed.

[P. 242, C. 2 & P. 243, C. 1 & 2.]

(b) Civil P. C. (5 of 1908), O 21, R. 46—Deposit made subject to an enquiry is conditional deposit.

A deposit made by order of a Court pending adjudication of the question whether *B* or *D* is beneficially interested in the money, is a conditional one. [P. 243, C. 2.]

(c) Practice—Judicial Order—Order against person without notice is bad.

No judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. [P. 243, C. 2.]

(d) Rules of Supreme Court, O. 45, Rr. 5 and 6—*Ex parte* order to the prejudice of third person cannot be made—Though Civil P. C. provides no similar rule Court has inherent power to protect third person against *ex parte* orders.

The Rules of the Supreme Court in England contemplate not an *ex parte* order to the prejudice of third person who may be really interested in the debt due from the garnishee but an inquiry in the presence of all the persons interested. [P. 244, C. 1.]

The Code of Civil Procedure (Act V of 1908) does not contain any specific rule of the type of Rr. 5 and 6 of O. 45 of the Rules of the Supreme Court in England. But the Court has inherent powers to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. *Roberts* v. *Death*, 8 Q. B. D. 319, ref. to. [P. 244, C. 1.]

(e) Civil P C. (5 of 1908), S. 152—Court has inherent power to order re-deposit of money wrongly withdrawn.

The money deposited does not cease to be the money of the depositor merely because he brought it into Court on the faith of a conditional order, which directed its retention in Court pending inquiry into the question raised. [P. 244, C. 1.]

The Court has full authority to compel a party to bring back such money into Court to be re paid to the other party entitled to it. 6 I. C. 508 ref. to. [P. 244, C. 1.]

A. Guha, Sirendra Kumar Dey and *Akhil Chandra Guha*—for Appellant.

Joti Prosad Sarbadhicary and *Prokash Chandra Mazumdar*—for Respondents.

Judgment.—The problem which requires solution in this appeal may be concisely stated. On the 30th June, 1909 *A* sued *B* for recovery of money. On the same day *A* obtained an order for attachment before judgment under R. 5 of O. 38, Civil Procedure Code. The property attached was a debt due ostensibly from *C* to *D*; but the debt was attached on the allegation that *B*, and not *D*, was the person beneficially interested in it. The result was that a prohibitory order was issued upon *C*. On the 13th August, 1909 *A* obtained an *ex parte* decree in his suit against *B*. *C* was then called upon to pay into Court the money due from him ostensibly to *D*. On the 8th October *C* applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to *D*, and provided also that interest ceased to run upon his debt from that date. The Court thereupon ordered that the money, if deposited, would be retained in Court till the adjudication of the question, whether *B* or *D* was beneficially interested therein. On the faith of this order the money was brought into Court on the 13th December, 1909. Thereafter, without notice to *C* or *D*, the Court, on the application of *A* paid out the money to him. *D*, who had no intimation of these proceedings, subsequently sued *C* and recovered judgment against him on the debt. *C* now sues *A* to recover the money which he had deposited in Court and which, without notice to him or to his creditor *D*, had been withdrawn by *A*. The Courts below have decreed the claim and *A* has appealed to this Court. The substantial question in controversy on the merits in this litigation, consequently, plainly, is whether *B* or *D* was beneficially interested in the debt. The Courts below have concurrently answered this against *A*, and have found that *B* had no interest in the money, in other words, that not *B* but *D* was the real creditor of *C*. This is a finding of fact which cannot be successfully challenged in second appeal, indeed no attempt has been made to assail it before us; but the question has been mooted, has *C* any cause of action against *A*? On behalf of *A*, it has been argued that there is no cause of action, *first*, because the money was recovered under compulsion of legal process, and cannot accordingly be recovered by any form of suit; and, *secondly*, because by virtue of O. 21, R. 46 of the Code of Civil Procedure, the money, as soon as deposited, ceased to be the money of the plaintiff; and that, consequently, he is not entitled to recover it back. In our opinion there is no foundation for either of these contentions.

As regards the *first* ground, it is clear that the principle of the rule in *Marriot* v. *Hampton* (1), which has been the bulwark of the arguments for the appellant, is of no real assistance to his cause. The principle is that where money has been paid by the plaintiff to the defendant under compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The foundation of this doctrine was thus stated by Lord Kenyon:—"After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person." To the same effect is the observation of Ghose, J:—"It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence, J., added that if the case alluded to, that is, the

(1) 7 T. R. 269=2 Smith's Leading Cases 421=2 Esp. 546=4 R. R. 439=101 E. R. 969.

decision of Lord Mansfield in *Moses* v. *Macferlan* (2), be law, it would go the length of establishing this, that every species of evidence which was omitted by accident to be brought forward at the trial might still be availed in a new action to overrule the former judgment, which is too preposterous to be stated. The principle was again formulated by Patterson, J., in *Kadaval* v. *Collins* (3): "Money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." We refer to this statement in order to emphasize the qualification to the general rule formulated in the following terms by Kennedy, J., in *Ward & Co.*, v. *Wallis* (4); "There must be *bona fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the principle laid down in that case [*Marriot* v. *Hampton* (1)] into force; if the person enforcing a payment, under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriot* v. *Hampton* (1) may not prevent the defendant from recovering the money back."

Let us examine the application of this principle to the circumstances of the present case. Here money was deposited by the plaintiff *C* on the faith of an order which stated explicitly that the money would be retained in Court, pending the determination of the question, whether the money belonged to *B*, the then judgment-debtor of *A*, or to *D*, the alleged creditor of the depositor *C*. That inquiry was never made, but the Court, without notice to the depositor and his alleged creditor, paid out the money to the present defendant, on his application, so that neither *C* nor *D* was allowed an opportunity to defend his rights. We need not hold that this conduct of *A* was in any way designedly fraudulent, but this much is plain that he was able to appropriate the money by what constituted a grave abuse of the process of the Court. The principle of the decision in *Marriot* v. *Hampton* (1) has no application to these circumstances.

As regards the *second* ground, it is contended that under O. 21, R. 46, the money, as soon as it was deposited, ceased to be the money of the depositor. Clause (3) of R. 46, is in these terms: "A debtor prohibited under Clause (1) of sub-R. (1) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same." This clearly contemplates a case where there is no dispute that if the suit results into a decree against the defendant, or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. In the present case, the deposit was clearly conditional. The order of the Court makes it plain beyond all controversy that the deposit was made pending the adjudication of the question whether *B* or *D* was beneficially interested in the money. But it has been contended on behalf of the appellant that this order was irregular, as the Code neither contemplates an inquiry, nor provides for the issue of notices upon parties affected by its order. This argument overlooks the elementary principle that no judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. Our attention has been drawn in this connection to R. 5 of O. 45 of the Rules of the Supreme Court in England. An examination of that rule shows that there is no foundation whatever for the contention of the appellant. There the rule expressly provides for an inquiry in the events which have happened here. R. 5 is in these terms: "Whenever in any proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court may order such third person to appear, and state the nature and particulars of his claim upon such debt." R. 6 then provides that after the allegation if any third person under such order as in R. 5 mentioned and if any other person who by the same or any subsequent order may be ordered to appear or in case of such third person not appearing when ordered, the Court may

(2) 2 Burr. 1005=1 W. Bl. 219=97 E. R. 676.

(3) 4 A & E 858=111 E. R. 1006=6 N. & M. 324=2 H. & W. 54.

(4) (1900) 1 Q. B. 675=69 L. J. Q. B. 423=82 L. T. R. 1.

order execution to issue to levy the amount due from such garnishee. Consequently, the rules of the Supreme Court in England contemplate, not an *ex parte* order to the prejudice of third persons who may be really interested in the debt due from the garnishee, but an inquiry in the presence of all the persons interested. Our Code does not contain any specific rule of the type of Rr. 5 and 6 of O. 45 of the Rules of the Supreme Court in England. But the Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. In the case before us the Court was competent, indeed, it was incumbent upon the Court, to make a conditional order of this description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that money. Reference may in this connection be usefully made to the instructive decision of the Court of Appeal in *Roberts* v. *Death* (5). In that case the garnishee who was ordered to bring the money into Court contended that the money was due to the judgment-debtor, not in his personal capacity but in his capacity as a trustee. The question arose, whether the money, if deposited, should be paid without inquiry. Lord Justices Brett, Colton and Lindley unanimously held that it would not be right to make the payment without an inquiry into the question, whether the money was trust money or not, and they directed that the money should be brought into Court to abide the event of an inquiry. In our opinion, the money deposited in this case did not cease to be the money of the plaintiff, merely because he had brought it into Court on the faith of a conditional order which directed its retention in Court pending inquiry into the question raised.

We feel no doubt whatever that the justice of the case lies entirely with the respondent and that the Court has full authority to compel the appellant to bring back the money into Court to be re-paid to the plaintiff, [*Mrinalini Dasi* v. *Abinash Chunder Dutt* (6)].

(5) (1882) 8 Q. B. D. 319=51 L. J. Q. B. 15.
(6) (1910) 6 I. C. 508.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 244

HOLMWOOD AND MULLICK, JJ.

Seosaran Lal—Defendant—Appellant.

v.

Harihar Prasad Singh—Plaintiff—Respondent.

Second Appeal No. 1387 of 1912, decided on 14th January, 1915, against the decree of Sub Judge, Shahabad, dated 29th March 1912.

(a) Limitation Act (9 of 1908), Arts. 36 and 89—Art. 89 applies to suit for recovery of money misappropriated or received and not accounted for.

Money received and misappropriated by a servant is covered by Article 89 and not by Article 36 of the Limitation Act. It is immaterial in a civil action whether the misappropriation charged is criminal or not. If there is no misappropriation but money is payable by the defendant to the plaintiff for money received by the defendant and not accounted for, Article 89 still applies. [P. 245, C. 1.]

(b) Civil P. C. (5 of 1908), O. 20, R. 16—Preliminary decree is not necessary in every suit for accounts unless sum due is to be ascertained.

Under O. 20, R. 16, Civil Procedure Code, it is clear that it is not in every suit for accounts that a preliminary decree directing such accounts to be taken as the Court thinks fit, is necessary. It is only where it is necessary in order to ascertain the amount of money due to or from any parties that an account should be taken, and that the Court should before passing the final decree pass a preliminary decree directing such accounts to be taken as it thinks fit.

[P. 245, C. 2.]

Provash Chandra Mitter and *Satish Chandra Bose* - for Appellant.

Jogendra Chandra Ghose—for Respondent.

Judgment.—This second appeal arises out of a suit brought by the plaintiff to recover Rs. 536-13-6 and interest from the defendant. The defendant was admittedly the servant of the plaintiff and the plaint said that he misappropriated the amount. The plaint also said that the defendant was dismissed in the end of March 1907, and on the 10th March, 1907 the defendant appears to have filed a certain list of expenditure, called *farad kharcha*, which has been reproduced in

his written statement and which he desired to be set off against the sum claimed by the plaintiff, which sum the defendant admitted in his written statement had been received by him.

The defence in the Court below urged that the suit was barred by limitation by reason of Article 62. The lower Courts, the Munsif at any rate, seem to have held thet it came under Article 64, and that although the plaintiff did not ask for an account and although it was found that there had been no misappropriation, he seemed to think that the suit might be treated as a suit for accounts. The learned Subordinate Judge in the lower Appellate Court treated the case from the commonsense point of view, which we have just indicated, in stating what the case really is, and he found that the only questions for determination in appeal before him were, *first*, how much, if any, is due to the plaintiff from the defendant, and *second*, is the suit barred by limitation? As regards the first point we have nothing to do in second appeal and it is concluded by the finding of fact.

As regards the question of limitation we are clearly of opinion that the plaintiff's suit as originally framed fell under Article 89 of the Limitation Act, and that the suit as it has been treated in the lower Court, by dealing with the defendant's allegation of payment or expenditure and by going into each item and finding what the balance due to the plaintiff is, is quite within the scope of such suit. A great deal has been said as to the suit being wholly based on the allegation of criminal misappropriation of a specific sum. But it is immaterial in a civil action whether the misappropriation charged is criminal or not. Money received and misappropriated by a servant is undoubtedly covered by Article 89 and not by Article 36 as was sought to be argued before us. If there is no misappropriation but money is payable by the defendant to the plaintiff for money received by the defendant and not accounted for, Article 89 still applies, and although the defendant filed the *farad kharch* or bill of expenditure, it is found that the accounts were never adjusted and the plaintiff never admitted any of the items which the defendant pleaded. It cannot, therefore, be said that the money received by the defendant, which admittedly was money due on decrees and deposits in Court, was ever accounted for. The Courts below have, therefore, it appears to us, rightly gone into the allegation of the defendant that he had made certain payments and they have found in some instances in his favour, in some instances against him. Those are findings of fact with which we have no concern.

But it is argued that in a suit for accounts there must be a preliminary decree directing such accounts to be taken. We wish to point out that it is not in every suit for accounts that such a decree is necessary. O. 20, R. 16, is clear on the point. It is only where it is necessary in order to ascertain the amount of money due to or from any parties that an account should be taken that the Court shall, before passing the final decree, pass a preliminary decree directing such account to be taken as it thinks fit. Here the Court had the whole of the items disputed between the parties before it. A comparison of the schedule to the plaint with the schedule to the written statement clearly shows this, and really the only point which it had to decide on the merits was, how much of the money alleged to have been spent by the defendant out of the money he admittedly received had really been spent by him for the benefit of the plaintiff. It was a matter which the Courts can well deal with without putting the parties to the expense of employing a Commissioner and having a separate investigation of accounts.

It does not appear to us that any injustice has been done to the defendant and the appeal, is, therefore, dismissed with costs and the decree of the lower Appellate Court upheld.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 245

RICHARDSON AND IMAM, JJ.

Kunya Kesori Pal Chowdhury and *others*—Plaintiffs—Appellants.

v.

Bama Sundari Dasya and *others*—Defendants—Respondents.

Appeal No. 3882 of 1913, decided on 17th December, 1915, from the Appellate

Decree of Addl. Sub-Judge, Dacca, dated 12th August, 1913.

Landlord and Tenant—Non-transferable occupancy holding—Transfer of portion by tenant—Tenant refusing to pay rents for portion transferred - Rights of landlord—Landlord can refuse to accept apportionment of rent—He can accept amount of rent tendered without prejudice to rights as against transferee—As against transferee he is entitled to *Khas* possession of land transferred..

When a tenant of a non-transferable occupancy holding, after having transferred a portion of his holding, refuses to pay rent for that portion and tenders to the landlord the proportionate rent due in respect of the remainder of the holding, it is open to the landlord to decline to accept an apportionment of the rent and recognise any division of the holding and hold the tenant liable for the entire rent.

[P. 246, C. 2.]

In such a case a landlord is at liberty, if he so chooses, to accept from the tenant the amount of rent tendered by him for the land he still holds without prejudice to his rights as against the transferee in respect of the transferred portion. [P. 246, C. 2.]

As between such a transferee and the landlord the latter is *prima facie* entitled to *khas* possession of the land transferred. [P. 247, C. 1.]

Sarat Chandra Basak and *Hari Har Prosad Singh*—for Appellant.

Gobind Chandra Dey Roy—for Respondents.

Judgment.—The holding in question in this suit originally belonged in its entirety to the defendant No. 3. He sold a portion of it to the defendant No. 2 in the name of the latter's mother, the defendant No. 1. The holding is found to be a non-transferable occupancy holding and, as we read the judgment of the learned Subordinate Judge in the lower Appellate Court, he has also found that, subsequently to the transfer of the portion of the holding, the defendant No. 3 refused to pay rent for that portion and tendered to the landlords the proportionate rent due in respect of the remainder of the holding, which the landlords accepted. The learned Subordinate Judge, in one part of his judgment, says this: "The plaintiff's first witness Kamini, who is the *naib* of the plaintiffs owning 6 annas and 7½ *gandas* share, deposes that the defendants Nos. 3 and 4 refused to pay rent for the land in suit as it was sold and that the defendant No. 3 paid rent for the lands other than the land in suit. The refusal to pay rent was due to the fact that the land had been sold." Then further on, the Subordinate Judge says: "The refusal to pay rent was due to the fact that there was a sale and the alleged relinquishment was in favour of the purchaser." From these passages, we gather, as we have said, that the learned Subordinate Judge accepted the evidence of the plaintiffs' *naib* that, after the transfer in question, the defendant No. 3 refused to pay rent for the land he had transferred. In that state of things, it was, of course, open to the landlords to decline to accept an apportionment of the rent and to decline to recognize any division of the holding. On the defendant No. 3 refusing to pay the entire rent of the whole holding, the landlords might have instituted a rent suit and so brought the holding to sale in execution of any decree they might have obtained. But, in our opinion, this was not the only course open to the landlords. We can see no reason why the landlords should not be at liberty, if they so chose, to accept from the defendant No. 3 the amount of rent tendered by him for the land he still held without prejudice to any right which they might have as proprietors in respect of the transferred portion. The learned Subordinate Judge in the Court of Appeal below has found on these facts that there was no surrender of the transferred portion in favour of the landlords. It seems to us, however, that only one conclusion is possible from the transfer coupled with the subsequent refusal to pay the rent of the transferred portion; clearly that amounted on the part of the defendant No. 3 to a disclaimer of all right, title and interest in the transferred portion. He had transferred his interest as tenant to the defendant No. 2, and as between him and the defendant No. 2 his interest as tenant was extinguished. As to the landlords he put an end to the relationship of the landlord and tenant by refusing to pay rent for this land. In our opinion the tenant, the defendant No. 3, by his own acts and conduct made it as clear as possible that he had no further interest in the land. The land is, therefore, at the disposal, of the landlords, unless any third person can make out a good title to possession as against them. The present case is easily distinguishable from those cases where after transferring a portion of the holding the tenant continues in possession of the remainder and continues to pay, or, at any rate does not deny his liability to pay the rent due in

respect of the whole holding. In cases of that kind it is familiar law that there is no abandonment or surrender of the holding either as a whole or in part. But the present case is very different and the conclusion arrived at by the learned Subordinate Judge appears to us to be entirely inconsistent with the facts which he has found. On the materials before us the only conclusion possible. is, as we have said, that the defendant No. 3 has ceased to have any interest in the transferred land. If that be so, what are the rights to the land as between the transferee and the landlords? *Prima facie*, the landlords are entitled to the land. The transferee shows no title from the landlord, his title is derived from the defendant No. 3 who had no power to create title good against the landlords. In the circumstances, we are of opinion that there is no answer to the landlords' suit. The result is that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored. The plaintiffs, the appellants before us who are co-sharers in the land to the extent of 6 annas 7½ *gandas*, are entitled under the latter decree to joint possession to the extent of their share. The other co-sharers were made party defendants and no question is raised as to their share. The appellants are entitled to their costs throughout from the contesting defendants.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 247

GREAVES AND WALMSLEY, JJ.

Dirajaddi and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1122 of 1915, decided on 5th October, 1915.

Indian Penal Code (45 of 1860), S. 225—Rescue of thief from custody of *chowkidar* — Offence under S. 225 is not committed.

A person rescuing a thief, kept in custody by a *chowkidar* in Bengal, does not commit an offence under S. 225, Indian Penal Code. 35 Cal. 361; A. I. R. (1914) Cal. 272 and 27 Cal. 366. foll. [P. 247, C. 2.]

Asita Ranjan Ghose for *Brojendra Nath Chatterjee* – for Petitioners.

Facts.—One Fatik committed theft at night in the house of one Kalim, who arrested the thief red-handed, and made him over to the complainant *chowkidar* that night. The *chowkidar* kept him tied that night in the house of Kalim, and next morning at about breakfast time the accused petitioners rescued the thief Fatik from the custody of the *chowkidar*. Fatik was convicted in the original case for theft.

On these facts the petitioners were tried on the charge of rescuing the thief from the lawful custody of the *chowkidar* by the Sub-Deputy Magistrate of Madaripur, who convicted them under S. 225 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for 3 months by his order dated the 23rd June, 1915. The aforesaid order was confirmed on appeal by the Joint Magistrate of Faridpur, who upheld the conviction and sentence of the petitioners by his order dated the 26th July, 1915.

Against this order the petitioners moved the High Court, and a Rule was issued upon the District Magistrate of Faridpur to show cause why the conviction of and sentence passed upon the petitioners should not be set aside on the two following grounds:—

(*i*) For that on the facts found, the lower Courts ought to have held that no offence under S. 225, Indian Penal Code, was committed by the petitioners.

(*ii*) For that as the *chowkidar* was not a Police Officer, his custody was not lawful, and, therefore, the petitioners did not commit any offence by the alleged rescue.

Judgment.—We make this Rule absolute on the authorities to which we are referred, namely, *Bolai Dey* v. *Emperor* (1), *Purna Chandra Kundu* v. *Emperor* (2) and *Kalai* v. *Kalu Chowkidar* (3).

We set aside the convictions and sentences and direct that the bail bonds be discharged.

V.B./R.K.

Rule made absolute.

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(1) (1908) 35 Cal. 361.
(2) A. I. R. (1914) Cal. 272=41 Cal. 17=20 I. C. 750.
(3) (1900) 27 Cal. 366.

A. I. R. 1916 Calcutta 248

HOLMWOOD AND MULLICK, JJ.

Ramanugrah Narayan Singh and *others*—Plaintiffs—Appellants.

v.

Chuni Lal and *others*—Defendants—Respondents.

Appeal No. 306 of 1911, decided on 12th January, 1915, from Original Decree of Sub-Judge, Gaya, dated 19th June, 1911.

Succession Certificate Act (7 of 1889), S. 4—Certificate is not necessary when Probate or Letters of Administration are obtained—It is not necessary that certificate must be obtained before suit—Suit should not be dismissed on that account.

Where Probate or Letters of Administration have been obtained as regards the estate of a deceased, a Succession Certificate is not necessary under S. 4 of Act VII of 1889 to entitle a person to sue. [P. 248, C. 2.]

Where a Succession Certificate is necessary to entitle a plaintiff to maintain a suit, it should be allowed to be produced before a decree is passed and the suit should not be dismissed because the Succession Certificate has not been obtained previously. Case-law discussed. [P. 248, C. 2.]

Umakali Mukherjee, Siva Nandan Roy and *Jnanranjan Chatterjee*—for Appellants.

Provas Chandra Mitter and *Jatindra Nath Sen*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs to recover a certain deposit made in a Bank, known by the name of Sheo Lal Majhilal in the town of Gaya, by their uncle and predecessor, Bissesswar Dayal. The plaintiffs are the three minor nephews of Bissesswar and his brother, Pasupat Nath, who has obtained Letters of Administration to his will. The case is that Bissesswar Dayal and Dudhnath, who predeceased him leaving his son plaintiff No. 3, and plaintiff No. 4 are members joint in mess and estate in a *Mitakshara* family. Bissesswar died in February 1908, leaving a will dated the 2nd January, 1908, of which will Pasupati Nath obtained Letters of Administration, with a copy of the will annexed, to the property and credits of Bissesswar on the 22nd September, 1910. From the will it appears that the testator admitted that he was fully joint with his brothers as regards the ancestral property, which he sets out in Schedule I, and his statement in the 3rd column of Schedule I must be taken to mean that his share would be ⅓rd on partition, but that no partition had ever taken place. He also had a considerable amount of immovable and movable property acquired by him alone, and he gives a list of that in Schedule II. But it appears that that list is not complete, inasmuch as another item is mentioned in the body of the will which is not included in Schedule II. The parties went into evidence on the merits and both parties say here before us that they are anxious for a decision on the merits.

The learned Judge has dismissed the suit on a preliminary point and we think that he has erroneously decided that point. He says that the fact that Bissesswar Dayal made a will negatives the theory that he was joint with the plaintiffs. That was his first error, We have shown that the will itself clearly shows that he was joint with the plaintiffs. He further says that they cannot get a decree until they produce the Succession Certificate. This is his second error. S. 4 of Act VII of 1889 is perfectly clear on the point that Probate or Letters of Administration evidencing the grant of Letters for Administration of the estate of the deceased is sufficient to render a Succession Certificate unnecessary.

It has been argued before us that those Letters of Administration are not with a copy of the will annexed. It is only in cases of intestacy that Letters of Administration without copies of the will annexed are given, and it is apparent from the alternative words—a Probate or Letters of Administration—that the section includes Letters of Administration with a copy of the will annexed. Even if a Succession Certificate had been necessary we must point out to the learned Judge in the Court below that the practice of the Courts in India approved by this Court has always been to allow the Succession Certificate to be produced before the decree is passed and not to dismiss the suit outright because the Succession Certificate has not yet been obtained. However, we do not think that any Succession Certificate is necessary, because the plaintiff No. 4 has obtained Letters of Administration to the estate of Bissesswar.

Then it is argued that the plaintiff No. 4 did not bring the suit upon the

basis of the Letters of Administration and that, therefore, he cannot be allowed to amend the plaint now so as to alter the character of his suit. We think that this is a very technical view to take of the pleadings. Paragraph 9 of the plaint says that the will was proved in solemn form before the District Judge of Gorakpur and Letters of Administration with a copy of the will was granted on the 27th May, 1910. Following that, paragraph 10 says that the plaintiffs are entitled to recover the whole amount from the defendants. The Letters of Administration are, therefore, clearly referred to, and the case falls within the remarks of the Privy Council in *Mohummud Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Koer* (1) and the case of *Raja Rup Singh* v. *Rani Baisni* (2). The case in *Mohummud Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Koer* (1) was somewhat of the same nature as the present case. The nature of the transaction and the status of the obligor, their Lordships say, make it peculiarly desirable that the Appellate Court should have the benefit of the judgment of the Court below on the issues on the merits, and they, therefore, allowed an amendment of the plaint in what is a much stronger case against such amendment than the present; for we are of opinion that this case could have proceeded on paragraphs 9 and 10 of the plaint without any amendment, and that the question of the Letters of Administration, the question of survivorship and the question of inheritance could have been gone into upon the plaint as it stands. But as the parties are still anxious that the verbal amendment should be made so as to make the two paragraphs clear, we think it right to accede to their prayer and to expand paragraph 10 of the plaint so as to enable all these pleas which are referred to in the plaint itself to be specifically included. Paragraph 10 would be amended as follows: that the plaintiffs are entitled to recover the whole amount from the defendants, as plaintiffs Nos. 1 to 3 are the nephews and plaintiff No. 4 is the brother of the deceased depositor, who has left no issue or widow. Whether this is under the will or by survivorship or by inheritance does not appear to us to be very material. But if the defendants desire to give any evidence to show that the plaintiffs are not entitled on either of those grounds to any share in any money that may be found due to Bissesswar's estate, they are at liberty to give evidence on the point; and it shall further be added to paragraph 10, that the plaintiff No. 4 is entitled to recover the whole amount from the defendants on behalf of the other plaintiffs as Administrator to the estate of Bissesswar. The case will then be tried on the merits.

The result is that the appeal is decreed. The decision of the Court below and its decree on the preliminary point is discharged and the case is remanded to the lower Court for decision on the merits.

The appellants are not entitled to any costs in this Court as their own defective pleadings seem to have got them into this trouble; but the costs of the suit in the lower Court will abide the result of the final decision.

The Court-fee paid on the memorandum of appeal will be refunded to the appellants.

V.B./R.K.

Appeal decreed; Case remanded.

(1) (1866-67) 11 M. I. A. 468=9 W. R. 9 (P.C.)
(2) (1885) 7 All. 1=11 M. I. A. 149 (P.C.).

A. I. R. 1916 Calcutta 249

FLETCHER AND TEUNON, JJ.

Atul Chandra Singha—Plaintiff—Appellant.

v.

Kunja Behari Singha and *others*—Defendants—Respondents.

Second Appeal No. 508 of 1912, decided on 19th April, 1915, against the Decree of the Sub-Judge, 1st Court, Midnapur, dated 29th November, 1911.

(a) Civil P. C. (5 of 1903), S. 97—Scope of—Appeal on preliminary decree is obligatory.

Under S. 97 of the Code of Civil Procedure not only has an appellant right to appeal against a preliminary decree, but he is bound to appeal or else he is precluded from questioning it in a subsequent proceeding. [P. 250, C. 1.]

(b) Civil P. C. (5 of 1908), S. 97—Appeal on preliminary decree is tenable even if no appeal on final decree is preferred.

Where no appeal is preferred against the final decree, the appeal against the preliminary decree is not incompetent. 20 I. C. 576 and 19 I. C. 630, foll. [P. 250, C. 1.]

(c) Civil P. C. (5 of 1908), S. 97—If appeal on preliminary decree succeeds final decree

must be varied even though not appealed against.

The law gives a right to appeal against the preliminary decree and that right is not taken away because no appeal is preferred against the final decree, which is subject to the decision in the appeal in the preliminary decree. If that appeal succeeds the final decree ought to be amended in accordance with the result of the appeal. [P. 250, C. 1 & 2.]

Amarendra Nath Bose—for Appellant.

Jyoti Prosad Sarbadhikari, *Trailokya Nath Ghose* and *Dhirendra Kanta* for *Biraj Mohan Majumdar*—for Respondents.

Judgment.—This is an appeal from the decision of the learned Subordinate Judge of Midnapore, dated the 29th of November, reversing the decision of the Munsif. The suit was a partition suit. Two points have been raised in this case, of which the first is whether the appeal was properly preferred to the lower Appellate Court. To decide this the following dates are necessary. The preliminary decree was made on the 9th September, 1910. The present appeal was preferred before the lower Appellate Court on the 4th November, 1910. The final decree was made in the partition suit on the 11th March, 1911. Under S. 97 of the Code of Civil Procedure not only has the appellant a right to appeal against the preliminary decree, but he is bound to appeal or else he is precluded from questioning it in a subsequent proceeding. The appellant contends that as no appeal was preferred against the final decree, the appeal against the preliminary decree is incompetent. We do not think that it is so. That is quite clear from the decision in the case of *Nistarinee Dabee* v. *Rai Mahun Biswas* (1). A similar view seems to have been taken in the case of *Ugra Narain Singh* v. *Basan Narain Singh* (2). There is another decision * * * * * * to the contrary, namely, the case of *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (3). It seems to us that we ought to follow the decisions in the first two cases cited. It is quite clear that the law gave a right to appeal against the preliminary decree and that right was not taken away because no appeal was preferred against the final decree, which was subject to the decision in the appeal in the preliminary decree. If that appeal succeeds the final decree ought to be amended in accordance with the result of the appeal. The case of *Mackenzie* v. *Narsingh Sahai* (4) has also been relied upon by the learned Vakil for the appellant. That case, it is admitted, was under the old Code of Civil Procedure. There a party preferred an appeal against a preliminary decree without preferring an appeal against the final decree. S. 97 was expressly enacted to get over the practice which had grown up by virtue of a Full Bench decision of this Court. There is, therefore, nothing in the first contention.

The second question raised is whether there was a previous partition. It is purely a question of fact. The learned Judge has held that there was a previous partition and we cannot disturb his finding.

The present appeal, therefore, fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1913) 20 I. C. 576.
(2) (1913) 19 I. C. 630.
(3) (1913) 21 I. C. 516.
(4) (1909) 36 Cal. 762=1 I. C. 413.

A. I. R. 1916 Calcutta 250

MOOKERJEE AND RICHARDSON, JJ.

Abjal Majhi and *others*—Plaintiffs—Appellants.

v.

Intu Bepari and *others*—Defendants—Respondents.

Appeal No. 1392 of 1914, decided on 27th July, 1915, from Appellate Decree of Dist. Judge, Backergunge, dated 19th February, 1914.

Civil P. C. (5 of 1908), O. 41, R. 33—Scope of—Should not be allowed to defeat other provisions of law—Part of claim decreed on admission of defendant—In appeal by plaintiff whole claim dismissed—*Held* dismissal of whole claim was improper—*Held* further there was misuse of discretion by lower Appellate Court.

O. 41, R. 33 of the Civil Procedure Code is very widely expressed but it is not to be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of Statutes like those which relate to limitation or payment of Court-fees. [P. 251, C. 1 & 2.]

O. 41, R. 33, should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. [P. 251, C. 2.]

In a suit for arrears of rent the plaintiffs claimed rent at the rate of Rs. 34-6-0 a year. The defendants admitted that rent was payable at the rate of Rs. 24 a year. The Court of first instance allowed the claim at the rate of Rs. 24 a year. The plaintiffs appealed against this decree. The defendants did not prefer an appeal, nor did they file a cross-objection. The lower Appellate Court dismissed the entire suit:

***Held*, that the lower Appellate Court was not justified in dismissing the suit entirely on the appeal of the plaintiffs.** [P. 251, C. 1 & 2.]

***Held*, further, that the judicial discretion vested in the Court of Appeal below was not properly exercised.** [P. 251, C. 2.]

Abinash Chunder Guha—for Appellants.

Nakuleswar Mukherjee—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for arrears of rent. The plaintiffs claimed rent at the rate of Rs. 34-6-0 a year. The defendants admitted that rent was payable at the rate of Rs. 24 a year. The Court of first instance decreed the suit in part and allowed the claim at the rate of Rs. 24 a year. The plaintiffs appealed against this decree. The defendants were satisfied with this decree and they did not prefer an appeal nor did they file a cross-objection as provided in the Code. But the District Judge on the appeal by the plaintiffs has dismissed the entire suit. The plaintiffs have now appealed to this Court and have argued that the District Judge should not on their appeal have deprived them of the benefit of the decree of the Trial Court. In support of this contention, reliance has been placed upon the cases of *Rangamlal* v. *Jhandu* (1) and *Ganga Dhar Muradi* v. *Banabashi Padhari* (2). On behalf of the defendants-respondents, reliance has been placed upon R. 33 of O. 41 of the Code, which authorises the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. The rule further lays down that this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

This rule is, no doubt, very widely expressed; but, clearly, it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of Statute, like those which relate to limitation or payment of Court-fees. R. 22 of O. 41 of the Code provides that any respondent, who has not appealed from any part of the decree, may take cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month, from the date of service, on him or his Pleader, of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may deem fit to allow. Court-fee *ad valorem* is also required to be paid on the memorandum of cross-objection, under Article 1, Schedule I of the Court Fees Act, 1870. In the case before us, the defendants not only did not prefer an appeal against the decree of the trial Court in so far as it was adverse to them, they did not file a memorandum of cross-objection. When the District Judge permitted them to contend before him that the decree against them should be discharged on the appeal preferred by the plaintiffs, he allowed them in substance to evade the provisions of the Civil Procedure Code, the Limitation Act and the Court Fees Act. We are of opinion that even if it be assumed that R. 33 is applicable to a case of this description, the judicial discretion vested in the Court of Appeal below has not been properly exercised. We may also observe that, as was pointed by Jenkins, C. J., in *Ganga Dhar Muradi* v. *Banabashi Padhari* (2), ordinarily R. 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. This is the rule recognised in England under O. 58, R. 4, Rules of Supreme Court, which furnished the basis for O. 41, R. 33 of our Code [*Attorney-General* v. *Simpson* (3); and *Middlemas* v. *Wilson*(4)]; though a different rule was possibly recognised in earlier decisions [*Rowlins* v. *Powel* (5); and *Watts* v. *Symes* (6)]. If the course followed by the

(1) (1912) 34 All. 32=11 I. C. 640.
(2) A. I. R. (1914) Cal. 722=24 I. C. 208.
(3) (1901) 2 Ch. D. 671=70 L. J. Ch. 828.
(4) (1875) 10 Ch. App. 230=44 L. J. Ch. 476.
(5) (1715) 1 P. Wms. 297=24 E. R. 397.
(6) (1851) 1 De. G. M. & G. 240=21 L. J. Ch. 713.

Court of Appeal below were approved, a party would be penalised merely because he had preferred an appeal against the decree of the Court of first instance. We cannot persuade ourselves to hold that this could have been the intention of the Legislature.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 252

SANDERSON, C. J. AND MOOKERJEE, J.

Sashi Bhusan Hazrah — Plaintiff—Appellant.

v.

Deno Moyee Dasi — Defendant—Respondent.

Letters Patent Appeal No. 24 of 1914, decided on 18th May, 1916, against the decree of Teunon, J., dated 6th February, 1914.

(a) Bengal Tenancy Act (8 of 1885). S. 153—'Order" includes interlocutory orders.

The term "order" as used in S. 153 of the Bengal Tenancy Act is not limited to final orders but includes interlocutory orders such as orders of remand. [P. 252, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), S. 153—Suit for rent valued at less than Rs. 100—Order of remand without decision on special questions under S. 153 is not appealable.

In a suit for rent valued at less than Rs. 100 the order of the first Appellate Court remanding the suit for re-trial without deciding any of the special questions mentioned in S. 153 is not appealable. 4 C. W. N. 44, foll.

[P. 252, C. 2.]

Satya Charan Singh and *Sarat Chandra Rai Choudhury*—for Appellant.

Nagendra Nath Ghosh—for Respondent.

Mookerjee, J.—This is an appeal under Clause 15 of the Letters Patent from a judgment of Mr. Justice Teunon.

The plaintiff-appellant instituted a suit for arrears of rent. The defendant pleaded that rent was not payable at the rate claimed. The Court of first instance decreed the claim in full. Upon appeal the Subordinate Judge set aside the decree of the primary Court and remanded the case for a fresh trial, with full liberty to the parties to adduce whatever evidence they might like to bring forward in support of their respective allegations. The plaintiff preferred an appeal to this Court against the order of remand. The appeal was heard by Mr. Justice Teunon and was dismissed. The present appeal is directed against the decision of Mr. Justice Teunon.

The suit was valued at less than one hundred rupees. Consequently under S. 153 of the Bengal Tenancy Act, no appeal lay against the order of the Subordinate Judge, unless it was established that the Subordinate Judge had by his order determined one or more of the special questions mentioned in that section. The decision of this Court in the case of *Gagan Chand Sardar* v. *A. Casperz* (1) shows that the term *order* as used in S. 153 is not limited to final orders but includes interlocutory orders, such as orders of remand. Consequently it was obligatory upon the appellant before Mr. Justice Teunon to show that the order of the Subordinate Judge had decided one or more of the special questions. But on a perusal of the order of the Subordinate Judge it is clear that he has not only not decided any of the questions mentioned in S. 153, but has left open all the questions in controversy between the parties and remanded the case for re-trial, as, in his opinion, material evidence had been erroneously excluded by the trial Court. Consequently, the appeal to this Court was incompetent, and should have been dismissed on that ground by Mr. Justice Teunon.

The result is that this appeal is dismissed with costs and the order of Mr. Justice Teunon is affirmed on the ground that the appeal heard by him was incompetent under the law.

Sanderson, C. J.—I agree.

V.B./R.K.

Appeal dismissed.

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(1) (1900) 4 C. W. N. 44.

A. I. R. 1916 Calcutta 253 (1)

CHATTERJEA AND MULLICK, JJ.

Lakenatulla and *others*—Petitioners.

v.

Asmatulla Sarkar—Opposite Party.

Rule No. 685 of 1914, decided on 19th April, 1915, against the Order of Dist. Judge, Rungpur.

Civil P.C. (5 of 1908), S. 60 and O. 21, R. 53—Objection by judgment to sale left undecided—Sale held without enquiry—Proceedings are irregular—Remedy of judgment-debtor is by way of appeal.

Where in an execution proceeding for the sale of an attached holding, the Munsif allowed the application of objection to the sale to stand over and in the meantime held the sale without making inquiries into the objection raised by the judgment-debtor:

Held, that the proceedings of the Munsif were wholly irregular: [P. 253, C. 2.]

that the proper procedure in such a case for the judgment-debtor was to appeal against the order refusing to postpone the sale or directing the sale to take place. [P. 253, C. 2.]

Hari Bhusan Mukherjee—for Petitioners.

Judgment.—The petitioner before us was the judgment-debtor in an execution case, in the Court of the Munsif, in which the decree-holder had attached a holding for sale. He objected to the sale on the ground that the holding was an occupancy holding and, as such, was not saleable. This objection was raised by him on the 3rd November, the sale having been fixed for the 6th. The Munsif held that the application had been filed too late and that the sale, therefore, should not be postponed. At the same time, he directed the application to be put up on the 26th of November for hearing. The holding was sold on the 6th of November, and on the 26th the application of the petitioner having been put up before the Munsif, he took evidence in the matter and came to the conclusion that the holding was not saleable, and accordingly set aside the sale. On appeal by the decree-holder, the learned District Judge set aside the order of the Munsif dated the 26th November, on the ground that the Munsif could not go into the question whether the holding was liable to sale or not, after the sale had already been held. The petitioner thereupon obtained this Rule from this Court calling upon the opposite party to show cause why the order of the District Judge should not be set aside.

We are of opinion that the proceedings of the Munsif in allowing the application to stand over till the 26th November, and at the same time holding the sale on the 6th November were wholly irregular. He ought not to have held the sale without making inquiries into the objection raised by the judgment-debtor on the ground that the property was not saleable. The proper procedure ought to have been for the judgment-debtor to appeal against the order refusing to postpone the sale or directing the sale to take place, notwithstanding the pendency of the application in which the question of the saleability of the holding was raised. But before the period for appeal against the order expired, the Munsif took up the application on the 26th November and set aside the sale. So, although the proceedings of the Munsif were irregular, the order ultimately passed by him appears to be right. Under the circumstances, we think that the order of the District Judge should be set aside and that of the Court of first instance dated the 26th November, restored.

V.B./R.K.

Order set aside.

A. I. R. 1916 Calcutta 253 (2)

HOLMWOOD AND MULLICK, JJ.

Lala Singh and *others*—Plaintiffs—Appellants.

v.

Latif Hossein and *others*—Defendants—Respondents.

Second Appeal No. 3215 of 1911, decided on 14th January, 1915, against the Decree of Additional Sub-Judge, Patna, dated 22nd August, 1911.

Evidence Act (1 of 1872), S. 114—Where evidence of possession is unreliable, presumption of possession with person having title should be made.

Where the evidence of possession is equally unworthy of credit on either side, the presumption that possession goes with title does not apply. 20 W. R. 25 (P. C.), ref. to and foll. 12 Cal. 38, ref. to. 27 Cal. 25, ref. to and 8 C. W. N. 876, ref. to. [P. 254, C. 1.]

Provash Chandra Mittra and *Susil Madhab Mullick*—for Appellants.

Kulwant Sahay—for Respondents.

Judgment.—This point which is raised in this second appeal raises the ancient controversy regarding the effect of presumption of continuous possession from title. It

was laid down by the Privy Council in the case of *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (1) that the ordinary presumption would be that possession went with the title, but that presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary. But where there is strong evidence of possession, as it is here on the part of the respondent, opposed to evidence apparently strong also on the part of the appellant, their Lordships think that in estimating the weight due to the evidence on both sides, the presumption may in the peculiar circumstances of that case be regarded. Upon that a Bench of this Court in the case of *Dharm Singh* v. *Hur Pershad Singh* (2) refer to this presumption arising on title found to be in the plaintiff, and they say that if the Judge had disposed of the case solely with reference to this presumption he would have been in error. There must be some positive evidence of the plaintiff's possession on the record. Following this and explaining the dictum of the Privy Council, Ghosh and Stevens, JJ., in the case of *Thakur Singh* v. *Bhogeraj Singh* (3) laid down that where evidence was equally strong on both sides and apparently equally balanced, preference should be given to the evidence on the side of the parties with whom title was found, thus following the course which was actually taken by the Privy Council in the case we have above cited. But where, as in the case before them, the evidence of the witnesses on both sides was equally unworthy of reliance, no such presumption can be made, thus approving the dictum of Mr. Justice Field that the presumption could not take the place of all evidence. This case was cited with approval by Bodilly and Mukerjee, JJ., in the case of *Babu Kasturi Singh* v. *Rajkumar Babu* (4) and we are asked to find that one of the Judges who decided that case has since laid down the opposite dictum in the case of *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (5). What Mr. Justice Mukerjee says there is that when the District Judge deals with this part of the case he may, if the state of evidence justifies it, apply the principle laid down by their Lordships of the Judicial Committee in the case of *Runjeet Ram Panday* v. *Goburdhan Ram Panday* (1), namely, where the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner. Now the first remark that we have to make is that the learned Judge carefully guards his directions with the condition "if the state of the evidence justifies it," which is precisely what was laid down by Mr. Justice Field; and as regards the dictum of *Runjeet Ram Panday's* case (1), it would appear that the judgment has been either misreported or a clerical error has crept into it because Mr. Justice Mukheriee is not citing the dictum of the Judicial Committee where he says: "namely, where the evidence of possession is equally unsatisfactory on both sides," and it cannot, therefore, be said that the learned Judge intended to reverse what he himself was a party to in the previous case which we have cited.

It appears to us that it is not an error of law on the part of the learned Subordinate Judge in the Court below to say that when the evidence of possession is equally unworthy of reliance on either side, as he found it is here, the presumption cannot apply. There being no such error of law, the appeal must be dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1873) 20 W. R. 25 (P. C.).
(2) (1886) 12 Cal. 38.
(3) (1900) 27 Cal. 25.
(4) (1904) 8 C. W. N. 876.
(5) (1908) 12 C. W. N. 273.

A. I. R. 1916 Calcutta 254

RICHARDSON AND IMAM, JJ.

Satischandra Chakravarty—Plaintiff—Petitioner.

v.

Amiruddin Khadim—Defendant—Opposite Party.

Rule Nisi No. 544 of 1915, decided on 23rd November, 1915.

(a) Bengal Tenancy Act (8 of 1885), S. 153—Suit for rent for less than Rs.50—Interest in land having conflicting claim thereto decided—Appeal lies to District Judge.

In a suit for rent for an amount less than Rs. 50 on the allegation that the plaintiff held the land under *A* and *B* and that the defendant was his sub-tenant, the defendant pleaded that he had the land under *B* and was not the plaintiff's sub-tenant. The first Court dismissed the suit and an appeal against it to the District Judge was dismissed as incompetent under S. 153 of the Bengal Tenancy Act:

Held, that the appeal lay to the District Judge inasmuch as the decree decided a question

relating to some interest in land as between parties having conflicting claims thereto. 8 C. W. N. 434, foll. 8 C. W. N. 437 and 8 C. W. N. 438, ref. to. [P. 255, C. 1.]

Birendra Kumar Dey—for Petitioner.

Kali Kumar Chakrabutti—for Opposite Party.

Judgment.—This matter arises out of a suit for rent in which the amount claimed was less than Rs. 50. The suit was dismissed by the first Court and an appeal preferred to the District Judge was dismissed by him as incompetent under the provisions of S. 153 of the Bengal Tenancy Act. The question is whether the decree of the first Court has decided a question relating to some interest in land as between parties having conflicting claims thereto. On the facts, the case appears to me to be indistinguishable from the case of *Sita Nath Pal* v. *Kartick Gharmi* (1). That case is mentioned certainly without disapproval in the subsequent cases of *Dena Bandhu Nandi* v. *Nobin Chandra Kur* (2) and *Ram Kanai Dass* v. *Fakir Chund Das* (3). The learned Pleader who appears for the opposite party in this Rule has not been able to show that the case has been dissented from or overruled. That being so, in my opinion we ought to hold, in accordance with the view then taken, that an appeal lay to the learned District Judge in the present case and that the appeal preferred to him should not have been dismissed as incompetent. The Rule must, therefore, be made absolute, the order dismissing the appeal must be set aside and the appeal heard by the District Judge in due course. Costs of this Rule will abide the result. We assess the hearing fee at one gold *mohur*.

V.B./R.K.

Rule made absolute.

(1) (1904) 8 C. W. N. 434.
(2) (1904) 8 C. W. N. 437.
(3) (1904) 8 C. W. N. 438.

A. I. R. 1916 Calcutta 255

SANDERSON, C. J. AND NEWBOULD, J.

Kali Prasanna Sil—Plaintiff—Appellant.

v.

Panchanan Nandi Chowdhury and *others*—Defendants—Respondents.

Appeal No. 1354 of 1913, decided on 17th March, 1916, from the Appellate Decree of Sub-Judge, Burdwan, dated 12th September, 1912.

(a) Civil P. C. (5 of 1903), S. 11—Suit dismissed by first Court—Appeal—Appellate Court allowing withdrawal of suit with permission to bring fresh suit on ground that plaintiff could not adduce all evidence—Order is without jurisdiction—Fresh suit is barred as *res judicata*.

An order of an Appellate Court permitting a plaintiff-appellant to withdraw his suit, which was dismissed by the Court of first instance, with liberty to bring a fresh suit on the ground that the plaintiff-appellant had not been able to adduce all the evidence which he would have liked to adduce at the first hearing, is without jurisdiction, and a fresh suit instituted under such an order is barred as *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit. [P. 256, C. 2.]

(b) Civil P. C. (5 of 1908), O. 23, R. 1 (2) (a) and (b)—Clauses (a) and (b) are to be read together.

Clauses (*a*) and (*b*) of sub-R. (2) of O. 23, R. 1, are to be read together and a ground included in Clause (*b*) must be of the same nature as the ground specified in Clause (*a*), that is to say, it must be something of the same nature as formal defect. [P. 256, C. 2.]

Mohendra Nath Roy—for Appellants.

Baranasibasi Mukerji—for Respondent.

Sanderson, C. J.—This is an appeal from the judgment of the learned Subordinate Judge of Burdwan given on the 12th of September, 1913, in which he dismissed the suit of the plaintiff on the ground that the matter was *res judicata*. It appears that the plaintiff brought a suit in the year 1905 in respect of the same property which was the subject-matter of this suit, asking for the same relief which he asked for in the present suit. That suit was contested, evidence being called on both sides, and the Court of first instance which heard that evidence dismissed the plaintiff's suit. Then on appeal to the lower Appellate Court, and at some stage of that hearing, he applied under S. 373 of the old Civil Procedure Code for leave to withdraw from the suit alleging, *first* of all, a formal defect, and *secondly*, his inability to produce the necessary evidence in time. It was admitted by learned Vakil who argued this case for the appellant that, as far as he knew, there was no formal defect proved before the Appellate Court, and that the only ground which could be relied upon by the petitioner in that case was the *second* one, namely, that he had not been able to produce the necessary evidence in time at the trial before the Court of first instance. Thereupon, the Appellate Court made an order to this effect: "The appeal is dismissed with costs and the plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject-matter

if not barred." Thereupon, this suit was brought, and the point was taken by the defendant that the order of the Appellate Court of the 18th of May, 1906 had been made without jurisdiction and that, consequently, the subject-matter of the present suit was *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit in 1905. The learned Subordinate Judge has upheld that view, and has consequently dismissed the plaintiff's suit, and this appeal has been lodged against the judgment of the Subordinate Judge. In my judgment the Subordinate Judge was right.

The whole question depends upon whether the order of the 18th of May, 1906 was made without jurisdiction. If it was within the learned Judge's jurisdiction to make it, but it was a wrong order, then I can quite understand that the learned Vakil for the appellant had something to say, inasmuch as the order had been allowed to stand, and the defendant against whom the order was made had taken no steps to attack that order. But if it was made without jurisdiction and it is brought to our notice now that it was made without jurisdiction and if we are satisfied that it was made without jurisdiction, then we are bound to say so and also to say that as a matter of consequence all proceedings taken in consequence of that order failed on that ground. Therefore, the only question is whether the order was made without jurisdiction. I think it was. I need not read the section in full. The section says "……If the Court is satisfied on the application of the plaintiff (*a*) that the suit must fail by reason of some formal defect or (*b*) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit……" Now, the words, as they stand in the section, are, of course, of general application, namely, "that there are sufficient grounds for permitting him to withdraw from the suit:" but there are decisions of this Court which, in my opinion, are binding upon us. It is quite true they are not upon the same section, but they are upon O. 23, R. 1, of the Civil Procedure Code which is now in operation, but the learned Vakil who argued the case for the appellant admitted that there is no substantial difference between this rule and S. 373 of the old Code. In the first case, *Kharda Company Limited* v. *Durga Charan Chandra* (1), it was held by my learned brother Mr. Justice Mookerjee that Clauses (*a*) and (*b*) of sub-R. (2) have to be read together and that the intention is that a ground included in Clause (*b*) must be of the same nature as the ground specified in Clause (*a*), that is to say, it must be something of the same nature as *formal defect*, and, inasmuch as in that case the ground for allowing the suit to be started afresh was not because there was a formal defect but for some other reason, the order was illegal. Then again the learned Chief Justice Sir Lawrence Jenkins in *Mabulla Sardar* v. *Hemangini Debi* (2) says: "The decision in *Kharda Company Limited* v. *Durga Charan Chandra* (1) shows that Clause (*b*) of sub-R. (2) must be read in connection with Clause (*a*) and with the limitations Clause (*a*) suggests and so reading it, it is clear that it is not within the jurisdiction of a Court of Appeal to grant the permission on the terms which have been approved by the Court in this case. In my opinion, this Rule should be made absolute." Therefore in the present case, inasmuch as the only ground that can be suggested for the order of the 18th of May, 1906 was that the plaintiff had not been able to adduce all the evidence which he would have liked to adduce at the first hearing, I am of opinion that that was not a ground which is contemplated by S. 373 of the old Civil Procedure Code and, therefore, the order which was made by the Appellate Court was made without jurisdiction. Consequently, that order having been made without jurisdiction, a fresh suit should never have been brought, and the defendant was perfectly competent and was within his right when he raised the point that the matter was *res judicata*. I am of opinion that the lower Appellate Court was right in coming to the conclusion that it did, and this appeal must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K.

Appeal dismissed.

(1) (1910) 5 I. C. 187.
(2) (1910) 6 I. C. 629.

A. I. R. 1916 Calcutta 257

CHATTERJEE AND CHAPMAN, JJ.

Runjit Singh—Defendant—Appellant.

v.

Jnanendra Nath Sen Gupta—Plaintiff—Respondent.

Appeal Nos. 91 and 339 of 1912, decided on 4th February, 1915, from the Original Decrees of Sub-Judge, Murshidabad, dated 30th March, 1912.

Bengal Putni Regulation (8 of 1819), S. 8—Due publication of notices of sale is very essential for validity of sale—*Zamindar* at whose instance sale is held is responsible for it—Provision of notices is mandatory—Failure vitiates sale.

A due publication of the notices prescribed by Regulation VIII of 1819 forms an essential portion of the foundation on which the summary power of sale is exercised and makes the *zamindar* who institutes the proceedings exclusively responsible for its regularity. 9 Cal. 619, (P. C.) and 14 Cal. 365, ref. to. [P. 259, C. 1.]

The provision for the advertisement of sale in the Collectorate is very material and is not directory but mandatory, and failure to duly observe it is a sufficient ground for setting aside a sale. [P. 259, C. 1.]

Rash Behary Ghose, Basanta Kumar Bose, Hemendra Nath Sen, Satish Chandra Ghose, Priya Sanker Mazumdar, Sridhar Das Gupta and *Probodh Chandra Mukherjee*—for Appellant.

Mohendra Nath Roy and *Bankim Chandra Mukerjee, Kalidas Sarkar*—for Respondent.

Judgment.—These two appeals arise out of two suits for setting aside a *patni* sale in which the *zemindar* is the purchaser. Appeal No. 91 arises out of the suit brought by the *patnidars* and No. 339 out of the suit brought by the *dar-patnidar* of some of the *mouzas* covered by the *putni*. The grounds on which the sale is impeached are the same in both suits, namely, irregularities in the service and publication of the notices required by law and irregularities in the conduct of the sale. The Court below has set aside the sale and the purchaser, the *zemindar*, has filed these appeals. It is contended on his behalf

(1) that the findings as to the irregularities are not justified by the evidence on the record;

(2) that the provisions of the Putni Regulation are directory and it is not necessary that they should be followed in every detail;

(3) that the plaintiffs have not shown that they suffered any injury by reason of the irregularities complained of;

(4) that the irregularities, even if proved, do not vitiate the sale.

We shall first see if the irregularities complained of are proved.

Under S. 8 of the Putni Regulation, the *zemindar's* application for sale and notice that the defaulting property is to be sold on the 1st of *Jyestha* if the arrears are not paid before that, have to be stuck up in some conspicuous part of the *kutchery*.

The Nazir of the Collectorate who was examined as a witness produced a bundle of papers stuck up in respect of the sale of the 15th of May, 1911. This bundle does not contain the original application of the *zemindar*. Even the notice that has been exhibited as being in respect of the disputed *mehal*, Exhibit A, is in respect of a different *mehal* altogether, bearing a different *jama* and a different number and owned by a different *putnidar*. This may be due to some mistake in the Court below in marking one document for another, but no notice of this was taken by the appellant until it was pointed out by the learned Vakil for the respondent. But supposing this was a mistake for the correction of which no steps have been taken by the appellant, there is nothing to show that the original application was stuck up. Our attention has been drawn to Exhibit C, the notice to the *putnidar*, which mentions that the original petition is going to be stuck up in the *Saddar Kutchery*, but that is no evidence that it was stuck up in the Collectorate and the whole bundle produced by the Nazir did not contain this. The appellant has, therefore, failed to prove that the original application was stuck up.

As regards the sticking up, the Nazir says that the *ishtahar* (notice of sale) was hung upon a board in the verandah, but it used to be taken down by the Muktears and placed on his table to be hung up again at the close of the day. The appellant's witness Muktear Purna Chandra Chatterjee admits that this used to be so formerly when he used to go to the Nazarat, but he is not aware of the present practice. We agree with the learned Subordinate Judge that this way of dealing with the notices is proved and does not make out that continuous unobstructed presentation to the notice of the public which the law contemplates.

In the case of *Bejoy Chand Mahatap* v. *Atulya Chandra Bose* (1), the sticking up of the notice from 10 to 5 in the day during Court hours was held to be not in conformity with the Regulation. This view was considered to be an *obiter dictum* in the case of *Sachi Nandan Dutta* v *Maharaj Bejoy Chand Mahtap Bahadur* (2) by Brett and Gupta, JJ., and the learned Judges held that this sort of publication was sufficient to meet the requirements of the Regulation. The present case is, however, distinguishable in that in it the notice bundle was removed from the notice board and placed on the table in the Nazir's room for the inspection of the Muktears, so that although the notices might be on the board in the night and during short times when the Muktearsdid not remove them to the Nazarat, they were not on the board during the greater portion of the Court hours. There is no evidence that the public had notice of the removal or had access to the Nazarat. It is not for the Muktears alone that these notices are meant, and we agree with the learned Subordinate Judge that the sticking up was not in accordance with the requirements of the Regulation. A similar notice is to be stuck up in the *Sadar Kutchery* of the *zemindar*, but the appellant's Nazir says he only hung up a list of the defaulting *mehals* with the names of the defaulters and the amounts due. This is not strictly in accordance with the letter of the law, but we agree with the learned Subordinate Judge that this may be taken as a substantial compliance.

Then the notice in the Mofussil was served in the *kutchery* of the *dar-putnidar*, although it incorrectly states that it was served in the *kutchery* of the *putnidar*. Now the *dar-putni* is in respect of three only of the six *mauzas* covered by the *putni*. The *dar-putnidar's kutchery*, however, is in the principal village on the defaulting tenure and we agree with the learned Subordinate Judge that service there was good service.

As regards the conduct of the sale, several irregularities are complained of. One is that the public had not unobstructed access to the place of sale and the sale was, therefore, not in a public *kutchery* as required by the law. It is clear from the evidence that the sale was in the Court-room of the Collector and, therefore, in a public *kutchery*, but it is also clear that the *chaprasees* of the Collector who were placed at the wicket gate for keeping order did not allow many persons to enter for preventing overcrowding. The learned Subordinate Judge has believed this evidence and we have no hesitation in agreeing with him.

Then it is urged that the sale took place too early, *i.e.*, before 12 o'clock, the usual hour for holding these sales. There is no evidence as to at what particular time this sale took place, as no one referred to his watch. The Collector is under the impression that he commenced sale at 12, but he is not quite sure. There is evidence that the Muktears remarked at the time that the sale was too early and they had to hurry to the *ejlas* to look after the interests of their clients. The law, however, does not require that the sale should be at any particular hour and the defaulter cannot impeach the sale as illegal merely on the ground that it took place earlier than usual; he may, however, be permitted to show that he was misled to his prejudice by the deviation from the usual practice. Now supposing the sales of the day commenced at or very near 12, if the formalities enjoined by the law had been observed, the sale of this property would have taken place much later and the plaintiffs could have paid up the money, which they no doubt brought to the *kutchery* but could not pay as they could not enter the sale room before the sale on account of the excessive zeal of the *chaprasees* of the Collector.

S. 10 of the Regulation requires that the lots shall be called up successively in the order in which they may be found in the notice. If the lots in the several notices of the Nawab Bahadur, Maharaja Tagore, Maharaj Bahadur Singh and the appellant Maharaja were called one after another and orders were passed on each before the property in suit was reached, it would have taken a good deal of time and the plaintiffs who came with the money in arrears would have been able to pay to the Muktear according to the usual practice and save their property. The earlier lots however, were passed over as the *zemindars* would not proceed with the sales, having probably received the arrears and the sale of this this property was finished in 3 or 4 minutes, the *zemindars* Muktear being the only bidder. The section further directs that the observance of the forms mentioned in the section shall be recorded in a separate

(1) (1905) 32 Cal. 953.
(2) (1907) 11 C. W. N. 729.

rubakari to be held upon each lot sold. There was a *rubakari* but it was not prepared at the time of the sale; it is signed not by the Collector, but by a Deputy Collector and is dated the 18th May, 1911 corrected into 15th May, 1911. It is clear, it was not prepared at the time of the sale.

Then the 15 per cent. of the purchase-money was not deposited as required by S. 9.

These are the irregularities and we agree with the Court below that they are proved. In the case of *Maharajah of Burdwan* v. *Tarasundari Debi* (3) their Lordships of the Judicial Committee says: "Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the *zemindar*, who institutes the proceeding exclusively responsible for its regularity." In another case, the *Maharani of Burdwan* v. *Krishna Kamini Dasi* (4) their Lordships say: "Their Lordships have to construe the Regulation. They find a process prescribed by it, which its framers thought it indispensable to fix, for the observance of which they have declared the *zemindar* to be exclusively answerable, and which is calculated to protect all persons interested in the estate against injury by the working of a very swift and summary remedy given to the *zemindar*." Some of the irregularities found in this case might not be of much consequence but they are certainly deviations from the rules laid down in the Regulation, but there are others, such as the advertisement in the Collectorate, which are very material and cannot by any means be called directory only and not mandatory.

As regards injury, the learned Subordinate Judge has found in favour of the plaintiffs and we are of the same opinion. In fact the matter was not pressed before us. There are, we think, sufficient reasons for setting aside the sale. We therefore, dismiss these appeals with costs. We assess the hearing fee in Appeal No. 339 at 5 gold *mohurs*. We do not interfere with the order of the lower Courts as to costs in that Court.

V.B./R.K.

Appeals dismissed.

(3) (1883) 9 Cal. 619=10 I. A. 19 (P.C.).
(4) (1887) 14 Cal. 365 (P. C.).

A. I. R. 1916 Calcutta 259

CHITTY AND RICHARDSON, JJ.

Janardan Mahato—Plaintiff—Appellant.

v.

Bhairab Chandra Mondal and *others*—Defendants—Respondents.

Second Appeal No. 3510 of 1912, decided on 13th July, 1915, against the Decree of Dist. Judge, Dumka, dated 13th May, 1912.

(a) Contract Act (9 of 1872), S. 55—Where Specific Relief Act does not apply contracts of sale is governed by rules of justice, equity and good conscience.

Where the Specific Relief Act does not apply a suit for the specific performance of the agreement to sell land is governed by the ordinary rules of justice, equity and good conscience. [P. 260, C. 1.]

(b) Contract Act (9 of 1872), S. 55—Time is not essence of contract unless so provided—Where time is mentioned reasonable notice is necessary.

Time is not of the essence of a contract, until the parties expressly make it so. [P. 260, C. 1.]

Where in an agreement to sell some time is named, it is not until one side or the other gives the opposite party reasonable notice to complete the agreement within a definite time that the opposite party can be tied down to the time so prescribed. [P. 260, C. 2.]

(c) Contract Act (9 of 1872), S. 55—Laches defeats suit for specific performance.

A suit for specific performance should succeed if no laches is found on the part of the plaintiff and his suit is within limitation. [P. 260, C. 2.]

Mohini Mohan Chakravarthi and *Abinash Chandra Chakravarti*—for Appellant.

Naresh Chandra Sinha—for Respondents.

Chitty, J.—In this case, the plaintiff is the appellant. He filed a suit on 14th May, 1909 against Srimati Thaka Sundari Dasi, wife of Naba Gopal Roy, for specific performance of an agreement to sell to him certain land. The suit has been dismissed in both the lower Courts and the plaintiff has consequently appealed.

It appears that, by a *bainamah*, dated 12th *Sravan* 1315 (27th July, 1908), the first defendant, Thaka Sundari Dasi, agreed to sell to the plaintiff this land for a sum of Rs. 3,100. Of that Rs. 200 was paid as earnest money. The *bainamah* provided that the sale should be completed in three months, when the sale-deed was to be

registered and the balance of the purchase-money paid. The plaintiff subsequently paid and the defendant accepted a sum of Rs. 85 on the 7th *Asvin* 1315. That was before the three months named in the *bainamah* had expired. The parties thereafter did not come to terms with regard to the completion of the document. The plaintiff says that he asked Naba Gopal that his wife should go to Jamtara, and register the deed, but that Naba Gopal refused and required the plaintiff to come to Nagori where they lived and have the deed executed there. Nothing, therefore, was done with regard to the completion of the agreement. On 14th May, 1909, some 10 months after the agreement, the plaintiff filed the present suit. After he had filed the suit, namely, on 16th July, 1909, the defendant Thaka Sundari Dasi purported to sell the same property to Bhairab Chandra Mandal and Gopal Sundari Dasi, who are said to be mortgagees of the property from Thaka Sundari Dasi. That deed was registered on 17th July, 1909. In consequence of that sale, those two persons were made parties defendant in this suit, and it is they who have contested the suit throughout. Thaka Sundari Dasi has stood aside; and, after filing her written statement, has taken no further part in the proceedings.

The learned District Judge has dismissed the plaintiff's suit in *toto*. In doing so, we think that he was clearly in error. In any case the plaintiff might have been given a chance of recovering the deposit which he had made, unless it was shown that he was guilty of laches which would prevent him from so doing. But the error of the learned District Judge consists in this that he has regarded the three months named in the contract as being the extreme limit, within which the contract was to be performed, and that there could be no extension of that time. In other words, that the three months fixed was of the essence of the contract. Now the Specific Relief Act does not apply to the Sonthal Parganas; nor did the provisions of the Civil Procedure Code of 1859 in which there was a section dealing with specific relief. The case will, therefore, have to be governed by the ordinary rules of justice, equity and good conscience. It has been a long standing rule in all matters of specific performance of contract for sale of land that time is not of the essence of the contract, until the parties expressly make it so. Some time is generally named in the agreement to sell, but that is rarely adhered to; and it is not until one side or the other gives the opposite party reasonable notice to complete the agreement within a definite time that the opposite party can be tied down to the time so prescribed. In this case, nothing of that kind was done; and within 10 months, the plaintiff filed the suit in which he offered to pay the amount and asked the Court to insist upon the defendant Thaka Sundari Dasi executing a conveyance in his favour. It appears to us that he was right in so doing.

It is argued that the matter would be in some way governed by the provisions of the Contract Act. There are really no provisions in the Contract Act, which are in conflict with the ordinary rules with regard to the specific performance of contracts of sale of land. On the contrary S. 55 says: "If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure." That would not prevent the plaintiff from coming in and requiring the defendant to perform her contract in his favour. The Limitation Act, gives three years for a suit for specific performance. This does not mean that the plaintiff is entitled to stand out for three years, but, in this case, there seems to have been no laches on the part of the plaintiff nor is any such laches found by the Courts below. The fact that he brought his suit within 10 months of the date of the *bainamah* shows that he was anxious to carry out the contract on his part.

Then, it is said that the defendants Nos. 2 and 3 were purchasers for value without notice. The Transfer of Property Act applies to the Sonthal Parganas and S. 52 provides that in a case of sale of the property in question by any party to a suit or proceeding, such sale cannot affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. Defendants Nos. 2 and 3, who have contested this suit, have no equities whatever in their favour. They were mortgagees of the property and they will, no doubt, be able to recover their mortgage-money

from the purchase-money if and when it is paid by the plaintiff.

We think that the decisions of the Courts below cannot be upheld. We accordingly set them aside, and pass a decree in favour of the plaintiff for specific performance of the contract on the plaintiffs' depositing in Court, within two months of the receipt of the record in the Court below, the balance of the purchase-money. There will also be a decree for possession to be given to the plaintiff on payment of the purchase-money and the execution of the conveyance, but subject to any rights of the defendants Nos. 2 and 3 as mortgagees of the property. Plaintiff must have his costs of suit from defendants Nos. 2, 3 in all the Courts. If the balance of the purchase-money is not paid into Court within the two months as aforesaid, the suit will stand dismissed with costs.

Let the record be sent down without delay.

Richardson, J.—I agree.

V.B./R.K.

Appeal accepted.

A. I. R. 1916 Calcutta 261

MOOKERJEE AND N. R. CHATTERJEA, JJ.

Akimannessa Bibi and *others*—Defendants—Appellants.

v.

Bepin Behari Mitter—Plaintiff—Respondent.

Appeal No. 493 of 1908, decided on 15th August, 1915, from the Original Decree of Sub-Judge, Barisal, dated 8th January, 1908.

Civil P. C. (5 of 1908), O. 41, R. 33—Scope of—Should not be used to enable to evade provisions of other statutes—Claim decreed in part—Defendants appealed—Plaintiff did not prefer cross-appeal or objection—At last stage plaintiff applied for permission to withdraw whole suit—Held permission to withdraw only that portion decreed should be granted—*Obiter*—Defendant respondent not preferring cross-objection should not be allowed to contend that whole suit be dismissed.

O. 41, R. 33, must be cautiously applied and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes, *e. g.*, the Limitation Act and the Court Fees Act. [P. 262, C. 1.]

A suit for recovery of possession of land on declaration of title was decreed in part. The defendants appealed against the decree in so far as it was adverse to them. The plaintiff neither preferred a cross-appeal, nor presented a memorandum of cross-objections. On the appeal coming up for hearing a local investigation was ordered. After the investigation the appeal came up for final disposal. After the arguments on behalf of the appellants had been concluded and while the arguments on behalf of the plaintiff-respondent were in progress, an application was made on behalf of the plaintiff to withdraw from the suit with liberty to bring a fresh suit upon the same cause of action :

Held, that leave under O. 41, R. 33 of the Civil Procedure Code, 1908, ought to be granted with respect to that portion of the plaintiff's claim which had not been decided adversely to him, inasmuch as the plaintiff did not ask for a relief which had been denied to him by the Court below but he merely sought to be relieved from the position of embarrassment in which he had been placed by the decree of the primary Court. [P. 261, C. 2 & P. 262, C. 1 & 2.]

Obiter dictum.—Where a plaintiff has obtained a decree for a portion of his claim and has appealed for relief in respect of the remainder, the defendant, who has not taken the statutory steps to assail the decree in so far as it is adverse to him, should not be allowed to contend that not only the appeal by the plaintiff but the entire suit should be dismissed. [P. 262, C. 1.]

Dwarka Nath Chakrabarti and *Romes Chandra Sen*—for Appellants.

Mahendra Nath Ray, *Baranasibasi Mukherjee* and *Hari Charan Gangooly*—for Respondents.

Mookerjee, J.—This is an appeal in a suit for recovery of possession of land on declaration of title. The trial Court decreed the suit in part. The defendants have appealed against the decree in so far as it is adverse to them. The plaintiff has neither preferred a cross-appeal nor presented a memorandum of cross-objections. On a previous occasion, a Division Bench of this Court directed a local investigation. That investigation has now been made and the appeal is before us for final disposal. After the arguments on behalf of the appellants had been concluded and while the arguments on behalf of the respondent were in progress, an application was made to us on behalf of the plaintiff for leave to withdraw from the suit with liberty to bring a fresh suit upon the same cause of action. This application has been opposed by the appellants on two grounds, namely, *first*, that as a portion only of the subject-matter of the controversy is before us, it is not competent to this Court to allow the plaintiff to withdraw from the entire suit with liberty to bring a fresh suit upon the same cause of action ; and *secondly*, that the circumstances do not justify the grant of the prayer of the plaintiff.

As regards the *first* objection, it is plain that R. 33 of O. 41 of the Code entitles us to allow the plaintiff to withdraw from the entire suit with liberty to bring a fresh suit, although the plaintiff has not preferred an appeal against the decision of the Court below. R. 33 authorises the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require; and the rule explicitly states that this power may be exercised by the Court, notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeals or objection. The latter part of the rule is expressed in very comprehensive language, and unquestionably covers a case of the description now before us. We are not unmindful that, as has been repeatedly observed, for instance, in the cases of *Rangamlal* v. *Jhandu* (1), *Ganga Dhar Muradi* v. *Banabashi* (2), *Abjal Majhi* v. *Intu Bepari* (3) and *Ananga Mohun* v. *Bijoy Chandra* (4), this power must be cautiously exercised and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes, *e.g.*, the Limitation Act and the Court Fees Act. To take one illustration, where the plaintiff has obtained a decree for a portion of his claim and has appealed for relief in respect of the remainder, the defendant, who has not taken the statutory steps to assail the decree in so far as it is adverse to him, should not be allowed to contend that not only the appeal by the plaintiff but the entire suit should be dismissed. It is not necessary, however, to apply that doctrine to the case before us. Here, the plaintiff does not ask for a relief which has been denied to him by the Court below; he seeks merely to be relieved from the position of embarrassment in which he has been placed by the decree of the primary Court. In our opinion, R. 33 of O. 41 may justly be applied to the case before us. We are thus brought to a consideration of the *second* objection, namely, that, in the circumstances of the present case, the plaintiff should not be allowed to withdraw from the entire suit with liberty reserved to institute a fresh suit upon the same cause of action. An examination of the protracted proceedings in this litigation has convinced us that the plaint is open to objection and that the mode of trial in the Court below has not been conducive to a correct determination of the real controversy between the parties. It was for this reason that this Court was constrained on the last occasion to direct a local investigation. The result of that investigation has been placed before us; we need only say that it is by no means satisfactory, and that if the appeal were heard on the merits to its final stage, possibly a further investigation might be necessary. In these circumstances, we feel no doubt that the plaintiff should be allowed to withdraw from the suit. But we are not prepared to allow the plaintiff liberty to bring a fresh suit in respect of the portion which has been decided against him by the Court below. The defendants frankly conceded that they were anxious to retain the judgment in respect of the portion which has been decided in their favour, not merely because they have got a favourable decree but also because they might use it against the plaintiff in another litigation not now before us. We are of opinion that this is a consideration which should not weigh with us in determining whether the plaintiff should be allowed to withdraw from the suit. We, therefore, allow the plaintiff to withdraw from this suit with liberty to bring, subject, of course, to the law of limitation, a fresh suit in respect of the same cause of action, only with regard to the lands which have been decreed in his favour by the Subordinate Judge; but such liberty is not reserved to him with respect to that portion of his claim which has been decided adversely to him. This order is made on the condition that the costs in the Court below, namely, Rs. 413-11 and the costs subsequent to the decree, namely, the costs of the local investigation, *i.e.*, Rs. 48, and the costs of this appeal are deposited by the plaintiff in the Court below within three months from this date. The amount to be deposited will be specified in the order of this Court to avoid possible dispute. If the amount is not deposited as directed, this appeal will stand decreed and the suit will stand dismissed with costs in both Courts. We assess the hearing fee in this Court at ten gold *mohurs*.

(1) 11 I. C. 640 = 34 All. 32.
(2) A. I. R. (1914) Cal. 722 = 24 I. C. 208.
(3) A. I. R. (1916) Cal. 250 = 32 I. C. 494.
(4) A. I. R. (1916) Cal. 237 (2) = 32 I. C. 49.

As one of the respondents is an infant, we desire to add that in our opinion the application for withdrawal is undoubtedly for his benefit.

V.B./R.K.

Suit allowed to be withdrawn.

A. I. R. 1916 Calcutta 263

SHARFUDDIN AND CHAPMAN, JJ.

Pardip Singh and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. Nos. 794, 797 to 816 of 1915, decided on 26th July, 1915, against the Order of Dist. Magte., Mozafferpur, dated 26th May, 1915.

(a) Police Act (1861), Ss. 17 and 19—Special constable should be appointed only when it is really intended to use them as Police Officers.

Special constables should be appointed under S. 19 of the Police Act only when it is really intended to use them as Police Officers and to strengthen the ordinary Police force, and not otherwise. [P. 264, C. 1.]

(b) Criminal P. C. (1893), S. 107—Proceedings under O. 107—Parties to dispute should not be appointed Special Constables—Arms Act (1861), Ss. 17 and 19.

It is objectionable to appoint as special constables parties to a dispute against whom complaints have been lodged or against whom proceedings are pending under S. 107 of the Criminal Procedure Code so as to handicap them in their defence. [P. 264, C. 1.]

W. Gregory and *Babu Birbhusan Dutt*—for Petitioners.

S. Ahmed—for the Crown.

Judgment.—These twenty-one Rules have been heard together. They were issued to show cause why the orders directing the prosecution of the petitioners upon the charge of refusing to serve as special constables should not be set aside.

The petitioners live in four villages adjoining two ferries named Dih *Ghat* and Itwa *Ghat*, lease of which is held by a certain Rambirich and his son under the District Magistrate and District Board of Mozafferpur. These ferry farmers complained that in January and March last there had been riotous disturbances over their use of the ferry, and in consequence proceedings were instituted against thirteen of the present petitioners under S. 107 of the Code of Criminal Procedure for the purpose of binding them down to keep the peace. During the pendency of these proceedings, the ferry farmers, on the 14th April, again complained that the villagers did not allow them to ply the ferry and prayed that certain persons named by them should be made special constables. The names given include all the present petitioners. The District Magistrate directed the District Superintendent of Police to depute an Inspector to enquire into the matter, intimating at the same time his willingness to appoint special constables. The Inspector reported that the disturbances had been due to the enhancement of the ferry tolls. He recommended that the persons named by the ferry farmers be appointed special constables, and that in the meantime a head constable and four constables be deputed from the Reserve. A head constable and four constables were accordingly deputed, and eventually, on the 10th May, the District Magistrate recorded an order appointing twenty-seven persons to serve as special constables within a certain area in the neighourhood of the ferries. These twenty-seven persons were the persons originally named in the complaint of the ferry farmers and included the petitioners against some of whom, as we have said, proceedings under S. 107 had then been pending for a considerable time. The petitioners heard of this order, and before it was formally communicated to them came into the town of Mozafferpur. On the 19th May they presented a petition to the District Magistrate impugning the right of the ferry farmers to the ferries and praying that they (the petitioners) should not be appointed special constables. While they were in Mozafferpur awaiting the result of their petition to the District Magistrate, six of the petitioners were met by certain Police Officers who asked them to take their belts and other equipment. They refused. This was reported to the District Magistrate on the 25th May. On the same date the District Magistrate recorded an order summarily rejecting the petition which the petitioners had made to him on the 19th. On the 26th he directed the prosecution of the six petitioners above referred to under S. 19 of the Police Act for refusing to serve as special constables. It does not appear whether the District Magistrate's order rejecting their petition of the 19th was communicated to the petitioners. On the 28th May, they were all present in the precincts of the court-house at Mozafferpur in connection with the S. 107 proceedings in which they were accused and which were

that day under trial. The remainder of the petitioners were then offered appointments, certificates and belts. They refused to take them, and upon a peon being sent to call them before the Joint Magistrate, they refused to comply. An order was then issued directing the prosecution of the remainder of the petitioners.

The only legitimate object of appointing special constables is to strengthen the ordinary Police force by the addition of suitable persons. It has been more than once held by this Court that when such appointments are not made with the object above stated, proceedings under S. 19 of the Police Act will not be permitted.

It does not appear that any instructions for the performance of any kind of police duty were even issued to the petitioners, and the circumstances above set forth compel us to come to the conclusion that it was never really intended to employ the petitioners as Police Officers.

We may note also that the proceedings under S. 107 are now approaching termination. The matters in issue will be decided, and any further action to prevent a breach of the peace will, we hope, then be unnecessary.

In the circumstances, we direct that the proceedings against the petitioners be quashed.

The Code of Criminal Procedure, as it stands at present, does not provide any obvious remedy for the prevention of disturbances during the pendency of proceedings under S. 107. It was the difficulty, no doubt, which led the District Magistrate to have recourse to appointing the persons reported likely to create disturbance, special constables. We cannot, however, believe that he intended to actually utilize their services on police duties, for this would have been objectionable and would have handicapped them in their defence in the S. 107 case. We may point out that in the present instance an order under S. 144 would probably have sufficed. We think also that the petitioners might well have been given a hearing. Ferry farmers are often exacting.

We welcomed the assurance of the Deputy Legal Remembrancer that, if we expressed the opinion that the prosecutions were ill advised, they would be dropped.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 264

MOOKERJEE AND NEWBOULD, JJ.

Gopal Chandra Bose and *another*—Petitioners.

v.

Hari Mohan Dutt—Opposite Party.

Civil Rule No. 1222 of 1914, decided on 26th March, 1915, from the Order of Sub-Judge, Dacca, dated 3rd September, 1914.

(a) Civil P. C. (5 of 1908), S. 73—Execution by sale of occupancy holding—Objection disallowed—Property sold—Another decree-holder also applied for sale of the holding or alternatively under S. 73 before sale—Objection to sale was allowed in his case—*Held* it does not bar his right to rateable distribution.

A, a decree-holder against *C*, the judgment-debtor, sought to satisfy his dues by the sale of an occupancy holding of *C*. *C* objected that the holding was not transferable and could not be sold in execution of a decree for money. The objection was overruled and the execution was allowed. *B* another decree-holder against *C* applied for execution of his decree by sale of the same holding and in the alternative prayed for rateable distribution if the holding was sold in execution of *A*'s decree. *C* again objected that the holding was not transferable and this time his objection was allowed. The holding, however, was sold in *A*'s decree.

Held, that *B* was entitled to rateable distribution of the sale-proceeds. [P 265, C. 1.]

(b) Civil P. C. (5 of 1908), S. 73—Rateable distribution cannot be allowed if decree is held satisfied or barred by time or if execution is dismissed.

No valid claim for rateable distribution can be laid under S. 73 of the Code of Civil Procedure if, in an application for execution of the decree, it has been held that the decree has been satisfied, or is barred by limitation, or if such application has been dismissed. [P. 266, C. 1.]

(c) Civil P. C. (5 of 1908), S. 152—Appellate Court has inherent power to order restitution of money withdrawn under order that is set aside.

If pursuant to an erroneous order of a subordinate Court money has been paid out to a litigant, it is competent to the High Court to direct that person to bring back the money into Court when such erroneous order is set aside. The Court has inherent power to direct such restitution to enable it to do effective and complete justice between the parties. 6 I. C. 508; 32 Cal. 921 and 21 I. C. 111, ref. to. [P. 265, C. 2.]

(d) Civil P. C. (5 of 1908), S. 73—Requirements of S. 73 stated.

To bring a case under S. 73, it is necessary to establish that more persons than one have made an application to the Court for execution of decrees for payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, before the receipt of the assets in respect whereof rateable distribution is claimed. 23 All. 106, dist. [P. 266, C. 1.]

Basant Coomar Bose and *Bhupendra Chandra Guha*--for Petitioners.

Sarat Chandra Mookerjee—for Opposite Party.

Judgment.—We are invited in this Rule to set aside an order made under S. 73 of the Code of Civil Procedure, 1908. The property brought to sale is an occupancy holding owned by the Pals. Two sets of decree-holders, the Boses who are the petitioners in this Court and the Dutts who are the opposite parties to this Rule, sought to satisfy their dues from the Pals by the sale of this property. The Dutts applied for execution of their decree for money against the Pals. The Pals objected that the holding was not transferable and could not be sold in execution of a decree for money. This objection was overruled by this Court on the 24th June, 1912, when it was held that the holding was transferable by custom and was liable to be brought to sale in execution of a money decree. On the 15th March, 1913, the Boses applied for execution of the decree for money which they held against the Pals. They stated that an application for execution had already been made at the instance of the Dutts and the 9th April, 1913 had been fixed for the sale of the property. They prayed in the alternative that if the property was sold at the instance of the Dutts, they might be allowed rateable distribution under S. 73 of the Code; if, on the other hand, the property was not brought to sale by the Dutts, they themselves might be permitted to attach and sell it. For some reason not explained, the property was not actually sold on the 9th April, 1913. The Pals then objected to the attachment of the property by the Boses, and this time they were more fortunate than they had been with their objection against the attachment and sale of the property at the instance of the Dutts. The Court held that the holding had not been established to be transferable by custom and ruled on the 9th March, 1914, that it could not be attached by the Boses. Their application of the 15th March, 1913, in so far as it related to the prayer for rateable distribution, however, remained on the file, and the Court directed it to be heard along with the execution case initiated by the Dutts. The property was sold at the instance of the Dutts on the 16th March, 1914. The Boses then prayed that they might be allowed to share rateably in the sale-proceeds. The Dutts objected that as the Boses had failed to attach the property, they could not be allowed rateable distribution under S. 73. The Court adopted this view and on the 3rd September, 1914, disallowed the prayer of the Boses for rateable distribution. On the very next day, the sale-proceeds were paid out to the Dutts. The Boses now invite this Court to set aside the order of the 3rd September, 1914, on the ground that the Court should have held that they have a *locus standi* to make the application for rateable distribution The Dutts contend that the Rule should be discharged on two grounds: *first*, that inasmuch as they have already withdrawn the money from the Court, there can be no order for rateable distribution: and *secondly*, that as the Boses failed in their application for attachment of the holding, they cannot be permitted to claim rateable distribution under S. 73. In our opinion, both these objections are unsustainable.

As regards the first objection, it is obviously open to this Court, should the order of the 3rd September, 1914 prove erroneous, to direct the Dutts to bring back into Court the money they had withdrawn on the basis of that order. It is well settled that if pursuant to an erroneous order of a subordinate Court money has been paid out to a litigant, it is competent to this Court to direct that person to bring back the money into Court when such erroneous order is set aside. The Court has inherent power to direct such restitution to enable it to do effective and complete justice between the parties. This fundamental principle is amply supported by the decisions of *Mrinalini Dasi* v. *Abinash Chunder Dutt* (1), *Nobin Kali Debi* v. *Banalata Debi* (2), and *Jogesh Chander Roy* v. *Yakub Ali* (3). If the contrary view were taken, the result would be that this Court would find itself helpless when its interference was imperatively needed in the interests of justice. In the present case, it may be observed that the withdrawal of the money was so expeditious that the petitioners had no opportunity whatsoever to apply to this Court to obtain an *ad interim* order for stay of proceedings and for retention of the money in Court. The first objection to the Rule consequently fails.

(1) (1910) 6 I. C. 508.
(2) (1905) 32 Cal. 921.
(3) (1913) 21 I. C. 111.

As regards the second objection, it is plain that to bring a case within the scope of S. 73, it is necessary to establish that, before the receipt of the assets in respect whereof rateable distribution is claimed, more persons than one have made an application to the Court for execution of decrees for payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof. In the present case, an application was made by the Boses for execution and rateable distribution on the 15th March, 1913; that application was still pending on the 16th March, 1914, when the assets were realised. It may be conceded that if on an application for execution, it has been held that the decree has been satisfied or is barred by limitation or if such application has been dismissed and is not pending at the time when the assets are realised, no valid claim for rateable distribution can be laid under S. 73. But the case before us is of an entirely different description, for on the 9th April, 1913, the Court had expressly directed that the prayer of the Boses for rateable distribution be considered along with the execution case initiated by the Dutts, and such claim for relief still awaited investigation when the assets were realised at the instance of the Dutts. Reliance has, however, been placed on behalf of the Dutts upon the decision of *Bithal Das* v. *Nand Kishore* (4), which was distinguished by this Court in *Ramjash Agarwala* v. *Guru Charan Sen* (5). There it was found that one of two decree-holders had attached the interest of the judgment-debtor in a joint *Mitakshara* property. Before the other decree-holder could attach that property, the judgment-debtor died, and it consequently became impossible for him to proceed against an interest in joint property, which had become vested by survivorship in the other members of the joint family. In these circumstances, it was ruled by Strachey, C. J., that as the decree-holder had lost his right to attach the share of the judgment-debtor who had died before attachment could be effected, he could not claim rateable distribution. We have here to deal with an entirely different set of circumstances; but it is worthy of note that Banerjee, J., did not rest his decision on the same ground as Strachey, C. J., whose view is not quite in harmony with the decision of the Bombay High Court in *Sorabji Edulji Warden* v. *Govinda Ramji* (6). It is needless for us to pronounce an opinion upon the precise question raised in *Bithal Das* v. *Nand Kishore* (4); it is sufficient to hold that it is clearly distinguishable and does not apply to the facts of this case. Here the property has been held by the Court to be a saleable occupancy holding; it has actually been brought to sale as such and converted into money at the instance of the opposite party. They, however, argue that the petitioners are not entitled to rateable distribution, because they were unsuccessful in their allegation that the property was saleable. This contention is clearly untenable. Nor can we accede to the suggestion that it was the imperative duty of the petitioners to come to this Court and have the erroneous order against them set aside before they could claim rateable distribution.

The result is that this Rule is made absolute and the order of the 3rd September, 1914 set aside. The Court below will make an order for rateable distribution, and the Dutts will bring back into Court, within such time as may be prescribed by that Court, so much of the money withdrawn by them as is necessary for payment to the Boses. The petitioners are entitled to their costs both here and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*.

V.B./R.K.

Rule made absolute.

(4) (1901) 23 All. 106.
(5) (1909) 3 I. C. 105.
(6) (1892) 16 Bom. 91.

A. I. R. 1916 Calcutta 266

MOOKERJEE AND RICHARDSON, JJ.

Ledu Plaintiff—Petitioner.

v.

Hira Lal Bose Defendant—Opposite Party.

Civil Rule No. 1161 of 1914, decided on 28th April, 1915, against the decision of Sm. C. C. J., Barisal, dated 25th July, 1914.

(a) Contract Act (9 of 1872), S. 23—Contract to appoint any one to public office is void—Contract tainted with moral turpitude is unenforceable—Contract against law cannot be enforced nor its consideration refunded.

Contracts which have for their object the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons are illegal and void. [P. 267, C. 1.]

A Court will not assist a party who has entered into a contract tainted by moral turpitude. [P. 269, C. 1 & 2.]

Where a contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. [P. 268, C. 2.]

(b) Contract Act (9 of 1872), S. 65—Scope of S. 65—It does not apply where contract is *ab initio*, void.

S. 65 of the Contract Act relates to the obligation of a person who has received an advantage under an agreement which if discovered to be void or under a contract which becomes void but not where the agreement is void *ab initio*. [P. 269, C. 2.]

A. K. Fazlul Huq—for Petitioner.

Mohendra Nath Ray, *Manmatha Nath Ray* and *Suresh Chandra Bose*—for Opposite Party.

Judgment.—We are invited in this Rule to set aside a decree of dismissal in a suit for recovery of money on the basis of a contract. The defendant is the Nazir of the Court of the District Judge of Barisal. The case for the plaintiff is that there was a contract between him and the defendant that if the latter provided his son with the post of a permanent peon within two years, the plaintiff would give the defendant Rs. 150, and that if the defendant failed to secure the appointment, he would return the money paid by the plaintiff. The plaintiff asserts that, in accordance with the terms of the contract, he has from time to time paid the defendant several sums aggregating Rs. 100, and that the defendant has failed to provide his son with the appointment, though the two years have elapsed. The plaintiff consequently sues to recover the money. The defendant denied the truth of the allegations of the plaintiff, and also pleaded that the suit was not maintainable as it was based on an illegal and void contract. The Court below has not investigated the facts, but has dismissed the suit as not maintainable on the face of the allegations contained in the plaint. The question for determination is, whether the agreement was void, as its object was opposed to public policy within the meaning of S. 23 of the Indian Contract Act.

It is well settled that contracts which have, for their object, the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons to be appointed, are illegal and void. The principle is that an officer, who has the power of appointment, should make the best appointment possible, and it is contrary to public policy that such officer be deprived of this discretionary power by a contract previously made or an obligation previously assumed; in other words, public policy forbids that a public office be made the subject, of contracts, for the contrary view would inevitably tend to official corruption. Illustrations of this doctrine will be found in cases of high authority; *Blachford* v. *Preston* (1), *Hartwell* v. *Hartwell* (2), *Thomson* v. *Thomson* (3), *Card* v. *Hope* (4), *Hopkins* v. *Preskott* (5), *Reg* v. *Charrette* (6), *Parsons* v. *Thompson* (7), *Richardson* v. *Mellish* (8), and *Gardner* v. *Grant* (9), which all affirm the rule that the sale of a recommendation, nomination or influence in procuring a public office is illegal and void. The question has frequently come up for judicial consideration in the Courts of the United States, which have emphatically condemned contracts of this nature. Mr. Justice Field, in delivering the unanimous opinion of the Supreme Court of the United States in *Providence Tool Company* v. *Norris* (10), observed as follows: "These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation for procuring these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone adjudges these agreements inconsistent with sound morals and public policy: *Gray* v. *Hooke* (11). Other

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(1) (1799) 8 T. R. 89=4 R. R. 598=101 E. R. 1282.
(2) (1799) 4 Ves. 810=31 E. R. 420.
(3) (1802) 7 Ves. 470=6 R. R. 151=32 E. R. 190.
(4) (1824) 2 B. & C. 661=4 D & R. 164.
(5) (1847) 4 C. B. 578=16 L. J. C. P. 259.
(6) (1849) 13 Q. B. 447=116 E. R. 1333.
(7) (1790) 1 H. Bl. 322=2 R. R. 773.
(8) (1824) 9 Moore, 435=2 Bing. 229=1 Car. & P. 241.
(9) (1885) 13 Shaw & Dunlop 662.
(10) (1865) 2 Wallace 45=17 Law. Ed. 868.
(11) (1851) 4 N. Y. 449.

agreements of an analogous character might be mentioned, which the Courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly, it is sufficient to observe generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to the public offices, or the ordinary course of legislation, are void as against public policy, *without reference to the question whether improper means are contemplated or used in their execution.* The law looks to the general tendency of such agreements: and it closes the door to temptations, by refusing them recognition in any of the Courts of the country." Equally explicit is the condemnation of such contracts by Mr. Justice Swayne in *Mequire* v. *Corwine* (12): "Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a Statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists and of those by whom it is administered; corruption is always the forerunner of despotism." To the same effect are the decisions in *Marshall* v. *Baltimore and Ohio Railroad Company* (13), *Hall* v. *Coppell* (14) and *Trist* v. *Child* (15). But it is needless to multiply authorities on the subject of trafficking in offices, which will be found collected in Greenhood on Public Policy, pages 338-349. Our attention, however, has been drawn to the decision in *Pichakutty Mudali* v. *Narayanappa Aiyan* (16). There the defendant had agreed, in consideration of a sum of money received by him, to obtain a more favourable assessment upon certain villages in respect of waste and cultivable lands, and in case of failure to re-pay the amount received. In a suit to recover amount paid to the defendant, Scotland, C. J., and Frere, J., held that the contract was not vitiated by illegality. The reason assigned in support of this view was that there was nothing to show an understanding between the parties that the defendant was to have recourse to corrupt or illegal means of any kind, or that he would use personal influence which he professed to possess with any public servant. The case was thus treated as one where the defendant undertook the task of preparing and presenting before the Revenue Authorities the case of the tenants and made his claim to remuneration contingent upon his success. The case is, consequently, distinguishable, though we are by no means convinced that the decision is based on sound principles. We affirm without hesitation the rule that any contract to appoint one to a public office or involving the sale of a public office or securing an office for the promissor or recommending him for such office, is opposed to public policy and is consequently void. It is plain, therefore, that the contract, which is the foundation of this suit, is based on an unlawful consideration, is opposed to public policy and is void. It follows that under such circumstances when the illegality of the contract has been made to appear, the law will not extend its aid to either of the parties, who will be left to abide the consequences of their own acts. We are not unmindful that there are exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to perform his part of the agreement. It is plain that although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral; where the contract is illegal, because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. Lord Alvanley, C. J., observed in *Tappenden* v. *Randall* (17) that where there is moral turpitude in the contract, the Court will

(12) (1879) 101 U. S. 108=25 Law. Ed. 899.
(13) (1853) 16 Howard 314=14 Law. Ed. 953.
(14) (1868) 7 Wallace 542=19 Law. Ed. 244.
(15) (1874) 21 Wallace 441 = 22 Law Ed. 623.
(16) (1864-65) 2 M. H. C. R. 243.

(17) (1801) 2 Bos. & P. 467=5 R. R. 662=126 E. R. 1388.

not allow the party who has advanced money on such a contract, to recover it back. In the case before us, the substance of the matter is that the plaintiff, if his allegation is true, offered a bribe to the defendant to secure an appointment for his son, and made part payments which were accepted by the latter. The parties are clearly *in pari delicto* and the Court will not assist either of them. In *Collins* v. *Blantern* (18) where money had been paid for the purpose of stifling a prosecution for perjury, Wilmot, C. J., said: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again." To the same effect is the observation of Kenyon, C. J., in *Howson* v. *Hancock* (19), where money deposited upon an illegal wager had been paid over to the winner by the consent of the loser: "there is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." The same principle is illustrated in *Taylor* v. *Chester* (20), where the consideration was immoral, and, in *Kearley* v. *Thomson* (21), where the defendants were in substance bribed not to appear at the public examination of a bankrupt [see also *Harse* v. *Pearl Life Assurance Co., Ltd.* (22)]. The principle has been applied in this country in a case where money had been paid to a married woman to enable her to obtain a divorce and marry the plaintiff. *Bai Vijli* v. *Nansa Nagar* (23). The cases mentioned at the Bar related to marriage brokage contracts which, as is clear from the decisions in *Bakshi Das* v. *Nadu Das* (24) and *Gulabchand* v. *Fulbai Harichand* (25), stand on a special footing of their own and have no analogy to the case before us. The principle that the Court will not assist a party who has entered into a contract tainted by moral turpitude, should be strictly applied in the circumstances of the case now before the Court. If the Court were to assist the plaintiff to recover his money, bribery and corruption would be encouraged; every person in the position of the plaintiff will be tempted to say, "let me offer a bribe to get an appointment for my son, for I can do so with impunity and without risk of loss; if he secures the appointment, the end is achieved, if he does not, I can sue to recover back my money." No Court of Justice will tolerate such a position.

We may add that, in the course of argument, reliance was to some extent placed on S. 65 of the Indian Contract Act, but that section is of no real assistance to the plaintiff; as it relates to the obligation of a person who has received an advantage under an agreement which is *discovered* to be void or under a contract which *becomes* void. The case before us is, however, not that of an agreement "discovered" to be or "becoming" void. The agreement is void on the face of it, and it was void *ab initio*, while the words of the section can only be aptly applied in such cases as that of an agreement which is subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreement, or of an agreement which is afterwards made void by circumstances which supervene.

The result is that the decree of the Small Cause Court Judge is affirmed and this Rule discharged with costs. We assess the hearing fee at one gold *mohur*.

V.B./R.K.

Rule discharged.

(18) (1765) 2 Wils. 341=95 E. R. 847=1 Sm. L. C. 369.
(19) (1800) 8 T. R. 575=101 E. R. 1555.
(20) (1869) 10 B. & S. 237=38 L. J. Q. B. 225=4 Q. B. 309=21 L. T. 359.
(21) (1890) 59 L. J. Q B 288=24 Q. B. D. 742=63 L. T. 150=38 W. R. 614.
(22) (1904) 1 K. B. 558=73 L. J. K. B. 373=52 W. R. 457.
(23) (1886) 10 Bom. 152.
(24) (1905) 1 C. L. J. 261.
(25) (1909) 33 Bom. 411=3 I. C. 748.

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SHARFUDDIN AND COXE, JJ.

Puncha Thakur and *another*—Defendants—Appellants.

v.

Bindesri Thakur and *others*—Plaintiffs—Respondents.

Appeal No. 3828 of 1912, decided on 12th March, 1915, from the Appellate Decree of Offg. Addl. Sub-Judge, Mozaffarpore, dated 7th October, 1912.

(a) Hindu Law—Temple—Offerings—Right to share offerings in temple is not transferable.

Per *Sharfuddin, J.*—A right to share the offerings made to a deity in a Hindu temple is *res extra commercium* and is not transferable. 26 Mad. 31, foll. 26 Cal. 356, ref. to.

[P. 270, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 6 (a)—Offerings in temple are made to deity —Appropriation of it by priests is not a right to traffic with—Income is indefinite—Mortgage or execution sale of such right is invalid—(*Per Coxe, J.*)—**It is a mere possibility and hence not transferable.**

Offerings are, according to their true significance, made to the deity of which the image is its visual symbol and their appropriation by the officiating priest is not a right with which he is entitled to traffic. 27 Cal. 30, ref. to.

[P. 271, C. 1.]

The income arising from the offerings which are voluntary presents, is uncertain and indefinite and thus an income from such a right is not transferable under the Transfer of Property Act, and therefore the mortgage of that right and the purchase of it in execution of the mortgage-decree are invalid. [P. 271, C. 1.]

Per *Coxe, J.*—The chance that future worshippers will give offerings to the temple is a mere possibility within the meaning of S. 6, Clause (*a*), of the Transfer of Property Act, and so it cannot be transferred. [P. 271, C. 1 & 2.]

Baldeo N. Singh and *Sahay Ram Bose*—for Appellants.

Asita Ranjan Chatterjee and *Gour Chandra Pal* for Respondents.

Sharfuddin, J.—The suit out of which this second appeal arises, was instituted by the plaintiffs for recovery of possession of a 3 annas share in the offerings made to the temple of Sri Bhairo Nath on establishment of their title thereto. The plaintiffs and the defendant third party form a joint Hindu family. It is alleged that out of the 16 annas offerings, they owned and possessed a 3 annas share and to that extent they used to get *charhawa* (offerings) offered by the people. The defendant second party, it appears, in execution of a decree put up that share to sale and himself purchased it. Thereafter, he sold it to the defendant first party. The defendant third party, father of plaintiffs Nos. 1 to 4, and the father of plaintiff No. 5 had executed a mortgage-bond with respect to the above share in favour of the defendant second party, and it was in execution of the mortgage-decree obtained on the strength of the above mortgage that the defendant No. 2 sold and purchased that share which he afterwards sold to the defendant first party.

In the plaint it is urged that the right in the share of the offerings is inalienable and so the father of the defendant No. 5 and the third party defendant, father of plaintiffs Nos. 1 to 4, had no right to mortgage it and that, therefore, the defendant second party, and his vendee, the defendant first party, acquired no valid title as the whole transaction from mortgage to sale was invalid.

The suit was contested only by the defendants Nos. 1 and 2 of the first party and by the defendant No. 4 of the second party. Their contention is that the suit is barred by limitation and that the right in the offerings is transferable.

The first Court gave a modified decree in favour of the plaintiffs and the defendant third party, jointly. The defendants Nos. 1 and 2 of the first party, therefore, appealed to the lower Appellate Court which affirmed the judgment and decree of the first Court, and dismissed the appeal. The decree passed by the first Court, which was affirmed on appeal, is in the following terms:—"That the suit be decreed modifiedly with full costs, that the plaintiffs' title be declared, that they jointly with the defendant third party do recover possession over 2 annas 16-*gundas* and 1-*kara* share of *charhawa* interest, and that permanent injunction be issued on the defendants first and second parties, restraining them from receiving the *charhawa* offerings for the aforesaid share."

The defendants Nos. 1 and 2 now appeal to this Court.

Two grounds were urged on their behalf, *first*, that of estoppel and *second*, that the right to offerings was transferable.

The first question to be decided is whether such a right, as is claimed by the plaintiffs, is transferable or not.

I am of opinion that such a right is not transferable. There are certain rights that cannot be transferred; they are termed *res extra commercium*, for instance, sacerdotal office which belongs to the priest of a particular temple. It was so held in *Lakshmanaswami Naidu* v. *Rangamma* (1). Similarly a right to receive offerings from pilgrims resorting to the temple or shrine, is inalienable and no suit can be maintained for the recovery of *wasilat* in respect of properties derived from a turn of worship which from its very nature is voluntary. It was so held

(1) (1903) 26 Mad. 31.

in the case of *Kashi Chandra Chuckerbutty* v. *Kailash Chandra Bandopadhya* (2). Indeed, no man can compel another to make voluntary offerings. Offerings are, according to true significance, made to the deity of which the image is its visual symbol and their appropriation by the officiating priest is not a right with which he is entitled to traffic. This was held to be so in the case of *Dino Nath Chuckerbutty* v. *Pratap Chandra Goswami* (3).

A very strong reason has been given by the lower Appellate Court that such a right is not transferable. It says : "In the present case the duty of a *pujari* seems to have been assigned to Brahmans who make *pujas* to the idol Bhairo Nath. To my mind the performance of *puja* or *sheba* of the idol creates a right to receive the offerings made to it. If it be assumed for a moment that a right to receive offerings is alienable or transferable, then it is clear that an alienation of such right can be made even in favour of Muhammadans or persons of another caste who would obviously be incompetent to perform the *puja*." Offerings are voluntary presents to the deity to which, no doubt, the *shebait* is entitled. They are nothing but voluntary payments. The income arising from them is uncertain and indefinite, and an income from such a right is not transferable under the Transfer of Property Act.

For the above reasons, I am of opinion that the mortgage of that right and the purchase of it in execution of the mortgage-decree are invalid and that the judgment of the lower Appellate Court cannot be assailed on that point.

It is somewhat difficult to reconcile the decree given with the character of the property which is clearly not transferable, but this point is not raised in the grounds of appeal and need not be considered.

As to estoppel I think the statutory provisions being against transfer, no question of estoppel can arise.

The appeal is dismissed with costs.

Coxe, J.—I agree. It appears to me that the chance that future worshippers will give offerings to the temple is a mere possibility within the meaning of S. 6, Clause (*a*) of the Transfer of Property Act. Such a possibility cannot be transferred, and, in my opinion, this being a statutory provision, no question of estoppel can arise.

V.B./R.K.

Appeal dismissed.

(2) (1899) 26 Cal. 356.
(3) (1900) 27 Cal. 30.

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HOLMWOOD AND IMAM, JJ.

Chandra Kanta Ganguly and *others*—Defendants—Petitioners.

v.

Sarojini Debi — Plaintiff — Opposite Party.

Rule Nisi No. 904 of 1915, decided on 24th January, 1916, against the Decree of Sub-Judge, Khulna, in Title Suit No. 27 of 1913 dated 11th March, 1915.

Civil P. C. (5 of 1908), O. 25, R. 1, O. 41, R. 10—Appeal—Security for costs—When to be demanded.

There is no hard and fast rule that unless a plaintiff-appellant has no interest in the litigation but is a mere puppet in the hands of others, there cannot be any order against him for security for costs. 14 Cal. 533, ref. to and expl. 5 Bom. L. R. 661, appr. [P. 271, C. 2.]

Tarakeswar Pal Choudhary—for Petitioners.

Dwarkanath Chakravarty and *Jotindra Mohan Chowdhuri*—for Opposite Party.

Judgment.—This is a Rule calling upon the opposite party to show cause why she should not furnish security for the costs of the petitioner here and in the Court below.

The case is one of a Hindu widow, who alleges that she did not enter into a certain *ekrarnamah* making over the management of her husband's property to the father of his adopted son. She likewise denies the adoption. The learned Judges who issued the Rule were, both of them, Hindu Judges and must have fully in their minds the position of a Hindu widow and the rulings protecting her interests.

It is argued before us that there is a hard and fast rule that unless the plaintiff has no interest in the litigation but is a mere puppet in the hands of others, there cannot be any order for security for costs. We do not think that any such hard and fast rule has ever been

laid down. The nearest approach to it is a ruling of a Single Judge of this Court on the Original Side in the case of *Khajah Assenoollajoo* v. *Solomon* (1), and there the rule, which has been adopted in all the Courts in India as well as in England, that mere poverty is no sufficient ground to ask for security for the costs of the suit, may be taken as clearly laid down ; and it is then said it is otherwise, as was the case in the case cited, when he is not the real litigant but a mere puppet in the hands of others. That does not, in our opinion, mean that a person who has an ostensible interest in the property in suit is not a puppet in the hands of others and that you cannot ask for security. It must inevitably happen that in all cases of litigation fomented by third parties the ostensible plaintiff must have a claim which can *prima facie* be supported in Court, and in this case the widow, were she able to get rid of her alleged action in adopting the son and of the alleged *ekrarnamah* which she denies, would no doubt have a very substantial interest in the property. But there are specific allegations in the affidavit of the petitioner which are supported by the findings of the Court of first instance ; and these specific allegations have not been traversed by the affidavit in reply. Now, in the case of *Ramsing Bhagwan* v. *Balubai* (2), it was clearly laid down that where "there is something more than mere poverty alleged and, so far as the Court below is concerned the respondents have succeeded in proving that allegation to its satisfaction, whether the Appeal Court will come to the same conclusion when it has heard the appeal is immaterial, but the respondents are entitled to ask the Court to bear the facts found by the lower Court in mind in deciding whether this is a first case for the exercise of the discretion" vested in the Court under O. 41, R. 10 ; and in exercising that discretion in the case of a Hindu widow who denies an alleged adoption, it was further held that the Court may very well be guided by the provisions of S. 380, now O. 25, R. 1.

There are, therefore, two grounds for making this Rule absolute:—*Firstly* that although the widow may have a very large ostensible interest in the property of her husband she has been found to be a puppet in the hands of others and *secondly*, that apart from the property of her husband, which is substantially in suit, she has no other immovable property which can be given as security and money security should, therefore, be asked for. Having regard to the allegations in the case we are willing to allow the lady either to deposit Rs. 600 (rupees six hundred only) to cover the costs of both Courts in cash or Government promissory notes or to furnish security of immovable property to the satisfaction of the lower Court through some substantial surety within three months of the date of the order reaching the Court below or thirteen weeks from this date, whichever is earlier. With these directions the Rule is made absolute. The petitioner is entitled to his cost of the day—two gold *mohurs*.

V.B./R.K.

Rule made absolute.

(1) (1887) 14 Cal. 533.
(2) (1903) 5 Bom. L. R. 661.

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SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Rameswari Chaudhurani—Objector—Appellant.

v.

K. B. Dutt—Receiver—Respondent.

Appeal No. 50 of 1915, decided on 13th December, 1915, from the Original Order of Chaudhuri, J., dated 26th April, 1915.

(a) Appeal — Competency — Order granting leave to Receiver to enter into settlement with debtor of estate—Appeal against order lodged after it has been carried out—Timely order of stay before filing of appeal not obtained—Appeal is infructuous—Civil P. C. (1908), O. 41, R. 5 (2).

Where on the application by the Receiver of an estate an order is made by the Court granting him leave to enter into a proposed settlement with a debtor of the estate and to execute in his favour a release in respect of property hypothecated by him, an appeal against that order, by a person who opposed the application, lodged after the Receiver has effected a settlement with the debtor and executed a registered deed of release in his favour, becomes infructuous, unless before filing the appeal, the appellant has obtained a timely order for stay.

[P. 274, C. 1 & 2.]

(b) Civil P. C. (5 of 1908), O. 41, R. 5 (2)—Appellant can before filing of appeal obtain stay order.

Per *Mookerjee, J.*—An appellant before filing his appeal can obtain a stay order under O. 41, R. 5, sub-R. 2. [P. 274, C. 1.]

Pugh and *R. L. Roy*—for Appellant.

S. K. Chuckerbutty—for Respondent.

Sanderson, C. J.—This is an appeal from a judgment of Mr. Justice Chaudhuri which was made on the 26th of April, 1915, whereby he gave leave to the Receiver, Mr. Dutt, to settle a claim of the estate against a man named Mr. Manuk for Rs. 15,800. A letter was sent to the Receiver on the 1st of May by the executors saying that they were going to appeal from the order of Mr. Justice Chaudhuri, and asking the Receiver not to take any steps in respect of that order until the appeal was heard. We were at first told that there was no answer to this letter, which was a mistake for it appeared that an answer had been sent on the following day, the 2nd of May. A part of the answer has been read out to us by Mr. Chuckerbutty, and it was obviously to the effect that the Receiver could not be bound by the terms of the letter and that if the executors wanted to stay the proceedings they must take the necessary steps by applying to the Court. The Receiver also gave notice in that letter that he intended to carry out the order of the Court. It appears that on the 10th of June the Receiver did effect a settlement with Mr. Manuk—the property was reconveyed to him on that date, the release was signed, and, we are informed, the release was registered on the same date. On the 23rd of June, the very last day which was open to the appellant, this appeal was filed.

Now, to my mind, as soon as the statement that the matter had been settled and the property had been reconveyed was brought to the knowledge of the Court, the time of this Court ought not to be occupied in a further hearing of the appeal, and for this reason: at the time the property was reconveyed and the release granted, the Receiver was acting under an order of the Court, which was a perfectly good order at the time, and under that order Mr. Manuk, who was not a party to the suit, obtained possession of the property. Not only that: we are informed that he has in fact parted with it to another individual altogether. Therefore, if we were to reverse this order,—I do not say for a moment that on the merits this is an order which ought not to have been made and we ought to reverse it, but supposing we did--our order would have no effect. We shall have no jurisdiction to order Mr. Manuk to reconvey the property to the Receiver, and, therefore, it seems to be quite useless and mere waste of time for this Court to go on discussing the point which has been urged by the appellant. I may say that if there is any injustice or any harm done to anybody, it is entirely the fault of the appellant, because after the warning which he received from the Receiver, the obvious thing for him to do was to file an appeal at once and then to come to this Court and make an application to the Court to restrain the Receiver from acting upon the order of Mr. Justice Chaudhuri until the hearing of the appeal. Had this course been adopted, the Receiver would not have thought of proceeding with the order of Mr. Justice Chaudhuri. But that obvious course was not adopted. On the contrary, the matter was left until the very last day which was open to the appellant, namely, the 23rd of June. Under these circumstances, I think this appeal should be dismissed.

The costs of both parties will come out of the estate.

Woodroffe, J.—In order to make out a claim for relief the appellant should at least have applied for a stay-order, which the Receiver invited her to get if she was dissatisfied with the Judge's order. Without expressing any opinion on the merits or whether an appeal lies I think the matter comes too late. For this reason I agree that the appeal should be dismissed.

Mookerjee, J.—I agree that the appeal has become infructuous by reason of events which have happened since the order of the 26th April, 1915, and should not consequently be entertained. In my opinion, this appeal falls within the class of cases where it is incumbent upon a Court of Appeal to take note of events subsequent to the order under appeal: *Hazari Mull* v. *Janaki Prosad* (1), *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (2) and *Rai Charan Mandal* v. *Biswanath Mandal* (3).

(1) (1907) 6 C. L. J. 92.
(2) (1907) 6 C. L. J. 102.
(3) A.I.R. (1915) Cal. 103=26 I. C 410.

On the 26th April, 1915 the trial Court granted leave to the Receiver to enter into the proposed settlement with the debtor, and to execute in his favour a release in respect of the hypothecated property. On the 1st May, the present appellant, who had unsuccessfully opposed the application of the Receiver, intimated to the latter that he intended to appeal against the order and requested him not to carry out the order meanwhile. On the following day, the Receiver replied that he could not wait indefinitely for the proposed appeal and would proceed to carry out the order, unless an order for stay was obtained from the Court of Appeal. Notwithstanding this clear intimation, the appellant took no steps to file an appeal or to obtain an order for stay of proceedings. The Receiver carried out the order, the settlement with the debtor was duly effected, and the deed of release in his favour was executed and registered on the 10th June, 1915. The present appeal was thereafter lodged on the 23rd June, 1915. The excuse offered is that the order itself was not filed till the 11th June, 1915; that merely shows, however, that the appeal was filed within the time allowed by law. But, plainly, there was nothing to prevent the appellant from obtaining an order for stay, even before the appeal was actually lodged, as is clear from the principle recognized in O. 41, R. 5, sub-R. 2, of the Code of Civil Procedure. In my opinion, it was the duty of the appellant, in the event which had happened, to obtain a timely order for stay. Complications of the gravest character may obviously arise if we entertain the appeal and set aside the order; we may prejudice the position of parties who had no notice of the intended appeal. The debtor is not a party to these proceedings, and, we are informed that since the execution of the release, the property has been transferred by him to a stranger who also is not before the Court; the position might have been different if benefit had been received by one of the parties to the proceedings, who might, on reversal of the order, be called upon to make restitution. It has not been suggested that the Receiver and the debtor conspired to rush matters through, with a view to embarrass the Court of appeal in the effective exercise of its jurisdiction; if such a case had been alleged and made out, it would have been necessary for us to consider what steps we should take so as to ensure that the ends of justice might not be defeated. But no such question arises here. On the other hand, upon the facts before us, it is plain that by reasons of the laches of the appellant the appeal has become infructuous. On these grounds I agree that the appellant, has disentitled himself to the assistance of the Court, and that his appeal must be dismissed.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 274

CHATTERJEA AND GREAVES, JJ.

Pran Krishna Saha and *another*—Defendants—Appellants.

v.

Trailakhya Nath Chowdhury and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 727 to 733 of 1912, decided on 28th January, 1915, against the decisions of Dist. Judge, Pabna, dated 14th September, 1911.

(a) Bengal Tenancy Act (8 of 1885), S. 106—S. 106 does not apply to the claim for declaration and possession by person not in possession before Record of Rights.

A person who is not in possession of land which is claimed as rent-free at the date of the Record of Rights, cannot have the mere question of his title to hold the land rent-free tried in a suit under S. 106 of the Bengal Tenancy Act (VIII of 1885), nor can he obtain possession of the land in a suit under that section. 20 I. C. 151, ref. to.

[P. 275, C. 2 & P. 276, C. 1.]

(b) Jurisdiction—Civil and Revenue—Where S. 106 does not apply the plaintiff will get his relief in Civil Court if his claim is otherwise valid.

Where, however, the plaintiff has a title and his claim is not barred by limitation he is entitled to possession, but he cannot get all the reliefs in a suit under S. 106, whereas he can get a complete remedy by a suit in the Civil Court. [P. 276, C. 1.]

Jogendra Chandra Roy, Upendra Lal Roy and *Jogendra Chandra Dutta*—for Appellants.

Dwarka Nath Mitter, Purno Chandra Roy and *Gnanendra Nath Sarkar*—for Respondents.

Judgment.

In No. 727 of 1912.—This appeal arises out of a suit instituted under S. 106 of the Bengal Tenancy Act. It appears that in the Record of Rights prepared under Chapter X of the Bengal

Tenancy Act, the land in suit was entered as the *mal* land of the *patnidar* defendants and as constituting the holding of the other defendants under the former. The plaintiffs thereupon instituted this suit under S. 106 of the Bengal Tenancy Act for a declaration that the lands formed the rent-free (*brahmottar*) tenure of the plaintiff No. 1, under whom the other plaintiffs held as tenants, and for correction of the entry in the Record of Rights accordingly. The Courts below have found in favour of the plaintiffs and the defendants have appealed to this Court.

It is contended on behalf of the appellants that the Revenue Officer in deciding disputes in suits under S. 106 of the Bengal Tenancy Act is confined to a consideration of the question of possession alone, and cannot try any question of title, and that the plaintiffs having been found to have been out of possession, at the date of the final publication of the Record of Rights, and also at the date of the suit, the suit ought to have been dismissed. The appellants rely on the cases of *Padmalav* v. *Lukmi Rani* (1), *Kali Sundari Debya* v. *Girija Sankar Sanyal* (2) and *Ram Chandra* v. *Nanda Nandanananda Deb* (3) in support of their contention.

It is contended on behalf of the respondents, that these cases were between rival *proprietors*, and are, therefore, distinguishable. The reason why in a case between rival proprietors, the Court is confined to a consideration of the question of possession, as was pointed out by Coxe J., in *Mohunt Padmalav* v. *Lukmi Rani* (1), is, that the *khewat* recording proprietary interests is drawn up with reference to the registers kept by the Collector under the Land Registration Act, which are prepared according to possession and possession alone, and have no concern with title unaccompanied by possession, and in that very case it was observed by the learned Judge that in a suit between tenant and tenant, or between a landlord and tenant, questions other than that of possession may legitimately arise.

The present case is not between rival *proprietors*. The defendants (or some of them) are *patnidars* and *durpatnidars* of the *mouza* in which the lands are situated, and the plaintiff No. 1 claims to hold the lands in the *mouza* in rent-free right derived from the *zemindars* under whom the defendants hold the *mouza* in *patni* and *durpatni*. The cases, therefore, relating to rival proprietors may be distinguished from the present case.

The learned Pleader for the respondents contends that the case comes under Clause (*j*) of S. 102 of the Bengal Tenancy Act, under which the Revenue Officer may, if the land is claimed to be held rent-free, record "whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and if so, entitled under what authority," and that under S. 106 the Revenue Officer may decide a dispute regarding any entry which a Revenue Officer has made in, or any omission which the said officer has made from, the record when such dispute is (among other matters) as to whether land held rent-free is properly so held or "as to any other matter."

The words "entitled to hold" in S. 102, clause (*j*), indicate that the question of title may be gone into, but then the words in S. 106 "as to whether land held rent-free is properly so held" and those in S. 102, Clause (*j*), "if the land is claimed to be held rent-free," taken with the other words, in that section *viz.*, whether or not the *occupant* is entitled to hold the land without payment of rent; go to show that the land must be in the occupation of the person who claims to hold it rent-free at the time the Record of Rights is made and published. It is found that the plaintiffs were dispossessed before the Settlement proceedings were commenced. That being so, the plaintiffs were not the *occupants* of the land. The words "or as to any other matter" in S. 106 are no doubt very comprehensive, but it seems to us that they must have reference to the matters indicated in S. 102, and that S. 106, in so far as it relates to the decision of disputes with respect to land claimed to be held rent-free, contemplates a suit by a person who is in possession of land, which he claims to hold rent-free, to have an entry or omission in the record with respect to it corrected.

We are of opinion that a person who is not in possession of land which is claimed

(1) (1908) 12 C. W. N. 8.
(2) (1911) 11 I. C. 184.
(3) A. I. R. (1914) Cal. 191=20 I. C. 298.

as rent-free at the date of the Record of Rights, cannot have the mere question of his title to hold the land rent-free tried in a suit under S. 106 of the Bengal Tenancy Act. Moreover, the plaintiffs were admittedly out of possession at the date of the suit under S. 106. They cannot obtain possession of lands in a suit under S. 106 [See *Nilmoni Kumar* v. *Kedar Nath Ghosh*, (4)] and they do not claim possession in the suit, though a declaration has been made that they are entitled to get possession. It is conceded that, that portion of the order cannot stand, but it is contended that they are entitled to have the entry as to *mal* land corrected in this suit, and that they may obtain possession by a suit in the Civil Court. If, however, the plaintiffs have a title and their claim is not barred by limitation, as found by the Courts below, they are entitled to possession. But they cannot get all the reliefs in a suit under S. 106, whereas they can get a complete remedy by a suit in the Civil Court.

The appeal is, therefore, allowed, but having regard to the fact that the ground upon which the appeal succeeds was not specifically taken in the Courts below, we direct that each party will bear his own costs in all the Courts.

This judgment will govern Appeals Nos. 728, 729 to 731, 732 and 733 of 1912.

V.B./R.K.

Appeals allowed.

(4) (1913) 20 I. C. 151.

A. I. R. 1916 Calcutta 276

SHARFUDDIN AND MULLICK, JJ.

Surendra Narain Sinha—Defendant—Appellant.

v.

Hafijur Rahaman and *others*—Plaintiffs—Respondents.

Appeal No. 91 of 1915, decided on 14th June, 1915, from the Order of Dist. Judge, Purneah, dated 18th January, 1915.

(a) Court Fees Act (7 of 1870), S. 4—Valuation by Subordinate Court—Court-fee in appeal must be on that valuation.

A Court of Appeal should not entertain an appeal without its being stamped with a Court-fee calculated upon the valuation arrived at by the Subordinate Court. [P. 277, C. 1.]

(b) Civil P. C. (5 of 1908), O. 6, R. 17 and O. 41, R. 33—Amendment in appeal—Principles of O. 6, R. 17 apply—Amendment to prejudice other side should not be allowed—When suit must fail for want of amendment and fresh suit is barred amendment would seriously prejudice defendant.

O. 41, R. 33, is subject to the general principle that no order for amendment of a plaint should be passed where it would deprive a party of a substantial right or privilege or otherwise prejudice a party. [P. 277, C. 1.]

Where but for an amendment a plaintiff's suit should fail and a fresh suit would be barred, the defendant acquires a substantial right and it would be unfair at an appellate stage to order an amendment of the plaint and deprive him of that right. [P. 277, C. 1.]

D. N. Mitter and *Rishendra Nath Sircar*—for Appellant.

Girija Prosanna Sanyall—for Respondents.

Judgment.—This appeal is by the defendant in a suit in which the plaintiff sued the principal defendants for a declaration of his title by adverse possession and for confirmation of possession.

It was the plaintiff's case that a cloud was thrown upon his title by an entry in the Record of Rights in favour of the principal defendants. The suit was lodged in the first instance before a Munsif. Upon an objection made by the defendants, the Munsif made an inquiry into the valuation of the property, and coming to the conclusion that the value was Rs. 3,000 he returned the plaint to the plaintiff for presentation to a proper Court. The plaintiff then filed the plaint before the Subordinate Judge with a Court-fee of Rs. 17-8. Valuing the relief for confirmation of possession at Rs. 100, he paid Rs. 7-8 as stamp-fee for that relief and for the relief in respect of the declaration he paid a fee of Rs. 10. The Subordinate Judge came to the conclusion that the plaint was insufficiently stamped and that the proper fee payable was on a valuation of Rs. 3,000. As the plaintiff failed to pay the full fee the Subordinate Judge rejected the plaint. There was an appeal against that order before the District Judge. The District Judge, while agreeing with the Subordinate Judge that the proper fee payable was upon a valuation of Rs. 3,000, allowed the plaintiff to strike out his prayer for confirmation of possession and convert the suit into one for

mere declaration of title upon which a fee of Rs. 10 was sufficient. So, holding that the plaint was sufficiently stamped as amended he set aside the Subordinate Judge's order rejecting the plaint and directed the suit to be tried. Against that order the defendant now files the present appeal.

The *first* defect that we have to notice in the learned District Judge's proceedings is that he should not have entertained the appeal before him without a stamp-fee calculated upon the valuation which had been arrived at by the Subordinate Judge.

The *second* and main defect is that by allowing the plaintiff at the appellate stage to amend the plaint, he has seriously prejudiced the defendant. The learned District Judge relies upon O. 41, R. 33, Civil Procedure Code, in justification of the amendment; but that rule is subject to general principle that no order for amendment can be passed where it deprives a party of a substantial right or privilege or otherwise prejudice a party. In the present case a fresh declaratory suit would under Article 120 of the Limitation Act be admittedly barred. The defendant, therefore, has acquired a substantial right and it is manifestly unfair at the appellate stage to order an amendment of the plaint and deprive him of that right. The order of amendment, therefore, was, in our opinion, wrong.

In these circumstances, the appeal must succeed, the order of the learned District Judge is set aside and that of the Subordinate Judge restored with costs in all Courts. We assess the hearing fee in this Court at one gold *mohur*.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 277

CHATTERJEE AND BEACHCROFT, JJ.

Mohamed Ali and *others*—Defendants—Appellants.

v.

Jnanda Sundari Chowdharani—Plaintiff—Respondent.

Appeal Nos. 3495 and 3748 of 1913, decided on 14th January, 1916, from Appellate Decrees of Offg. Sub-Judge, Mymensingh, dated 30th June, 1913.

Landlord and tenant—Occupancy holding—Transfer of non-transferable occupancy holding—One co-sharer landlord can recognise transfer in respect of his share—Recognition does not bind other co-sharers.

One co sharer landlord can recognise a transfer of a non-transferable occupancy holding in respect of his own share, although such a recognition is not in any way binding upon the other co-sharers and may not as such prevent the other co-sharers from effecting a sub-division of the holding. [P. 277, C. 2.]

Rajendra Chandra Guha—for Appellants.

Chandra Kanta Ghosh—for Respondent.

Judgment.—The learned Subordinate Judge has evidently made a confusion of the two cases. They were tried together. In Appeal No. 3748 a question was raised as to a settlement by a co-sharer *malik* in respect of his share. In Appeal No. 3495 a question was raised as to a settlement by the plaintiff's own agent. The learned Subordinate Judge, however, says: "The defendants' case is that they were recognised as tenants by the co-sharer landlords' *tahsildar*. This is not so in both cases." The settlement in Appeal No. 3748 is said to have been made by the co-sharer landlords' *tahsildar* in the presence of his *naib* and under his direction and the premium paid is said to have been entered in the *zemindar's* papers. That would not be a settlement by *tahsildar*. The learned Subordinate Judge then says:—"As no *tahsildar* had any authority to recognise any sub-division of the holding, the receipt of rent by any *tahsildar*, if true, cannot give validity to the transfer." That may be so. A *tahsildar* or even a *naib* may not have a right of sub-division without the landlord's consent, but the simple fact of the agent not being entitled to effect a sub-division would not invalidate the recognition by the co-sharers. The learned Judge is also under the erroneous impression that the recognition of the transfer by a co-sharer landlord is not valid even to the extent of his share. There is nothing in law to prevent one co-sharer landlord from recognising a transfer in respect of his own share, although such a recognition is not in any way binding upon other co-sharers and may not as such prevent other co-sharers from effecting a sub-division of the holding. Both these cases raised a question of separate settlement

in favour of the transferees and the Court must consider the question of settlement raised by the defendant in each case. In determining the question the Court will have to see who made the settlement or the recognition, whether he had any authority to do so and whether the *zemindar* directly or indirectly acted upon such recognition. Unless these questions are considered it is not possible to make a proper decree in this case.

The judgments and decrees of the lower Appellate Court are, therefore, set aside and the cases sent back to that Court for decision in accordance with law.

Costs to abide the result.

V. B./R. K.

Decrees set aside : Cases remanded.

A. I. R. 1916 Calcutta 278

CHATTERJEA AND NEWBOULD, JJ.

Kangali Molla—Plaintiff—Appellant.

v.

Beni Madhab Biswas and *others*—Defendants—Respondents.

Appeal No. 13 of 1913, decided on 24th May, 1916, from the Appellate Decree of Dist. Judge, Faridpur, dated 5th December, 1913.

(a) Evidence—Admissibility—Objection to—Appeal—Failure to object to relevancy—Effect.

Evidence admitted without any objection in the Trial Court cannot be objected to being on the record in the Appellate Court; but an erroneous omission to object in the primary Court to the admissibility of a certain piece of irrelevant evidence does not make it relevant in the Appellate Court. 34 Cal. 1059, (P.C.); 19 All. 76 (P.C.) and 1 C. W. N. 530, ref. to.

[P. 278, C. 2.]

(b) Evidence Act (1 of 1872), S. 18 and 32 (3)—Sale—Statement by vendor as to ownership of land described as boundaries—Admissibility—Statement against interest.

The statement of the vendor in a deed of sale as to the ownership of a land described as a boundary of the land sold is relevant under S. 32, Clause (3) of the Evidence Act as a statement against interest and is evidence against the vendee and strangers. But such a statement cannot be proved against the vendee as an admission under S. 18 of the Evidence Act. 22 W. R. 231 and 12 I. C. 149, ref.

[P. 279, C. 1.]

Surendra Nath Guha—for Appellants.

Gunada Charan Sen—for Respondents.

Judgment.—The plaintiff purchased a piece of land in 1898 by Exhibit L, and his vendor described the land sold as bounded on the west by the land of Jagat Biswas, the predecessor of the defendants. In 1902 the plaintiff purchased the *jote* of Ramdhupi in execution of a rent-decree. The plaintiff says the land appertains to Ramdhupi's *jote* and is within his purchase, the defendant says it is his land in another *jote*. The Record of Rights being in favour of the defendants, the plaintiff had to rebut the presumption in favour of the record. The Trial Court held that the plaintiff had succeeded in rebutting the presumption. But the lower Appellate Court says the plaintiff has failed to rebut the presumption. This is obviously a question of fact and would ordinarily be final. It is contended, however, that in arriving at this finding the lower Appellate Court has made use of evidence which is not relevant and otherwise erred in applying the law of evidence, and we cannot say how far or how much the lower Court has been influenced by this piece of evidence in arriving at its finding. This piece of evidence is Exhibit L. That document contains a statement of the plaintiff's vendor who is not a party to this suit, a statement which was made before the plaintiff had any interest in the *jote* of Ramdhupi. Any statement made by his vendor as to the ownership of the land on the west of the land sold would be a matter of the utmost indifference to the plaintiff. It would not matter to him whether this land belonged to A or B or C. The question is whether this statement of his vendor is either admissible or relevant in this suit. As regards admissibility it has been said that it was admitted without any objection in the Trial Court and the plaintiff cannot now object to its being on the record. That is a correct view of the position as to admissibility. See *Shahzadi Begam* v. *Secretary of State* (1). But is it relevant? In the case of *Miller* v. *Babu Madho Das* (2), their Lordships of the Privy Council say that the erroneous omission to object to the admission of a certain piece of evidence in the lower Court did not make it relevant. That was, however, in respect of a document which could not have been proved by the party who was allowed to prove it, the

(1) (1896) 34 Cal. 1059=34 I. A. 194 (P.C.).
(2) (1897) 19 All. 76=23 I. A. 106 (P.C.).

document was *per se* irrelevant under the Evidence Act. See *Girindra Chandra Ganguli* v. *Rajendra Nath Chatterjee* (3). We have to see, therefore, whether Exhibit L is *per se* irrelevant or could it have been proved against the plaintiff if he had objected to it. The learned Judge has in one place referred to it as an admission. Statements of a person from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissions under S. 18 of the Evidence Act. But the land conveyed by Exhibit L is not the subject-matter of this suit and, therefore, the statement of the plaintiff's vendor cannot go in as an admission. The statement though not relevant as an admission may, however, be relevant under S. 32, Clause 3, as a statement against interest which has been held to be evidence against strangers It was so held in the case of *Leelanund Singh* v. *Musammat Lakhputtee Thakoorain* (4) and lately in the case of *Abdullah* v. *Kunja Behari Lal* (5). If it is relevant we have no concern in second appeal with the question of the weight to be attached to the document. It is true the learned Judge in one part of his judgment says of the document that it "proves conclusively that this land was never Ramdhupi's" etc., but later on he says "which goes a very long way in disposing of the plaintiff's case." The use of the words "proves conclusively," therefore, must be considered as a wrong use of a legal expression which is defined in the Evidence Act.

In this view of the matter, we would dismiss the appeal but without costs in this Court, as the misuse of the words "conclusive" and "admission" may have encouraged the appeal.

V.B./R.K.

Appeal dismissed.

(3) (1897) 1 C. W. N. 530.
(4) (1874) 22 W. R. 231.
(5) (1911) 12 I. C. 149.

A. I. R. 1916 Calcutta 279
Full Bench.

JENKINS, C. J., MOOKERJEE, HOLMWOOD, WOODROFFE AND CHATTERJEE, JJ.

Bidya Prosad Singh—Plaintiff—Appellant.

v.

Bhupnarain Singh and *others*—Defendants—Respondents.

Second Appeals Nos. 617 and 769 of 1912, decided on 11th May, 1915, against the Judgment of Chatterjee and Walmsley, JJ., dated 31st August, 1914.

(a) Hindu Law—Alienation—Father—Decision in 5 Cal. 855 has not been overruled—Mortgage not for antecedent debts nor for necessity is not binding on sons as mortgage hence O. 34, R. 1, Civil P. C. does not apply.

The decision of the Full Bench in the case of 5 Cal. 855 has not been overruled by the Privy Council, nor has it been superseded by subsequent legislation, inasmuch as, where the mortgage is not operative as such against the sons, no question can arise as to the effect of S. 85 of the Transfer of Property Act (now replaced by R. 1 of O. 34 of the Code of Civil Procedure, 1908. [P. 282, C. 2.]

(b) Limitation Act (9 of 1908), Arts. 120 and 132—Mortgage which is not operative against sons as such—Suit against sons is governed by Art. 120 and not by Art. 132.

A suit upon a mortgage effected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors, at the time of the mortgage, is governed by Article 120 of the first Schedule to the Indian Limitation Act, and not by Article 132, as there is no charge on immovable property enforcible against the sons.

[P. 281, C. 2, P. 282, C. 1 & 2 & P. 283, C. 1.]

Provash Chandra Mitter and *Susil Madhab Mullick*—for Appellant.

Umakali Mukerjee and *Akshoy Kumar Banerjee*—for Respondents.

D. Chatterjee, J.—These two appeals arise out of one suit on two mortgage-bonds executed by a father, who was the *karta* of a Hindu family governed by the *Mitakshara* Law and consisting of himself and his sons, adult and minor. In both these documents he mortgaged what he called "all my rights" in certain *mouzhas* in which he and his sons jointly owned 2 annas 8 pies share, and in respect of which he was registered in the Collectorate as the owner of 5 annas 4 pies share (including the half-share of his brother). The bonds were

dated one in September 1901, and one in October, 1901. The suits were brought on the 12th of August, 1910. The mortgagee died in *Aughan* 1313= November 1905, and Hardeo Singh, the original mortgagor, died about eight years before suit (according to the defendants), *i.e.*, about 1902.

The main questions in the case, so far as the appeals are concerned, are (1) whether the mortgagor mortgaged the whole share belonging to himself and his sons, or only his individual share as a member of the joint family: (2) whether the claim or any portion of the same is barred by limitation.

The learned Subordinate Judge held that the mortgage was in respect of the individual share of the mortgagor and the suit was barred so far as it affected the shares of the sons.

The plaintiffs appealed to the District Judge, who agreed with the first Court as to the construction of the bond of September 1901, but as to the bond of October 1901, held that the mortgagor intended to mortgage the whole share belonging to himself and his sons. It is not quite clear whether the defendants pressed their plea of limitation before him, but he evidently agreed with the first Court on this point.

There are two appeals before us, one by the plaintiff which is numbered 769 of 1912. This appeal is confined at the hearing to a claim to hold the entire 2 annas 8 pies liable under both the bonds, the other, which is by the defendants and numbered 617 of 1912, is on the plea mainly that the claim against the shares of the sons was barred.

As regards the construction of the two bonds, I am unable to find any real difference betwen the terms of the two documents. The words "*Hakiat milkiat dakli khud*" (=right and property which is my own) in the first document have been paraphrased in the second into "*Jo is wakt tak bela mosharokat ahde or bemodakalat digre bakabz-dakhl mon mokir rahta chala aya hai*" (=which up to this time has been in my possession without any other person holding possession or share therein). If the mortgagor had been mortgaging his own individual share in the family property, he would have described the same as his *hissa* or share. I think the most reasonable construction would be to hold that he was mortgaging that of which he was in possession as the head of his own family, consisting of himself and his sons. The other construction would make the mortgage null and void as an alienation of an undivided share in a *Mitakshara* joint family estate, and it is not reasonable to hold that the mortgagor gave and the mortgagee took what could not be given and taken under the law.

On the *second* point, that of limitation, it has been contended that there is a considerable divergence of judicial opinion on the matter and there should be a reference to the Full Bench. In the case of *Surja Prasad* v. *Golab Chand* (1) Ghose and Harington, JJ., held, on the authority of the Full Bench case of *Luchmun Dass* v. *Giridhur Chowdhry* (2), that when a *Mitakshara* father executes a mortgage for a debt which is neither antecedent nor immoral, the mortgage is not binding on the son, and a suit brought against the son after the death of the father more than six years after the due date, must be dismissed as barred by limitation. This case was dissented from by Brett and Sharfuddin, JJ., in the case of *Maheshwar Dutt Tewari* v. *Kishen Singh* (3), the learned Judges holding that the Full Bench case had been virtually overruled by the Privy Council in the cases of *Nanomi Babuasin* v. *Modhun Mohun* (4)and *Bhagbut Pershad Singh* v. *Girja Koer* (5). Then in the case of *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (6) Mookerjee and Holmwood, JJ., dissented from the case of *Maheshwar Dutt Tewari* v. *Kishen Singh* (3) and refrained from making a reference to the Full Bench only because that was a case in which the suit had been brought within six years from the due date. This divergence of opinion came under judicial discussion in two recent cases. In the case of *Bissonath Prosad Malita* v. *Brindesri Prosad Singh* (7) Sir Lawrence Jenkins, C. J., and N. R. Chatterjea, J., held that the law as laid down by the Full Bench in the case of *Luchmen Dass* v. *Giridhur Chowdhry* (2) had been practically altered by the provisions of S. 85 of

(1) (1900) 27 Cal. 762.
(2) (1880) 5 Cal. 855.
(3) (1907) 34 Cal. 184.
(4) (1886) 13 Cal. 21=13 I. A. 1 (P.C.).
(5) (1888) 15 Cal. 717=15 I. A. 99 (P. C.).
(6) (1907) 34 Cal. 735.
(7) (1913) 40 Cal. 342=17 I. C. 577.

the Transfer of Property Act, and the later provisions of the Civil Procedure Code, which were substituted for the same. In the subsequent case of *Sheo Narain Roy* v. *Mookshoda Das Mitra* (8) Coxe and N. R. Chatterjea, JJ. followed the above case. In the first of the latter two cases, however, the suit was brought in the life-time of the mortgaging father, and in the second also some of the mortgagors were parties. These cases are, therefore, distinguishable from the present case, in which the suit was brought more than six years after the death of the father and more than six years after the accrual of the cause of action. The debts are not antecedent debts, they are not proved to have been taken for the purpose of the family or spent for the benefit of the same, nor are they proved to be immoral. The father could not, therefore, make a valid mortgage of the interests of his sons. This can be fairly deduced from *Girdaree Lall* v. *Kantoo Lall*, *Muddun Thakur* v. *Kantoo Lall* (9) and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (10). Then followed the Full Bench case in which the previous decisions of the Privy Council were discussed. Then came the cases of *Gunga Prasad* v. *Ajudhia Pershad Singh* (11), *Khalilul Rahman* v. *Gobind Pershad* (12) and *Surja Prasad* v. *Golab Chand* (1), and these latter two cases were, after the Privy Council cases, relied on in *Maheshwar Dutt's* case (3) as having overruled the Full Bench. With great respect for the learned Judges, I do not see how the particular phase of the law laid down by the Full Bench was overruled by the cases of *Nanomi Babuasin* v. *Modhun Mohun* (4) and *Bhagbat Pershad Singh* v. *Girja Koer* (5). The only other way in which the Full Bench is said to have been superseded is the passing of the Transfer of Property Act, subsequent to it: with great respect for the learned Judges who hold the latter opinion, I cannot persuade myself to believe that the Legislature intended to alter any provision of Hindu Law by S. 85 of the Transfer of Property Act, or the section of the Civil Procedure Code which now stands in its place. These are mere matters of procedure and could not have been intended to take away any vested rights. In any case the Full Bench made an effort to save the *Mitakshara* doctrine of equal rights of the father and the son from utter annihilation and was accepted as good law by a number of very learned Judges for a number of years; it is the last hope of the *Mitakshara* son and keeps up the last vestige of Vijnaneswara's cherished doctrine of equal rights, and I do not feel myself justified in holding that it has been taken away by implication, either by the Privy Council or by the Legislature, until there is an express and authoritative decision to that effect.

In view of the conflict of judicial opinion above referred to, I would refer the following questions to the Full Bench:

1. Whether the decision of the Full Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (2) has been overruled by the Privy Council or superseded by subsequent legislation?

2. Whether a suit upon a mortgage effected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage, is governed by the 12 years' rule of limitation under Article 132 of the Schedule to the Limitation Act, so far as it claims to affect the shares of the sons?

Walmsley, J.—I agree that there is such divergence of opinion expressed in the cases quoted that a reference is necessary.

By the Court.—Both the cases will be referred to the Full Bench.

Judgment of the Full Bench.

The questions referred for decision to a Full Bench have been framed in these terms:

(1) Whether the decision of the Full Bench in the case of *Luchman Dass* v. *Giridhur Chowdhry* (2) has been overruled by the Privy Council or superseded by subsequent legislation.

(2) Whether a suit upon a mortgage effected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage,

(8) (1913) 19 I. C. 878.
(9) (1874) 22 W. R. 56=1 I. A. 321 (P.C.).
(10) (1880) 5 Cal. 148=6 I. A. 88 (P.C.)
(11) (1882) 8 Cal. 131.
(12) (1893) 20 Cal. 328.

is governed by the twelve years' rule of limitation under Article 132 of the Schedule to the Limitation Act, so far as it claims to affect the shares of the sons.

We have been invited by the plaintiffs-respondents to answer the first branch of the first question in the affirmative: they rely upon the decision of the Judicial Committee in *Nanomi Babuasin* v. *Modhun Mohun* (4) and *Bhagbut Pershad Singh* v. *Girja Koer* (5) in support of their contention. The Rules of the Court (Chapter V, S. 6) ordain that every decision of a Full Bench shall be treated as binding on all Division Courts and Judges sitting singly, upon any point of law or usage having the force of law, determined by the Full Bench, unless it is subsequently reversed by a Bench specially constituted consisting of such number of Judges as in each case shall have been fixed by the High Court, or unless a contrary rule be laid down by the Judicial Committee of the Privy Council. The decision in *Lutchman Dass* v. *Giridhur Chowdhry* (2) has not yet been reversed by a Special Bench. A Special Bench was constituted in the case of *Balaram* v. *Mangta Das* (13) to consider the question; but the reference was disposed of on a preliminary ground. The only question, then, is, whether a contrary rule has been laid down by the Judicial Committee. The two cases mentioned do not expressly lay down any contrary rule: they do not even mention the Full Bench decision, which was not cited in argument before the Judicial Committee. It is said, however, that if the principles recognised in the two decisions of the Judicial Committee are logically developed, a result is reached which is contrary to the decision of the Full Bench. But it is important to observe that the decision of the Full Bench in *Luchmun Dass* v. *Giridhur Chowdhry* (2) was based upon an interpretation of the earlier decisions of the Judicial Committee in *Girdharee Lall* v. *Kantoo Lall*, *Muddun Thakoor* v. *Kantoo Lall* (9) and *Suraj Bansi Koer* v. *Sheo Persad Singh* (10). The two later decisions of the Judicial Committee in *Nanomi Babuasin* v. *Modhun Mohun* (4) and *Bhagbut Persad Singh* v. *Girja Koer* (5), so far as the question now before us is concerned, do not extend, though they possibly elucidate, the rule enunciated in the earlier Privy Council decisions interpreted by the Full Bench. The decisions by the Judicial Committee on this subject have in a large measure affected the strict doctrines of the *Mitakshara* Law, and the question now before us is essentially, to quote the language of Sir James Colvill in *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (14), "not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence." It is plain that the Full Bench decision is still binding on this Court, as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council.

We have next been invited by the plaintiffs-respondents to answer the second branch of the first question in the affirmative, on the ground that the Full Bench decision was superseded by S. 85 of the Transfer of Property Act (now replaced by R. 1 of O. 34 of the Civil Procedure Code of 1908). In support of this contention, reliance has been placed upon the cases of *Bisonath Prosad Malita* v. *Brindesri Prosad Singh* (7) and *Sheo Narain* v. *Mokshoda Das Mitra* (8), the former of which was based on *Lalla Suraj Prosad* v. *Golab Chand* (15). But where in accordance with the ruling of the Full Bench in *Luchman Dass* v. *Giridhur Chowdhry* (2), the mortgage is not operative as such against the sons, no question can arise as to the effect of S. 85 of the Transfer of Property Act. The suit may have been framed as one to enforce the mortgage against the sons; but, if, as laid down by the Full Bench, the mortgage as such is not enforceable against them, it is plain that S. 85 cannot touch the question. Consequently, the decision of the Full Bench has not been superseded by subsequent legislation.

The *first* question, in each of its two branches, must be answered in the negative.

As regards the *second* question, it follows that Article 132 of the Schedule to the Indian Limitation Act has no application, as there is no charge on immovable property enforceable against

(13) (1907) 34 Cal. 941.

(14) (1880-81) 5 Bom. 48=7 I. A. 181 (P. C.).
(15) (1901) 28 Cal. 517.

the sons. Consequently, Article 120 governs the case. The plaintiffs are thus entitled to sue within six years from the date when the right to sue accrues. Three alternatives have been suggested for this date: *first*, the date when the debt incurred by the father matures; *secondly*, the date when the creditor, after exhausting his remedies against the father, finds that the debt or a portion thereof is still unsatisfied; and, *thirdly*, the date of the death of the father. The first of these dates was accepted as the starting point in *Surja Prasad* v. *Golab Chand* (1); but the question does not require decision in the present case, as more than six years have elapsed from each of the three possible points of time mentioned. While, therefore, we hold that Article 120 applies to cases of the description mentioned in the second question, we do not decide when the right to sue accrues for the purposes of that Article. The *second* question is answered in the negative, and the rule of limitation applicable is held to be that embodied in Article 120.

The result of this view is that Appeal No. 617 of 1912 will be allowed with costs, both here and before the Division Bench; the suit will stand dismissed as against the appellants in respect of the bond of the 27th October, 1901, to which alone the appeal relates. The other Appeal, No. 769 of 1912, will stand dismissed with costs, here and before the Division Bench. Each party will pay his own costs in both the Courts below. A self-contained decree, giving effect to these directions will be drawn up in this Court in supersession of the decree of the Court below.

V.B./R.K.

Appeal No. 617 *allowed;*
Appeal No. 769 *dismissed.*

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HOLMWOOD AND IMAM, JJ.

Meah Uzir Ali Sardar—Plaintiff—Appellant.

v.

Savaibehara and *others*—Defendants—Respondents.

Appeal No. 358 of 1912, decided on 25th January, 1916, from the Order of Addl. Dist. Judge, Jessore, dated 15th April, 1912.

(a) Landlord and tenant—Ejectment—Suit for—Necessary parties—Transferee of tenant's right is necessary party.

In a suit for ejectment by a landlord against the tenants the transferee of the tenancy right from the tenants, who was rightly or wrongly admitted to their possession as tenants and under whom the tenants are holding as sub-tenants, is a necessary party. [P. 284, C. 1.]

(b) Civil P. C. (5 of 1908), O. 41—Scope of.

There are possible cases of remand which are not included in O. 41, Civil Procedure Code. [P. 284, C. 2.]

(c) Civil P. C. (5 of 1908), S. 107, O. 41—Plaint amended in appeal—Parties added—Appellate Court can remand whole case.

When an amendment of plaint is granted in appeal and when parties are added, the Appellate Court has the power of remanding the whole case without keeping it on its own file. [P. 284, C. 2.]

(d) Civil P. C. (5 of 1908), S. 107, O. 41—General provision for remand in S. 107 is controlled by conditions and limitations prescribed in rules and orders.

The general provtsion for remand in S. 107, Civil Procedure Code, is not governed or limited by O. 41, alone but is subject to such conditions and limitations as may be prescribed in the rules and orders. A. I. R. (1914) Cal. 163, dis. appr. & dist. [P. 284, C. 2.]

Mohendra Nath Roy and *Amarendra Nath Bose*—for Appellants.

H. D. Bose (*Counsel,*) *Siva Prosanna Bhattacharjee* and *Tarakeswar Pal Chowdhry*—for Respondents.

Judgment.—This is an appeal from an order remanding a case in appeal. The plaint was filed so long ago as the 13th May, 1910. The judgment of the Subordinate Judge in the Court of first instance is dated 31st May, 1911 and the judgment now under appeal before us is dated the 15th April, 1912. We are now at the end of January, 1916. It, is, in our opinion, very lamentable that this matter should be still undecided, more especially as, for the reason which we are about to give, there does not appear to have been any substance in the appeal.

It is contended, *firstly*, that inasmuch as the Court of first instance did not decide the case upon a preliminary point the order of remand ought to have been made under O. 41, R. 25, and that the Appellate Court should have kept the case on its own file. In this connection it is conceded that the irregularity cannot be given effect to, unless the appellant was prejudiced by the procedure adopted; and in order to establish that he was so prejudiced, it is pointed out that two orders, which are alleged to be erroneous in law were passed incidentally by the

lower Appellate Court. The *first* was that three documents were admitted which had been rejected by the first Court as out of time, and the *second* was that the Judge has directed the plaintiff to add three persons as defendants before proceeding with the case.

Now curiously enough neither of these points has any substance in it. It is clearly found by the learned Judge in the Court of Appeal below that the documents were not out of time, and his finding of fact entirely disposes of the question, and shows that the Subordinate Judge very improperly rejected these papers on one excuse on the 25th April, 1911 and on another and wholly different excuse on the 26th April when a second attempt was made to file them. We need not go into details which are fully set out in the judgment of the lower Appellate Court.

As regards the *second* point, we do not think that a somewhat confused sentence in the penultimate paragraph of the judgment was intended to mean that the burden of adding these defendants should be thrown upon the plaintiff. In another passage in the judgment the Judge clearly directed that they should be added and the case should proceed. We are clearly of opinion that Mr. Macleod was a necessary party. It is contended before us that the alleged landlord set up by persons whom the plaintiff seeks to eject need not be made a party to the suit, and certain judgments of the Judicial Committee are relied upon in which it is held that it is not necessary for the plaintiff in a suit for ejectment to make any one a party who is not in possession, merely because the defendant sets him up as his landlord. But these cases can easily be distinguished from the present case when it is found as a fact that there was a transfer of the tenancy right from the defendants to Mr. Macleod and as a fact that Mr. Macleod was rightly or wrongly admitted to the defendants' possession as tenants and that the defendants are holding under him as sub-tenants by paying him rent. Under the circumstances it is clearly not only necessary but to the interest of the plaintiff to get rid of Mr. Macleod.

As regards the other two persons Gobardhan and Indu, whom the defendants put forward as their co-sharers, the adding of co-sharers as parties, when a re-trial is necessary is a matter of discretion with the Court, and it is certainly to the interest of the plaintiff as well as to the interest of every one else that there should be some finality in this litigation and that all the co-sharers should be added.

This brings us to a reconsideration of the very first objection that the remand was incompetent in the form in which it is made. With all respect for the decision of the learned Judges in the case of *Nabin Chandar Tripati* v. *Pran Krishna Dey* (1), it may be pointed out that that decision differs from several previous cases by which we are bound, and as the learned Judges decline to refer the question to a Full Bench, because they were of opinion that it did not directly arise, the case being disposed of on another ground, it is not, therefore, an authority for the very general proposition that there is no other possible case of remand which is not included in O. 41. Now, this very matter of amendment of a plaint in an Appellate Court with the necessary addition of parties is on the face of it a case which cannot possibly fall under O. 41, R. 23 or R. 25. It is not a decision on a preliminary point, therefore, it may be said that the whole case cannot be remanded; but it is not a case in which certain issues can be framed and certain additional evidence can be taken under R. 25, for new parties having been added and the plaint having been amended, the added defendants as well as the original defendants have a right to file fresh written statements and to have the whole case re-opened. It seems to have been overlooked that in the new Code of Civil Procedure the Legislature has given this power of amendment to the Court of Appeal; and it is a necessary outcome of that power that the Court must have the power of remanding the whole case when an amendment of plaint is granted in appeal and when parties are added. There is a general provision in S. 107, Civil Procedure Code, for a remand. The consideration which we have just pointed out must lead to the conclusion that that section is not governed or limited by O. 41 alone, but it is subject to such conditions and limitations as may be prescribed in the Rules

(1) A. I. R. (1914) Cal. 163=20 I. C. 39=41 Cal. 108.

and Orders; and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the Rules and Orders. S. 107, therefore, is just as much subject to that condition as it is to the conditions laid down in O. 41.

We, therefore, hold, *firstly*, that this remand was not improperly made; *secondly*, that if it had been irregularly made, it did not prejudice anybody; *thirdly*, that the District Judge would have been grossly wanting in his duty had he not admitted those three documents, and *lastly* that Mr. Macleod is a necessary party and that the Judge exercised a wise discretion in adding the alleged co-sharers Gobardhan and Indu.

The result is the appeal is dismissed with costs, three gold *mohurs*.

V.B./R.K.

Appeal dismissed.

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SHARFUDDIN AND COXE, JJ.

Gopal Lal — Plaintiff — Appellant — Petitioner.

v.

Kerani Gope and *others*—Defendants—Respondents—Opposite Parties.

Civil Rule Nisi No. 1001 of 1914, decided on 1st February, 1915, from the Appellate Decree of Dist., Judge, Bhagalpore.

Civil P. C. (5 of 1908), O. 22, R. 9—Delay must be accounted for otherwise order of abatement remains conclusive—It is the duty of the party contesting, to bring the legal representative on record when succession to deceased is doubtful.

Under O. 22, R. 9, Civil Procedure Code, it must be proved that the appellant was prevented by sufficient cause from going on with the suit within the time allowed by law; otherwise, the appeal once abated shall not be revived; and the High Court has no discretion in the matter. [P. 285, C. 2 & P. 286, C. 1.]

When succession to the estate of a deceased person is in doubt, a person litigating with the deceased should take every step to bring his representatives on the record. 7 C. W. N. 529, ref. to and foll. [P. 286, C. 1.]

Khurshad Hossein—for Petitioner.

Chandra Sekhar Prosad Singh—for Opposite Parties.

Coxe, J.—This application arises out of an appeal preferred by Babu Gopal Lal, the plaintiff, against Kerani Gope and others. One of the respondents was Babu Ugra Mohan Thakur, who died on the 29th January, 1914. On the 28th August, 1914, the plaintiff applied that Mr. F. A. Savi, Babu Hem Chandra Mitra and Babu Suruj Mohan Thakur, a minor under the guardianship of his mother, Srimuty Sundari Debi Thakurani, should be substituted on the record as the legal representatives of the said Ugra Mohan Thakur. He obtained a Rule from this Court, calling upon the opposite parties to show cause, why the substitution prayed for should not be made. Subsequently the minor's name was expunged from the Rule at the risk of the petitioner.

The application of the 28th August, 1914 was clearly out of time, and it has been argued on behalf of the opposite parties that this Rule must, therefore, be discharged. We think, however, that the application is in substance an application for an order to set aside the abatement of the appeal, as against Ugra Mohan Thakur's representatives, which took place *ipso facto* six months after Ugra Mohan Thakur died. To succeed the appellant is bound to show that he was prevented by sufficient cause from continuing the suit, which clearly means that he was prevented by sufficient cause from taking steps in time to avoid the abatement.

It has been said that we have discretion in the matter; but, in my opinion, we have no discretion at all. If sufficient cause is proved, the appellant is entitled as a matter of right to have the abatement set aside; if it is not proved, the respondent is equally entitled to have the application refused.

Now, the sufficient cause alleged is stated in paragraph 7 of the application which runs as follows:—"Because the two wills and the appointment of the executors were *sub judice*, your petitioner's son, Babu Gulzari Lal, who looks after the aforesaid appeal, was advised by *mufussil* Vakils to wait till any decision was arrived at and that, therefore, no steps were taken towards the substitution." Evidently this is an extremely vague allegation. The petitioner says that he learnt of Ugra Mohan's death long after it had occurred. He does not say when he was given this somewhat surprising advice by the *mufussil* Vakils or whether this advice was given within

the period of six months. In the end, as I have already pointed out, he did not apply to have the party whose application for Probate succeeded made the exclusive representative of Ugra Mohan. The executors of both wills and the minor, who was the beneficiary of one of the wills, were all made representatives, and, I cannot see why the petitioner should not have made this application as it stands within a month of Urga Mohan's death. It is clear that the final form of this application was not, as a fact, influenced by the decision in the Probate cases ; for the unsuccessful parties in those cases, as well as the su cessful ones, were all made parties to it. I think it impossible to hold that, when succession to the estate of a deceased person is in doubt, a person litigating with the deceased need not take any steps to bring the representatives on the record until that doubt has been finally resolved.

The action which should be taken in such a case and which met with the approval of this Court, is described in the case of *Syed Hossein Ali* v. *Abdur Rahim* (1). In the present application, there is really nothing whatever to show that the petitioner took any steps at all of any kind within six months of Ugra Mohan's death. After that time he applied to this Court and obtained a fortnight's time but no formal order seems to have been recorded and we have nothing with respect to that order except a mere note by a clerk. We cannot, therefore, feel certain that the learned Judges, who passed that order, considered themselves to be dealing with the matter as coming under O. 22, R. 9, so that their decision would be binding upon us.

In my opinion, the appellant has not proved that he was prevented by sufficient cause from going on with this suit within the time allowed by law. That being so, the opposite parties is entitled to a declaration that the appeal, which has abated as against them, shall not be revived against them.

The rule will be discharged.

Sharfuddin, J.—I agree.

V.B./R.K.

Rule discharged.

(1) (1903) 7 C. W. N. 529.

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CHATTERJEE AND MULLICK, JJ.

Nilmoni Behara—Plaintiff—Appellant.

v.

Rukuna Bewa and *others*—Defendants—Respondents.

Appeal No. 1051 of 1913, decided on 21st July, 1915, from the Appellate Decree of Offg. Sub-Judge, Cuttack, dated 30th January, 1913.

Transfer of Property Act (4 of 1882), S. 107—When title passes—Mere execution and registration of lease is not sufficient—Intention must be present.

The execution and the registration of a deed are not always sufficient to pass title. It is always a matter of the intention of the parties. 27 Cal. 7, ref. to. [P. 287, C. 1]

Where in the matter of an alleged execution of an *istemrari* lease for consideration, it is found that there was no payment of consideration, no delivery of possession and no delivery of the document, the transaction is not complete and no title passes. [P. 286, C. 2 & P. 287, C. 1.]

Provash Chandra Mitter and *Harihar Prasad Sinha*—for Appellant.

Sarat Chandra Ghosh for *Asutosh Mookerji* and *Satyendra Nath Mookerji*—for Respondents.

Judgment.—The plaintiff's case was that defendant No. 1 had executed an *istemrari* lease in his favour for consideration and registered it and put him in possession, but that he had lost the document and been subsequently dispossessed of a part of the lands sold: he, therefore, sued for declaration of title and recovery of possession of some lands and confirmation of possession in respect of others. The defendant's plea that she had executed the document under a misapprehension has been found against her. Her further plea was that the consideration had not been paid and she had taken back the document from the Registration Office and never parted with possession but that the document was lost in a flood. The lower Appellate Court has found that there was no payment of consideration, no delivery of possession and no delivery of the document. It is contended before us that the title of the plaintiff was complete by the registration of the document and he is entitled to a decree even if no consideration was paid and no delivery of possession effected, and that the delivery of the document was not at all material.

It is not correct to say that the execution and the registration are always sufficient to pass title; see *Mauladan* v. *Rughunandan Pershad Singh* (1). It is always a matter of the intention of the parties. In this case the learned Subordinate Judge says: "Now even assuming that there was the delivery of the *patta* it amply appears from the certified copy of the *patta* itself and the oral evidence on the plaintiff's side that it was the intention of the parties that there should be immediate payment of the consideration money," and then finds that the evidence as to the payment of the consideration is unreliable. This being so, we think the learned Subordinate Judge was right in holding that the transaction was not complete and no title passed. In this view of case it is immaterial whether the landlord recognised the plaintiff and when he did so. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) (1900) 27 Cal. 7.

A. I. R. 1916 Calcutta 287

MOOKERJEE AND CHATTERJEA, JJ.

Mahendra Narain Saha and *others*—Plaintiffs—Appellants.

v.

Gurudas Bairagi and *another*—Defendants—Respondents.

Appeal No. 305 of 1915, decided on 18th February, 1916, from the Original Order of Sub-Judge, Pabna, dated 21st June, 1915.

(a) Civil P. C. (5 of 1908), O. 38, R 5 and O. 43, R. 1 (q)—Application for attachment before judgment dismissed—No appeal lies against dismissal.

Where an application for attachment before judgment made under R. 5 of O. 38, is dismissed by Court after hearing the defendants, no appeal lies under O. 43, R. 1, Clause (*q*), against the dismissal. [P. 288, C. 2.]

(b) Civil P. C. (5 of 1908), O. 38, R. 5 (3).—Application for attachment before judgment—Issue of notice to defendants to show cause—Defendants also directed not to part with property—Held direction not to part with property could not be construed to be order of conditional attachment.

Where on an application for attachment before judgement the Court directed the issue of notices upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part in any way with the properties sought to be attached.

Held, that the order of the Court was not in strict accordance with the provisions of the Code of Civil Procedure as laid down in O. 38, R. 5, and that the direction upon the defendants not to part with the properties in any way could not be construed to be in essence an order of conditional attachment within the meaning of Clause 3 of R. 5.

[P. 287, C. 2 & P. 288, C. 1.]

Mohini Mohun Chakravarti and *Purno Chandra Roy*—for Appellants.

Jatindra Nath Lahiri—for Respondents.

Judgment.

Mookerjee, J.—This appeal is directed against an order, whereby the Subordinate Judge has in substance dismissed an application for attachment before judgment. The respondents have taken a preliminary objection to the competency of the appeal.

The appellants contend that the order must be deemed to have been made under R. 6 of O. 38 of the Code of Civil Procedure, and is, consequently, open to appeal under R. 1, Clause (*q*), of O. 43 of the Code. The respondents, on the other hand, urge that the order could not possibly have been made under R. 6, that it was probably made under R. 5, and that, treated as an order under R. 5, it is not liable to be challenged by way of appeal.

To explain the relative situations of the parties, it is necessary to recapitulate briefly the course of events in the Court below. The suit was instituted on the 24th March, 1915. On the 3rd May, 1915, the plaintiffs made an application for attachment before judgment under R. 5 of O. 38 of the Code. Thereupon, the Court directed the issue of notice upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part with the properties in any way. It is plain that this was not in strict accordance with the provisions of the Code, which were overlooked by the Court and the legal advisers of the parties. The order to be made in such circumstances will be found in Form No. 5 of Appendix F to the Code of Civil Procedure. That form plainly indicates that in a proceeding under R. 5, where the Court is satisfied by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any

decree that may be passed against him, is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct one of two things to be done, namely, *either* (*a*) to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree, or (*b*) to appear and show cause why he should not furnish security. The Court may also in the order direct a conditional attachment of the whole or any portion of the property required to be attached.

In the case now before us, the Court did not make an *ex parte* order upon the defendants to furnish security; nor did the Court direct them to appear and show cause why they should not furnish security. It is also plain that the Court did not direct the conditional attachment of the whole or any portion of the property required to be attached. We have, no doubt, been pressed by the appellants to take the view that the direction upon the defendants not to part with the properties in any way was in essence an order of conditional attachment within the meaning of Clause (3) of R. 5; but we are not prepared to accept this contention as well founded. If the defendants had disobeyed the direction of the Court, they might possibly have rendered themselves liable to punishment for contempt of Court; but a transferree from them would not have been affected as he would have been, if there had been a conditional attachment of the property. We must take it, therefore, that the order as framed was not in accordance with R. 5.

The defendants, however, did appear and show cause on the 29th May, 1915. On the 21st June 1915, both parties were heard and the affidavits filed by them were considered. The Court thereupon expressed the opinion that sufficient cause had not been made out for attachment, and dismissed the application of the plaintiffs. To enable the appellants to support this appeal, it is necessary for them to establish that this is an order under R. 6 of O. 38, Civil Procedure Code. Now, the first clause of R. 6 provides that "Where the defendant fails to show cause why he should not furnish security or fails to furnish the security required within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached." The order contemplated by this clause of R. 6 is clearly an order of attachment. No such order admittedly has been made in this case. Clause (2) of R. 6 provides that "where the defendant shows such cause" [that is, shows cause, if called upon to do so, under Clause (1) of R. 5] "or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn or make such other order as it thinks fit." It is plain that the attachment which the Court is thus directed to withdraw, is a conditional attachment made in terms of Clause 3 of R. 5. No such order of withdrawal was made in this case and none, indeed, could have been made, as no attachment had been ordered. The position, in substance, is that an application for attachment before judgment has been made under R. 5; the Court has heard the defendants and has dismissed the application. The parties never reached the stage contemplated by R 6; consequently no appeal lies under O. 43, R. 1, Clause (*q*), Civil Procedure Code.

This appeal is, therefore, dismissed with costs; the hearing fee is assessed at three gold *mohurs*.

V.B./R.K.

Appeal dismissed.

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SHARFUDDIN AND COXE, JJ.

Must. Bibi Saliman — Defendant—Appellant.

v.

Udhoran Sahi—Plaintiff and Defendant—Respondent.

Second Appeal No. 3015 of 1909, decided on 5th January, 1915, against the Decree of Second Sub-Judge, Muzaffarpore, dated 7th July, 1909.

(a) Civil P. C. (5 of 1908), O. 6, R. 4—Details of fraud must be specifically stated.

A rent-decree cannot be set aside on the ground of an act of fraud which is not clearly and precisely alleged in the plaint at all. 15 Cal. 533 (P. C.), ref. to. [P. 289, C. 1 & 2.]

(b) Decree—Setting aside—Fraud—What must be proved to show fraud stated—Claimant's mistake due to entry in Record of Rights will not amount to fraud.

In a suit to set aside a rent-decree on the ground that the rent claimed was greatly exaggerated, it is for the plaintiff to prove affirmatively that the rent sued for was more than the rent due and he must also prove that the exaggerated rent was claimed in order to defraud him. [P. 289, C. 2.]

A mistake on the part of the claimant arising out of an entry in the Record of Rights will not be fraud. [P. 289, C. 2.]

Mahammad Mustafa Khan—for Appellant.

Baidyanath Narain Singh—for Respondents.

Coxe, J.—This appeal arises out of a suit for a declaration that a rent-decree obtained by the defendant No. 1 against the defendant No. 2 was fraudulent. The suit, which is said to have been fraudulent, was instituted on the 16th December, 1907. About a month before that, the plaintiff had applied for execution of a mortgage-decree, which he held against the defendant No. 2 with respect to some lands included in the defendant No. 2's holding. This land he subsequently purchased in execution of his mortgage-decree. The date of his purchase is not known to us, but it is hardly possible that it can have taken place before the institution of the rent suit.

I find it extremely difficult to appreciate what precise fraud is alleged in this case. But as I understand from the learned Pleader for the respondents, two acts of fraud are pleaded. The first is that the defendant No. 1 sued the defendant No. 2 for the rent of the holding, although the defendant No. 1 himself was in possession of it and the defendant No. 2 was not the tenant at the time of the suit. I cannot find, however, that this fraud is alleged in the plaint at all. In paragraph 2 it is stated that the defendants, in a former suit, alleged that the defendant No. 1 was in possession of the land and that the defendant No. 2 had no connection therewith, but the paragraph concludes by asserting that these statements of the defendants were found to be false and it is nowhere suggested in the plaint that that finding was wrong.

It is quite clear that the former decree cannot be set aside on the grounds of an act of fraud which is not clearly and precisely alleged, and in this connection I may refer to the well-known case of *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (1). In my opinion, therefore, the plaintiff cannot rely on the first allegation of fraud mentioned above.

The second allegation is that the rent claimed in the suit was greatly exaggerated, that the rent of the holding is Rs. 5 odd whereas the suit was brought for rent at the rate of Rs. 5 odd in cash and 4½ maunds of produce. It is clear, therefore, that to succeed in this suit the plaintiff is bound to prove that the rent was not Rs. 5 odd and 4½ maunds in produce and that the defendant No. 1 alleged that the rent was so much, in order to defraud the plaintiff. But these facts have not been found. The learned Subordinate Judge appears to have imagined, as indeed is not unusual, that when fraud was alleged by the plaintiff, it was incumbent on the defendant to prove the whole of the former case over again. He says: "The onus lay heavily on the defendant No. 1 to prove not only that the disputed lands are *mankhassa* but that the arrears decreed were justly due by the defendant No. 2." This, in my opinion, is an entire misapprehension It is for the plaintiff to prove affirmatively that the rent sued for was more than the rent due, and even that is not sufficient. He must prove also that the exaggerated rent was claimed in order to defraud him.

It appears from the Record of Rights that the amount of 4½ maunds of produce is entered in some way against this holding. The learned Subordinate Judge regards this as not amounting to proof that that amount of rent was due from the holding, as of course he is perfectly entitled to do; but he has not considered the possibility that this entry in the Record of Rights may have misled the defendant No. 1 into claiming rent which may perhaps not have been due. A mistake of this kind, if it were a mistake, would not be fraud.

In my opinion, therefore, the case must go back to the learned Subordinate Judge for re-hearing of the appeal. He must come to affirmative findings on these two questions, *firstly*, whether the plaintiff has succeeded in proving that the defendant No. 1 sued the defendant No. 2 for

(1) (1888) 15 Cal. 533=15 I. A. 119 (P. C.).

more rent than was due from the holding, and *secondly*, if the defendant No. 1 did so, whether he did so with the intention of defrauding the plaintiff. If he finds these issues in the affirmative, his decision will stand; but if otherwise, it will be his duty to dismiss the appeal.

Costs will abide the result.

Sharfuddin, J.—I agree.

V.B./R.K.

Case remanded.

A. I. R. 1916 Calcutta 290

MOOKERJEE AND NEWBOULD, JJ.

Swarnamoyi Debi—Appellant.

v.

Secy. of State—Respondent.

Appeal No. 110 of 1915 and Civil Rule No. 438 of 1915, decided on 10th August, 1915, from the Original Order of Dist. Judge, Mymensingh, dated 18th January, 1915.

(a) Court Fees Act (7 of 1870) Ss. 19C and 19 (1)—Court fee is payable according to the scale in force at time of grant of probate—Subsequent changes do not affect—Scope of S. 19 (1)—Fees are payable before grant of probate—Second grant of probate is governed by scale in force at first grant—No further fees on second grant is required—English law is the same.

Once a Probate has been granted on payment of succession-duty in accordance with the scale of Court-fee then in force, no further Court-fee can be levied for granting a second Probate in respect of the same estate, if the scale of Court-fee has, in the meantime, been revised and raised. [P. 291, C. 2.]

S. 19-I of the Court Fees Act requires the fee chargeable upon a Probate to be paid before the order for grant of Probate is made and so what constitutes "the full fee chargeable under this Act" must be determined by reference to the point of time when the grant of Probate is made. [P. 291, C. 1.]

The full fee chargeable must not be determined with reference to the point of time when the second grant is sought. [P. 291, C. 1.]

The expressions "under the Act" and "under the same Act" refer to the Court Fees Act and not the subsequent Acts amending the Court Fees Act. [P. 291, C. 1 & 2.]

It is the intention of the Legislature that when the full fee chargeable under the Court Fees Act on a Probate, at the time it is granted, has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. 6 B. L. R. App. 137 and 3 Cal. 733, foll. [P. 291, C. 2.]

In England all second and subsequent grants of Probate and Administration in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by S. 3 of 41 Geo. III, c. 86. [P. 292, C. 1.]

(b) Probate and Administration Act (5 of 1881), S. 86—Another executor appointed to complete administration left incomplete by death of first—It is not new succession—No fresh fees are required—Refusing probate to another executor for non-payment of fees not legally recoverable is appealable.

When an executor to whom Probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new new succession, no devolution of the estate and no fresh succession duty should be levied. Case-law referred. [P. 292, C. 1.]

An order refusing to issue a Probate till a sum of money, which is not legitimately leviable under the law, is paid as succession-duty, refuses in effect the application for Probate and is, therefore, appealable under S. 86 of the Probate and Administration Act. [P. 291, C. 1.]

Dwarkanath Chakravarti and *Kali Kinkar Chakravarti*—for Appellant.

Ram Charan Mitra—for Respondent.

Judgment.—This appeal is directed against an order whereby the District Judge has in substance refused to issue a Probate to the appellant till a sum of Rs. 769-3-0 had been paid as succession duty. The facts are not in controversy, and may be briefly recited. One Prasunna Kumar Bhattachariya died on the 28th October, 1908. He had previously made a testamentary disposition of his properties on the 24th March, 1907. The will provided that during the minority of his son, Amulya Kumar Bhattachariya, his estate would be administered, *first*, by his eldest sister, Gobinda Sundari Debi, and, *next*, upon her death, by his widow, Swarnamoyi Debi; the ladies were thus constituted the two successive executrixes. On the 29th April, 1909 Probate was granted to Gobinda Sundari Debi under S. 31 of the Probate and Administration Act, 1881, though it was not explicitly stated that the grant was made *durante minore etate*. The executrix died on the 17th July, 1914. As the sole residuary legatee had not yet attained his majority, the second executrix named in the will applied for Probate on the 9th September, 1914. An order was recorded on that date that no Probate duty appeared necessary as it had been paid already, and the case was fixed for disposal on the 7th November, 1914. On that date the Court directed

that the original Probate produced by the applicant be cancelled and that a fresh Probate with a copy of the will annexed be granted to the petitioner. On the 21st December, 1914, the Court reconsidered the matter and held that as the scale of Probate duty on estates valued at above Rs. 50,000 had been raised from 2 to 3 per cent. by Act VII of 1910 and as duty had been paid at the rate of 2 per cent. on the first Probate, the petitioner should be called upon to pay the difference between the duties calculated at 2 per cent. and 3 per cent. respectively. The petitioner was heard on the 18th January, 1915, and contended that under S. 19-C of the Court Fees Act, 1870, as amended by Act XIII of 1875, no further duty was payable. This contention was overruled and she was called upon to pay the additional sum named before the Probate could be issued to her. The petitioner has appealed to this Court and has also obtained a Rule in the alternative, should a question be raised as to the competency of the appeal. It is plain that the order, in effect, refuses the application for Probate and is appealable under S. 86 of the Probate and Administration Act.

S. 19-C of the Court Fees Act, 1870, which was inserted therein by S. 6 of Act XIII of 1875, is in these terms: "Whenever a grant of Probate or Letters of Administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate." It is plain that as the fee chareable upon a Probate is required by S. 19-I to be paid before the order for grant of Probate is made, what constitutes "the full fee chargeable under this Act" must be determined by reference to the point of time when the grant of Probate is made. We are unable to accept the contention that the "full fee chargeable under this Act" must be determined, with, reference to the point of time, when the second grant is sought. We are further unable to accept the contention that the expressions "under this Act" "and under the same Act" refer to, not the Court Fees Act, but the subsequent Acts amending the Court Fees Act. What the Legislature appears to have intended is that where the full fee chargeable under the Court Fees Act on a Probate at the time it is granted has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. If this interpretation were not accepted, and if the contention of the Government Pleader were to prevail, the anomalous result would follow that S. 19-C would have no application where, as in the case before us, the scale of Probate duty has been raised in the interval between the grant of the first and the second Probates, and consequently, the entire Probate duty in the enhanced scale would be payable without deduction of the duty previously paid. This could hardly have been the intention of the Legislature. The second paragraph of S. 19-C would be of no avail, as it is restricted to grants in respect of property forming part of an estate. In our opinion, the interpretation put upon the first paragraph of S. 19-C by the appellant is reasonable and is undoubtedly consistent with the language used. We hold accordingly that as the full fee chargeable under the Court Fees Act on the first Probate granted in this case on the 29th April, 1909 was paid thereon, no fee is now chargeable under the Court Fees Act on the second grant. This view does not militate against the decision of Couch, C. J., in *In the goods of Chalmers* (1) and of Garth, C. J., in *In the goods of Gasper* (2). In the former case, the first grant had been made and a fixed duty paid thereon under the Indian Succession Act, 1865, while the second grant was made after the Court Fees Act, 1870, had come into force. In the latter case the circumstances were similar, with this difference that S. 19-C had meanwhile been inserted in the Court Fees Act, but that section could not avail, as it refers expressly to cases where both the first and the second grants had been made after the Court Fees Act had come into force. Nor is any assistance derived from the decision of Norman, C. J., in *In the Goods of Peter Innes* (3), which merely

(1) (1871) 6 B. L. R. App. 137=21 W. R. 246 *note*.
(2) (1877-78) 3 Cal. 733.
(3) (1871) 16 W. R. 253=8 B. L. R. App. 43.

recognises the principle subsequently embodied in the second paragraph of S. 19-C. We may add that the view adopted by us places the law in this country in a line with what has long been the law in England. There, all second and subsequent grants of Probate and Administration, in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by S. 3 of 41 Geo. III, c. 86: S. 36 of 5 and 6 Vict., c. 82, contains a corresponding provision for Ireland. It may further be observed that if the question be considered as one of principle, the rule as formulated in England and as interpreted by us is evidently just. When an executor to whom Probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new succession, no new devolution of the estate and it is difficult to appreciate why a fresh succession duty should be levied. A good illustration is afforded by the case of *In the goods of Samuel Balthazar* (4); there, Letters of Administration had previously been issued in respect of the whole property, and the full fee chargeable on the property at the value then placed upon it had been levied. It was ruled that when a new grant had to be made under S. 229 of the Indian Succession Act on the death of the first Administrator, no further Court-fee was leviable, although the value of the property had increased in the meantime. This is consistent with the decision of Norman, C. J., in *In the goods of Ameerun* (5) that no duty is payable on a double Probate which recites and in fact proceeds upon the first. Reference may in this connection be made to the following passage from Williams on Executors, 10th Edition, Volume 1, P. 295; "Probate granted to one of several executors enures to the benefit of all. *Webster* v. *Spencer* (6) and *Cummins* v. *Cummins* (7). Where there are several executors, upon the grant of Probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the Probate already granted enures to their benefit, and because they have a right to the grant, whether the power be reserved or not. The practice is to take out what is called a double Probate, which is in this manner. The first executor that comes in, takes Probate in the usual form, with reservation to the rest. Afterwards if another comes in, he also is to be sworn in the usual manner and an engrossment of the original will is to be annexed to such Probate in the same manner as the first, and in the second grant such first grant is to be recited; and so on, if there are more that come in afterwards. 4 Burn. E. Law 310, Phillimore's Ed.: *In the goods of Bell* (8). If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one will to be proved, one proving of it suffices. Wentw. Off. Ex. 31, 14th Edn., Bacon's Abr. Exors. C-4. So if B is made executor for 10 years and afterwards *C* is to be executor, and B proves the will and the 10 years expire, *C* may administer without any further Probate. *Anon.* (9), *Anon.* (10) and *Watkins* v. *Brent* (11)." In our opinion, we cannot reasonably hold that the appellant is bound to pay additional Probate duty.

The result is that this appeal is allowed, and the order of the District Judge dated the 18th January, 1915 set aside. Probate will be granted to the appellant without payment of fresh Probate duty.

The Rule will stand discharged.

V.B./R.K.

Appeal allowed; Rule discharged.

(4) (1907-08) 4 L. B. R. 255.
(5) (1871) 15 W. R. 496.
(6) 3 B & Ald. 360=22 R. R. 427.
(7) 3 Jo. & Lat. 64=8 Ir. Eq. R. 723=72 R. R. 29.
(8) (1871) 2 P. & D. 247=40 L. J. P. 67=25 L. T. 163.
(9) 1 Freeman 313=89 E. R. 231.
(10) 1 Ch. Case 265=22 E. R. 793.
(11) 1 Myl. & Cr. 97=7 Sim. 512=5 L. J. Ch. 49.

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HOLMWOOD AND MULLICK, JJ.

Kiranbala Devi—Plaintiff—Appellant.

v.

Kali Charan Singha—Defendant—Respondent.

Appeal No. 249 of 1915, decided on 21st December, 1915, from the Original

Order of Sub-Judge, Berhampore, dated 19th April, 1915.

(a) Hindu Law—Widow—Decree against widow directing sale of her interest in husband's property—Construction.

Where a decree against a Hindu widow directs her right, title and interest in the husband's property to be sold, the test to be applied in order to determine the exact interest that will pass by the sale depends upon the question, whether the suit in which the sale is directed is one brought against the widow upon a cause of action personal to herself or one which affects the whole inheritance of the property in suit. 7 Cal. 357 and 10 Cal. 985 (P.C.), foll.

[P. 294, C. 1.]

(b) Hindu Law—Widow—Decree against widow—Court should specify nature of decree—Decree—Construction.

In making a decree against a Hindu widow, a Court ought to state specifically whether the decree is a personal decree or one against her as representing her deceased husband. 6 Cal. 479, appl.

[P. 294, C. 2.]

(c) Hindu Law — Widow — Decree against widow—Nature of decree—Personal or as representative of husband not specified—Court dealing with decree can interpret it according to sound principles of law—Decree—Construction.

In the absence of any specification as to whether a decree against a Hindu widow is a personal decree or one against her as representing her deceased husband, it is open to any Court dealing with the decree to interpret it in accordance with sound principles of law and it is not open to the Judge who made the decree to interpret it in a sense which would render it contrary to law.

[P. 294, C. 2.]

(d) Hindu Law—Widow—Decree for mesne profits against widow—Construction—Frame of original suit can and should be gone into—Decree—Construction.

In interpreting a decree against a Hindu widow for mesne profits of a property, the frame of the original suit for recovery of possession of that property can and should be gone into. 6 C. L. J. 490, ref. to.

[P. 2944, C. 2.]

Brij Lal Chakraverty and *Guru Das Sinha*—for Appellant.

Lal Mohan Ganguly—for Respondent.

Judgment.—This is an appeal from an order of the learned Subordinate Judge of Berhampore directing that the life-interest of a Hindu widow in certain Government promissory notes should be sold in the first instance and if this is not sufficient, the promissory note themselves should be sold.

The decree against the widow was for mesne profits of a property recovered by the decree-holder in litigation with her husband. Part of the mesne profits accrued due during the husband's life-time and part after his death.

The learned Judge divided the claim into three periods:—1. The period of the husband's life-time for a few months in 1312. 2. The period of the executors of the estate under a forged will during the remainder of 1312 and up to *Assin* 1316. 3. The widow's period from *Kartick* 1316 to *Chaitra* 1317 when she gave up possession. Shyamacharan Singh, the husband, died on the 1st April, 1906. Litigation was then still going on. Plaintiff's title to recover possession of ⅓rd had already been declared but there was an appeal pending.

Plaintiff sued to recover possession with mesne profits on the 29th July, 1907. The suit was kept pending for the Privy Council decision in appeal as to the title. The Privy Council delivered judgment on the 14th February, 1911—2nd *Falgun* 1317 and the widow made over possession directly. She had notice of the decision in March, 1911—*Chait* 1317. On the authorities it is clear that the widow could not be made personally liable for the mesne profits on her husband's estate. Only the estate itself could be made liable.

The widow was bound to defend the litigation by which it was sought to diminish her husband's estate by one-third. She did no wrongful act. She had no possession herself after the final decree of the Judicial Committee. She must, therefore, have been sued in her representative capacity for mesne profits and if her right, title and interest were put up for sale as it ought to have been, what would pass would be the estate of the husband. But in an enquiry as to the amount of mesne profits due to the decree-holder the learned Subordinate Judge passed a judgment on the 29th August, 1914, which matured into the decree now sought to be executed, declaring that Kiranbala Dassi, the widow appellant, was liable for mesne profits from 1st *Bysack* 1313, Rs. 2,205 odd with interest and future interest till realization, *secondly* from 1st *Bysack* 1316, Rs. 2,306 odd with interest as before and *thirdly*, Rs. 5,936 from 1st *Bysack* 317. Now the dates given in the decretal order and the decree appear not to tally with the periods set out by the Judge or with the findings of the Commissioner.

The first item appears to be for the first period, that is, the period during Shyamacharan's life-time.

This alone shows that the decree against Kiranbala for this sum, whatever the learned Judge who made it may say, was a decree in her representative capacity and the respondent has admitted before us that he does not press for the personal liability of the widow as far as that amount is concerned. That being so, as all the items are governed by the words "Kiranbala is liable" the whole decretal order must be interpreted as meaning liable in her representative capacity. To hold otherwise would be to hold that the decree passed was contrary to all principle and authority and that a gross injustice was intended to be inflicted on the unfortunate lady by the Court. We observe that the learned Judge himself finds that it is quite true that the object of the decree-holder is to make Kiranbala Debi a beggar, because the promissory notes will pass out of her hands for a sum insufficient to cover the decree and they will have to be sold again at their face value as part of the husband's estate, yet he finds it impossible to interpret his own decree in the only way it can be interpreted so as to make it a legal and valid decree. In any case there was no decree against the life-interest of Kiranbala specifically. All that could be sold was her right, title and interest and if that had been done, the test to be applied in order to determine the exact interest which passed at the sale would depend upon the question whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself, or one which affects the whole inheritance of the property in suit. *Jotindra Mohun Tagore* v. *Jugal Kishore* (1) upheld by *Jugal Kishore* v. *Jotindro Mohun Tagore* (2). An examination of the Sub-Judge's judgment on which the decree is based clearly shows that for the first period during her husband's life-time the widow could not be personally liable, for the second period, she has been held not liable as the executors who got possession under a forged will could alone be liable; how then could she be liable for the third period in any other capacity than that in which she has been found liable in the decree for the mesne profits accrued due during her husband's life-time? The learned Subordinate Judge has neglected to carry out the sound rule that was laid down by this Court in the case of *Romkishore Chuckerbutty* v. *Kallykanto Chuckerbutty* (3) in neglecting to state specifically whether the decree against the Hindu widow is a personal decree or one against her as representing her deceased husband and it was, therefore, open to any Court dealing with the decree to interpret it in accordance with sound principles of law and it was certainly not open to the Subordinate Judge to interpret it in a sense which would render in contrary to law. Even if the widow had been personally responsible for retaining possession after her husband's death, which in this case she certainly was not, there is authority for holding that inasmuch as the origin of that debt was in her husband, and the proceeds of the sale could not be applied exclusively to a liability incurred after the husband's death, what would pass in a sale of the right, title and interest of the widow would be the estate of inheritance: *Rajah Debendro Narain Roy* v. *Coomar Chundernath Roy* (4). In a suit in which the estate of her husband is in any way involved, the widow represents the whole estate of her husband and she alone is entitled to be a party as representing the estate and the decree fairly and properly obtained against her will bind the whole estate. See *Katama Natchier* v. *Srimut Rajah Moottoo Vijaya Ragunadha Bodha Gooroo Sawmy Periya Oodaya Taver* (5).

There can be no doubt on the facts, pleadings and judgment in this case that the widow was sued for mesne profits in her representative capacity and even after sale under the decree the frame of the original suit can and should be gone into, as was pointed out by Mookerjee, J., in *Roy Radha Kissen* v. *Nauratan Lall* (6), where all the authorities on this point are collected.

A *fortiori* this can and should be done in interpreting the decree before sale when the decree does not specifically show on the face of it whether it was a decree against the widow in her personal or her representative capacity. We,

(1) (1881) 7 Cal. 357.
(2) (1884) 10 Cal. 985=11 I. A. 66 (P. C.).
(3) (1881) 6 Cal. 479.
(4) (1873) 20 W. R. 30.
(5) (1861-63) 9 M. I. A. 539=2 W. R. C. R. 31 (P. C.)
(6) (1907) 6 C. L. J. 490.

therefore, think that the order of the Subordinate Judge is erroneous and that all that can be sold in execution is the right, title and interest of the widow in the estate of her deceased husband. The petition for execution against her personal life interest is infructuous and must be dismissed with costs as an appeal from order valued above Rs. 10,000.

V.B./R.K.

Order set aside.

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IMAM AND GREAVES, JJ.

Jitendra Nath Palit —Plaintiff.

v.

Lokendra Nath Palit and *others* —Defendants.

Original Suit No. 1384 of 1914, decided on 15th July, 1915.

Calcutta University Act (8 of 1904), Ss. 3 and 14—Powers of University to accept even conditional gifts on trust and possess property is unfettered—Grant does not fail even if conditions are inoperative—Term "Student" in S. 3 is not restricted to any particular University—Exclusion of one trustee by legal disability does not affect powers of other trustees—Object of Act of 1904 is to extend its usefulness—Calcutta University regulations do not curtail its power in accepting conditional gifts—Scope of S. 2 of Regulation, stated—Absence of previous sanction of Governor-General or non-acceptance by Senate or irregular affixing of University seal does not invalidate a gift—These are mere irregularities that can be cured.

The powers of the Calcutta University under Act II of 1857 and Act VIII of 1904 to hold and possess property for its purposes are extensive and the University is empowered to accept trusts, grants or charitable gifts beneficial for its purposes, even where they are subject to conditions. The grant cannot fail, even if the conditions accompanying it are held to be invalid or incapable of fulfilment by the University. [P. 301, C. 1 & 2.]

The term 'students' in S. 3 of Act VIII of 1904 is not confined to students of any one University in particular. There is nothing in the Act to prohibit the University giving their aid to research by students who may not belong to any University and yet, by their exceptional gifts, may well be requisitioned to extend the bounds of knowledge. [P. 302, C. 1.]

The exclusion of one of several trustees, by reason of legal disability, would neither occasion a failure of the trust, nor affect the status of the other trustees or their competence to carry out the directions in the trust-deed. [P. 303, C. 1.]

Per *Imam, J.*—If the trusts constitute a charitable gift and the conditions are illegal, the charity takes the gift discharged from the conditions. [P. 301, C. 2.]

The object of Act VIII of 1904 is to extend the usefulness of the University and not to cramp it and to construe the term 'students' (in S. 3) to mean the students of the University alone is to fall into a rigidity of interpretation that is neither justified by the words of the Act nor its purpose. [P. 302, C. 1 & 2.]

Neither Act II of 1857 nor Act VIII of 1904 fetter the discretion of the Calcutta University to accept gifts subject to conditions. It could never have been intended that a grantor should either hand over his property free to the University or not make a grant at all. [P. 302, C. 2.]

The Calcutta University Regulations which are derived from the Acts themselves, do not curtail the power of the University to accept endowments of Professorships made by donors subject to conditions. [P. 302, C. 2.]

S. 2 of the Regulations, read with S. 1, does not mean that the University can accept such Professorships only as are sanctioned by the Governor-General in Council. The qualifying word 'likewise' in the first line of S. 2 does not govern the word 'accept' in the last but one line of that section. S. 2 clearly leaves it to the University to determine the fitness of an endowment for the purposes of their acceptance and it is not *ultra vires* of the University to accept fresh endowments subject to conditions. [P. 302, C. 2 & P. 303, C. 1.]

Per *Greaves, J.*—(*Obiter*)—If it is within the power of the University to accept trusts or gifts under Acts II of 1857 and VIII of 1904, the fact that the internal Regulations of the University may not have been observed, as that the previous sanction of the Governor-General was not obtained, that the Senate did not accept the trust or that the seal was irregularly affixed to the indenture, cannot invalidate the gift, as no question of *ultra vires* arises and these are merely irregularities, which, if necessary, can be cured at any time. [P. 309, C. 2.]

One Sir Tarak Nath Palit granted, by two separate indentures and by his last will and testament, certain properties to the Calcutta University for the diffusion of Scientific and Technical Education in Bengal. The grant was made subject *inter alia* to the following conditions, (1) that the University of Calcutta should found two Professorships or chairs, one of Chemistry and the other of Physics to be filled by Indian Professors, (2) that there should be a governing body to manage the trust, a proportion of them to be the nominees of the founder or his heirs and some members to be foreign to the University. Clause 9 of the Indenture provided that, during the settlor's life-time, the trustees should never be less than three in number and by Clause 11 it was declared that, during the settlor's life-time, he, in conjunction with any of the trustees, should be competent to do all the acts required to be done by the trustees or to exercise all the powers conferred upon them. The indenture was executed by the parties thereto, the seal of the University being affixed by the Vice-Chancellor. The plaintiff, one of the sons of the grantor, brought the present suit against the executors of the testator's estate and the University of Calcutta for a declaration that the grant to the University was invalid in law and for an order that the executors do administer in due course of law the

properties as assets of the late Sir Tarak Nath Palit. The plaintiff urged that it was beyond the powers of the University to accept the grant subject to the donor's conditions and in view of the constitution of the governing body which was to include members foreign to the University. He also took minor objections, as, that the Senate did not accept the grant, that the sanction of the Governor-General was not obtained and that the action of the Vice-Chancellor in affixing the seal of the University to the indentures was irregular. It was also urged by the plaintiff that it was *ultra vires* of the University to act as trustee during the life-time of Sir Tarak Nath Palit, and that the surviving trustees on Sir Tarak Nath's death could make no valid assurance or transfer of the properties to the University, inasmuch as they were never vested in them. It was, however established from the Minutes of the Syndicate that the gift was accepted by both the Syndicate and the Senate and that the Vice-Chancellor was authorized to take such further steps in the matter on behalf of the University as he might deem necessary:

[P. 309, C. 1.]

Held, (1) that under Clauses III and XIV of Acts II of 1857 and VIII of 1904, the University had power to accept the grant;

[P. 309, C. 1.]

(2) that there was nothing in the Regulations made under the Act prohibiting the acceptance of the conditions imposed by the donor;

[P. 302, C. 2.]

(3) that, assuming that the subsidiary objections, *viz.*, the want of the Governor-General's sanction or the consent of the Senate or the affixture of the seal by the Vice-Chancellors without the Syndicate's sanction, were true, they did not invalidate the grant; [P. 309, C. 2.]

(4) that it was competent to the surviving trustees, on Sir Tarak Nath's death, to make a valid transfer of the trust property to the University. [P. 310, C. 1.]

H. D. Basu, *L. James* and *Arabinda Ray* - for Plaintiff.

Advocate-General, *B. Chakravarti* and *M. R. Mehta* – for Defendants.

Imam, J.—This is an action brought to declare that two indentures, dated the 15th June, 1912 and the 8th October, 1912 respectively, executed by the late Sir Tarak Nath Palit are invalid and inoperative in law and that the properties covered by those indentures are unaffected thereby and form part of the estate of the deceased, and further for an order that the executors under the will of the late Sir Taruk Nath do, in due course of law, administer the said properties as assets belonging to his estate.

The plaintiff Mr. Jitendra Nath Palit is one of the two sons of the late Sir Taruk Nath, and, under the Hindu Law of the Bengal School by which the family is admittedly governed, is one of the heirs of the deceased.

Sir Tarak Nath died on the 3rd October, 1914, leaving a will dated the 2nd May, 1914, whereby he appointed his second son Mr. Lokendra Nath Palit and Mr. Sisir Kumar Mullick executors thereof. At the time of his death his heirs were his two sons above mentioned and his widow Lady Palit.

By the first indenture dated the 15th June, 1912, Sir Tarak Nath purported to transfer and convey certain properties to the University of Calcutta on the conditions and upon the trusts mentioned in that deed.

By the second indenture dated the 8th October, 1912, he purported to transfer and convey to himself, Sir Asutosh Mookerjee, Mr. Sisir Kumar Mullick, and the University of Calcutta, certain other properties upon trusts and conditions mentioned in that deed.

By his will dated the 2nd May, 1914, after making certain express requests in favour of some persons he devised the residue of his estate to the University of Calcutta to be held and applied by that body upon trusts specified in the two indentures.

Sir Tarak Nath's object in creating the trusts can best be expressed in his own language, which I quote here from the first indenture:—

"And whereas the Founder (meaning himself) has for sometime past contemplated doing something of a permanent character for the promotion and diffusion of Scientific and Technical Education in Bengal and the cultivation and advancement of Science, Pure and Applied, amongst his countrymen, and in the belief that this object could be best attained by the establishment of University Professorships of Science as a first step towards the foundation of a University College of Science and Technology, he approached the said University of Calcutta, &c, &c."

The conditions in that indenture are the following:—

(*a*) The University of Calcutta should found two Professorships or Chairs, one of Chemistry and the other of Physics, and apply the entire income of the properties covered by the indenture or so much of it as they deem necessary towards the maintenance of those two Chairs, and should the entire income be found insufficient for the purpose, the University should make such recurring

grant or contribution as may be required to supplement the deficiency.

(*b*) The said Chairs shall always be filled by Indians (that is, persons born of Indian parents as contradistinguished from persons who are called 'Statutory Natives of India') to be nominated by the Governing Body hereafter mentioned, who may in their discretion require a Professor-elect to receive special training abroad before he enters upon the duties of his office and who may give such Professor-elect during such period of his training abroad such allowance, including travelling expenses, as may in each case be determined by the Governing Body—such allowance being considered as part of the maintenance expenses of the Chair or Chairs.

(*c*). In connection with the said Chairs the University shall from its own funds provide suitable Lecture Rooms, Libraries, Museums, Laboratories, Workshops and other facilities for teaching and research, and it shall out of its own funds earmark and set apart a sum of two lakhs and fifty thousand rupees and apply the same towards the construction of such Lecture Rooms, &c., of permanent and substantial structure with proper and adequate equipment on the site of premises No. 92, Upper Circular Road, one of the properties covered by the indenture.

(*d*). The Governing Body shall consist of the following persons :—

(1) The Vice-Chancellor of the University as *ex-officio* president. (2) The Director of Public Instruction, Bengal. (3) The Dean of the Faculty of Science of the University. (4). The Dean of the Faculty of Engineering of the University. (5) Four members of the University to be annually elected by the Senate, at least two of whom shall be representatives of Calcutta Colleges under Indian management affiliated in Science to the University. (6) Four members to be nominated every three years by the Founder, and after his death by his representative or representatives in that behalf. The Hon'ble Sir Asutosh Mookerjee shall always be a nominee of the Founder if he has not otherwise a seat on the Board of the said Governing Body. The power of nominating a successor or successors shall be inherent in every original or derivative nominee of the founder. (7) Two representatives of the Professorial Staff to be elected by them annually from amongst themselves.

(*e*) The University shall from its own funds make such recurring and periodical grants as may be required (*a*) for the maintenance of the two Chairs, (*b*) for the maintenance of the Lecture Rooms, Libraries, &c., in such a state of efficiency as may be required and approved of by the Governing Body, subject to the control of the Senate, (*c*) for the maintenance and repairs of the buildings to be erected at No. 92, Upper Circular Road, and (*d*) for the payment of all rates and taxes and other impositions payable in respect of the said premises.

(*f*). It shall be the duty of the Professors (*a*) to carry on original research with a view to extend the bounds of knowledge, (*b*) to stimulate and guide research by advanced students, and as an essential preparation for this purpose, (*c*) to arrange for the adquate instruction of students for the Degrees of Bachelor of Science with Honours and Master of Science and Doctor of Science exceptionally and also of other students who may be qualified in any of the subjects of study though they may not be even under graduates of any University, provided that they be recommended by the said Governing Body.

(*g*). If the income of the endowed properties exceed the amount required for the maintenance of the two Chairs, such surplus income may at the discretion of the Governing Body be applied to the payment of Scholarships or Stipends to such advanced students for the Degrees of Master of Science or Doctor of Science as may receive training or carry on research under the said Professors—the number and value of such Scholarships to be determined by the said Governing Body.

(*h*). The income of the endowed properties shall be accumulated by the University until the Chairs are founded, the accumulations to be treated as part of the *corpus* of the endowed properties.

(1) The buildings now standing upon the premises No. 92, Upper Circular Road, shall be dismantled under the direction of the University who shall sell the old materials and hold the sale-proceeds as part of the *corpus* of the endowed properties.

The indenture recites that the University having agreed to accept the Founder's

offer of the properties upon the conditions and trusts above stated, he, in pursuance of the agreement and in consideration of the premises granted, transferred and conveyed to the University the properties set out in the schedules to the indenture, and it was agreed and declared between the parties to the indenture that the University should hold the endowed properties on the conditions and upon the trusts already recited. On behalf of the University the indenture was executed by their Vice-Chancellor, Sir Asutosh Mookerjee, who affixed to the deed the common seal of the University.

By the second indenture dated the 8th October, 1912 made between Sir Tarak Nath (therein described as the Settlor) of the first part, Sir Asutosh Mookerjee, Mr. Sisir Kumar Mullick and the University of Calcutta (therein described as the Trustees) of the second part, and the University of Calcutta (therein described as the Trustee University) of the third part, the Settlor granted, conveyed, assigned and transferred the properties mentioned in the schedules to the indenture to the Trustees upon the trusts and to and for the ends, intents and purposes declared in the identure, *viz.*: —

(*a*) During the life-time of the Settlor to permit him to collect, receive and take the rents, issues, profits, dividends and income of all the Trust Estate for his absolute use and benefit.

(*b*) Upon the death of the Settlor the Trustees or the survivors or survivor of them do and shall transfer and make over the said Trust Estate to the University of Calcutta, who shall thenceforth become the sole Trustee of the said indenture and shall hold and stand possessed of the Trust Estate upon the following trusts.

(1) To collect the income of the Estate and thereout pay all necessary charges.

(2) To set apart Rs. 1,00,000 out of the Trust Estate and to apply the net income thereof in perpetuity in establishing and maintaining Scholarships for advanced students in Science to enable them to carry a research or investigation outside India, the number and value of such Scholarships to be determined by the Governing Body mentioned in the indenture dated the 15th June, 1912, the right of nomination to any of the Scholarships resting with the Governing Body.

(3) To pay and to transfer to the authorities of the institution known as the Sakhi Shilpa Samity, Government Securities of the 3½ per cent. loan of the nominal value of Rs. 15,000 whenever the same may be required by that institution, to be applied by it for providing local habitation for Hindu widows, and upon an undertaking by that institution to refund the same to the Trustee University whenever the said local habitation ceases to be utilized for the promotion of the welfare of the Hindu widows, in which event the Trustee University to hold the amount so refunded upon the trusts declared in the indenture of the 15th June, 1912.

(4) To pay and transfer to the Albert Victoria Hospital, Calcutta Medical School and College of Surgeons and Physicians, Bengal Government Securities of the 3½ per cent. loan of the nominal value of Rs. 50,000 when the same may be required by that institution, to be utilized by it for the purpose of providing the said institution with a well-equipped Laboratory, upon an undertaking by the said institution, that in the events of the said institution ceasing to exist, or failing to carry out the purpose of the grant, to refund the amount of the securities to the Trustee University, the University to hold and apply the same upon the trusts set out in the indenture of the 15th June, 1912.

(5) To pay out of the income of the Trust Estate a sum of Rs. 15 per month to Srimati Rani Palit, the daughter of the Settlor's nephew, for the term of her natural life.

(6) To make such contribution, if any, as in the University's discretion may appear desirable in order to provide for adequate instruction and to give facility to female students who may be desirous of prosecuting their studies for the Degrees of Bachelor of Science with Honours, Master of Science or Doctor of Science, and also to other female students who may be exceptionally qualified in any of the relevant subjects of study though they may not be undergraduates of any University.

(7) To apply the entire balance of the income of the Trust Estate in aid of and for the better carrying out of the trusts in the indenture of the 15th June 1912.

The parties executed this indenture and Sir Asutosh Mookerjee, Vice-Chancellor

of the University, affixed the common seal of that body to the deed.

In the plaint the plaintiff has been reticent in enunciating the grounds on which he seeks the indentures to be declared invalid and inoperative, but at the trial his contention has been that in accepting the trusts the University have gone beyond their powers and it has been '*ultra vires*' of them to undertake to carry out trusts that are in their nature not consonant with the law governing the University. The plaintiff contends that it was *ultra vires* of the University:

(*a*) To agree that the Chairs shall always be filled by Indians.

(*b*) To agree that the Professors shall be elected by a Governing Body created by the founder.

(*c*) To leave to the Governing Body the determination (1) of whether the Professor-elect should receive special training abroad before entering upon his duties, and (2) of the amount payable to such Professor for allowance and travelling expenses.

(*d*) To agree to make recurring or periodical grants or contributions for the purposes mentioned in the first indenture.

(*e*) To agree to provide for instruction of persons who may not even be undergraduates of any University.

(*f*) To agree that the surplus income should at the discretion of the Governing Body be applied to the payment of Scholarships or Stipends, the number and value of which are to be fixed by that body.

(*g*) To agree to the creation of a Governing Body, some members of which are foreign to the University.

It is further contended that the University by accepting the terms of the trusts have divested themselves of their statutory powers in favour of the Governing Body, which they were not competent to do.

The objections stated above are pressed against the first indenture, and as the educational purpose of the second indenture is subject to the first indenture, the second indenture is also assailed on those grounds. There are, however, some objections that are special to the second indenture, and they are:

(*a*) That the University could not accept the trust for preserving the life-estate of Sir Tarak Nath.

(*b*) That the University cannot administer the trusts in favour of (1) Sakhi Shilpa Samity, (2) Albert Victor Hospital, and (3) Srimati Rani Palit.

There are certain other objections, minor in their character, that have been pressed against both the deeds. They are:—

(*a*) That the previous sanction of the Governor-General in Council has not been obtained for the foundation of the two Chairs in accordance with Chapter IX of the Regulations framed under Act VIII of 1904.

(*b*) That the Senate of the University have not accepted the trusts.

(*c*) That the common seal of the University was affixed by the Vice-Chancellor without the express authority of the Senate.

(*d*) That the Registrar, being the custodian of the common seal, was the person to affix it.

The parties to this suit are (1) Mr. Lokendra Nath Palit in his individual capacity and also as one of the executors of the will of the late Sir Tarak Nath, (2) Mr. Sisir Kumar Mullick, the executor, and (3) the University of Calcutta.

In their written statements the first two defendants have submitted the contentions of law raised by the plaintiff to the judgment of the Court and have urged no defence. The University of Calcutta, on the other hand, have contended that each of the two indentures is, and all the trusts thereunder are, valid and binding under the law and equity, and that the University have an unimpeachable title thereunder as also under the residuary devise contained in the 10th Clause of the will. The University have further contended that the trusts are being, and ought to be, carried out, regard being had to the clear intention of Sir Tarak Nath manifested in the two indentures and his will to devote the properties to the advancement of education in Bengal.

The properties comprised in the two indentures are in the possession of the University. The properties comprised in the second indenture have already been assured and transferred to the University by the surviving trustees under that deed.

The issues framed in the case are:—

(1) Does the plaint disclose any cause of action; and is the suit maintainable in

its present form in view of S. 42, Specific Relief Act?

(2) Are the two indentures of the 15th June, 1912 and 8th October, 1912, and the deed of transfer of properties assured by the indenture of the 8th October, 1912, after Sir Tarak Nath Palit's death valid and operative in law, and have the University acquired a good and indefeasible title thereunder?

(3) Have the University acquired a good and indefeasible title under the residuary devise and bequest in the will?

(4) Has not the Settlor by the two indentures of the 15th June, 1912 and 8th October, 1912 evinced a general intention to give his property to charitable and educational purposes for the use of the University to which the Court will give effect?

(5) Are not the Sakhi Shilpa Samity, the Albert Victor Hospital and Srimati Rani Palit, who are beneficiaries under the indenture of the 8th October, 1912, and each of them, necessary and proper parties to this suit, and is not the suit bad for their non-joinder?

After the above issues were framed, it was intimated to the Court that Mr. Lokendra Nath Palit in view of the 4th issue wished to be separately represented by Counsel in his individual capacity as distinguished from his capacity of an executor of his father's will, and at the trial he was so represented.

The powers of the University of Calcutta are governed by Act II of 1857, whereby that body was established and incorporated, and Act VIII of 1904. The intendment of the establishment of the University, as expressed in the preamble to Act II, was "for the purpose of ascertaining, by means of examination, the persons who have acquired proficiency in different branches of Literature, Science and Art, and of rewarding them by Academical Degrees as evidence of their respective attainments and marks of honour proportioned thereunto." The persons mentioned in S. 1 of that Act were constituted and declared to be one body politic and corporate by the name of the University of Calcutta with perpetual succession and a common seal, and by S. 2 this body corporate was empowered to take, purchase and hold any property, movable or immovable, which might become vested in it for the purpose of the University by virtue of any purchase, grant, testamentary disposition or otherwise. S. 8 of that Act provides that the Chancellor, Vice-Chancellor and Fellows, for the time being, shall have the entire management of, and superintendence over, the affairs, concerns and property of the University, and in all cases unprovided for by the Act it shall be lawful for them to act in such manner as shall appear to them best calculated to promote the purposes intended by the University. In 1904, Act VIII, which was to be deemed to be part of Act II of 1857, was passed. S. 3 of Act VIII provides that the University shall be and shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University Professors and Lecturers, to hold and manage educational endowments, to erect, equip, and maintain University Libraries, Laboratories, and Museums, to make Regulations relating to the residence and conduct of students, and to do all acts consistent with the Act of Incorporation and Act VIII which tends to the promotion of study and research.

The constitution and powers of the Senate of the University are set out in S. 4, Clause 3, which states that the body corporate shall be the Senate of the University, and all powers which are by the Act of Incorporation or by this Act conferred upon the Senate, or upon the Chancellor, Rector, Vice-Chancellor and Fellows in their corporate capacity, shall be vested in and exercised by the Senate constituted under this Act, and all duties and liabilities imposed upon the University by the Act of Incorporation shall be deemed to be imposed upon the body corporate as constituted under this Act. This Act vests the Executive Government of the University in the Syndicate.

To provide for matters relating to the University, S. 25 of the Act empowers the Senate with the sanction of the Government, which in the case of the University of Calcutta means the Governor-General in Council, to, from time to time, make Regulations consistent with the Act of Incorporation as amended by this Act, and with this Act; and S. 26 provides that where a draft body of Regulations is not submitted

within the time allowed, the Government may make the Regulations. In the present instance the University not having submitted the draft body of Regulations within the time allowed, the Government made the Regulations to provide for matters relating to the University. It will be seen from the Act II of 1857 and Act VIII of 1904 that the powers of the University to hold and possess property for their purposes are extensive and no objection to their accepting the trusts in question could validly be urged if the Acts alone had to be considered and construed. The plaintiff's main attack on the indentures is derived from the Regulations, and we are asked to hold, at least on the basis of the Regulations, that it has been *ultra vires* of the University to undertake the trusts in terms of the indentures.

The provisions of the Regulations material to the consideration of the questions raised in this case are contained in Chapter I, S. 4; Chapter III, S. 4; Chapter IV, Ss. 12 and 15; Chapter VI, S. 3; Chapter VII, S. 4; Chapter IX Ss. 1, 2, 9 and 10.

S. 4 of Chapter I says that no question shall be brought under the consideration of the Senate which has not first been considered by the Syndicate.

S. 4 of Chapter III provides that each Faculty shall erect its Dean annually from its own number as soon as its members have been appointed.

Chapter IV deals with the Syndicate, and S. 12 of that Chapter lays down, amongst other matters, that it shall be the duty of the Syndicate to consider and report upon matters to be submitted to the Senate, to administer the funds and to keep the accounts of the University, to correspond on the business of the University with the Government and all other authorities and persons, and generally to conduct the affairs of the University in accordance with the Act of Incorporation and Act VIII of 1904, the Regulations and the Resolutions of the Senate and the Syndicate, and S. 15 places the Syndicate under the Senate for approval, revision or modification of its decisions, or for direction to review the same.

Chapter VI constitutes a Board of Accounts and Section B of that Chapter directs that the Board shall, amongst other things, prepare the University Budget, examine and audit the University accounts and the accounts of the Endowment and Trust Funds.

S. 4, Clause (*a*), of Chapter VII directs, amongst other matters, that the Registrar of the University shall be the custodian of the common seal.

Chapter IX of the Regulations is the most important of all in relation to the contentions raised by the plaintiff, and I reproduce here the material sections in their integrity.

Section 1.—"When the funds of the University permit, the Senate with the previous consent of the Governor-General in Council shall found such Professorships as it may think fit, prescribe the conditions on which they shall be tenable, and provide, in connection therewith, Lecture Rooms, Libraries, Museums, Laboratories, Workshops and other facilities for teaching and research."

Section 2.—"The Senate shall likewise found and endow Professorships on particular subjects from funds specially given or bequeathed for the endowment of such Professorships, or if it thinks fit, accept endowments of such Professorships made by individual or corporate donors."

Section 9.—"Endowed Professorships already accepted by the Senate shall, subject to the conditions of the endowment, be governed by these Regulations."

Section 10.—"No University Professor shall be appointed without the sanction of the Governor-General in Council."

On behalf of the plaintiff it has been contended that under the terms of the indentures the relation between Sir Tarak Nath and the University was that of two contracting parties and not of donor and donee. The object of such a contention is obvious. If the trusts constitute a charitable gift and the conditions are illegal, the charity takes the gift discharged from the conditions. In the present case it is clear to my mind that the University have received the properties comprised in the two indentures merely as a charitable gift, and as such it cannot fail, even if the conditions accompanying it are held to be invalid or incapable of fulfilment by the University.

The first question to which attention has to be paid is that of *ultra vires*. Act II of 1857 and Act VIII of 1904, by themselves, confer on the University very

comprehensive powers, but it is argued on behalf of the plaintiff that those powers have been curtailed by the Regulations framed under the latter Act. The plaintiff's contention further is that, allowing the Regulations to be eliminated from consideration, it would be *ultra vires* of the University even under the Acts *alone* to undertake the trusts in terms of the indentures. This contention leads me to consider the Acts first. From the preamble to Act II of 1857 it may be pointed out that the object of establishing the University of Calcutta was to ascertain by means of examination the persons who had acquired proficiency in different branches of Literature, Science and Art and of rewarding them by academical degrees as evidence of their respective attainments. In the scheme of that Act no mention is made of research. In Act VIII of 1904 the usefulness of the University of Calcutta was extended and the University were authorised by S. 3 of Act VIII to do all acts consistent with the Act of Incorporation and Act VIII which tend to the promotion of study and research. As Act VIII is to be deemed part of the Act of Incorporation, the power of the University in accordance with the provisions of S. 2 of Act II to take and to hold any property, movable or immovable, for their purposes by virtue of grant or testamentary disposition cannot be questioned. In S. 3 of Act VIII it is provided that the University shall be and shall be deemed to have been incorporated for the purpose of making provision for the instruction of students, and for the plaintiff it is contended that the students must be of the University, and as the indenture provides as well for students other than those that belong to any University, the undertaking by the Calcutta University to carry out the trusts is not within their competence. In construing the term "Students," we cannot lose sight of one of the objects of the University being "the promotion of study and research." There is nothing in the Act itself to prohibit the University giving their aid as indeed they should, to research by students who may not belong to any University, yet by their exceptional gifts may well be requisitioned to, in the language of Sir Tarak Nath, "extend the bounds of knowledge." My reading of Act VIII convinces me that the object of that Legislation was to extend the usefulness of the University, and not to cramp it, and to construe the term "Students" to mean the students of the University alone is to fall into a rigidity of interpretation that is neither justified by the words of the Act, nor its purpose.

It has further been argued for the plaintiff that by accepting the conditions of the trusts the University have abdicated their statutory powers in favour of a Governing Body, the composition of which is not wholly out of the Senate, but some members of which are nominees, original or derivative, of the founder, foreign to the University. I see nothing in the Acts to prohibit this. If concession were made to the plaintiff's argument, it would imply that it would never be open to the University to accept a grant or testamentary disposition, however beneficial to their purpose, unless the same be entirely free from the grantor's conditions. I do not think it could ever have been intended that a grantor should either hand over his property to the University free from all conditions, or not make the grant at all. The Acts by themselves do not fetter the discretion of the University to accept such gifts.

So fas as the Regulations are concerned, it has been argued that they limit the powers of the University, and in view of those Regulations it was not competent to the University to accept the conditions of the two indentures. In my view of the Regulations the power of the University, derived from the Acts themselves, to accept endowments of Professorships made by donors, has not been curtailed, and the University are competent to accept, if they think fit, endowments subject to conditions. The only provision concerning it in the Regulations is found in S. 2, Chapter IX. It has been urged upon us that, in interpreting this section, we have to read S. 1 to that Chapter, and the two read together mean that the University can accept such Professorships only as are sanctioned by the Governor-General in Council. I do not think that this contention is sound. It does not appear to me that the qualifying word "likewise" in the first line of S. 2 governs the word "accept" in the last but one line of that section. Reading S. 9 of the same Chapter, the Regulations do not find it repugnant to allow the University to observe the

conditions of endowments already accepted, and I see nothing in the Regulations to prohibit the acceptance of fresh endowments subject to conditions. S. 2 has clearly left it to the University to determine the fitness of an endowment for the purposes of their acceptance. In the view I take of the general competence of the University in this matter, the objection of *ultra vires* must fail.

As regards the special objections to the indenture of 8th October, 1912, they are covered by the view I have just expressed. But apart from this, the University now stand possessed of the properties comprised in that indenture by the transfer effected in their favour by the surviving trustees after the death of Sir Tarak Nath in accordance with the terms of that indenture. Even if it were conceded that in the life-time of SirTarak Nath the properties were not vested in the University as co-trustee, exclusion of one co-trustee by reason of legal disability, if any, would neither occasion a failure of the trust, nor would such an event affect the status of the other trustees or their competence to carry out the directions in the trust-deed. The objection that the University cannot administer the trusts in favour of Sakhi Shilpa Samity, Albert Victor Hospital and Srimati Rani Palit, is without real substance. No trusts in fact have to be administered in respect of Sakhi Shilpa Samity and Albert Victor Hospital. Under the terms of the indenture those institutions are entitled to receive from the University out of the Trust Estate Rs. 15,000 and Rs. 50,000 respectively in Government Securities; and with the payment of those two items the obligation of the University is discharged. As regards the monthly payment of Rs. 15 to Srimati Rani Palit for the term of her natural life, the undertaking on the part of the University is so small as compared with the extent of the estate and the corresponding beneficence of the charity. that such a trifle can never be allowed to destroy the trust.

The objection that the Senate have not accepted the trusts seems to have been raised in ignorance of the proceedings of the Senate, bearing dates the 22nd June 1912 and 30th November, 1912. By the proceedings of the 22nd June the Senate accepted the trusts contained in the first indenture and by the proceedings of the 30th November, 1912 the Senate accepted the trusts contained in the second indenture. The other objection that the common seal of the Uniuersity should have been affixed by the Registrar and not by the Vice-Chancellor seems to possess no weight, for even if it were allowed it would not suffice to invalidate the trusts. Apart from this, the objection loses all its force by reason of the Vice-Chancellor being asked and authorized by the Syndicate to sign and take such further steps in the matter on behalf of the University as he might deem necessary. The resolutions embodying the authority are recorded at page 1144, Part III, and page 2351, Part VII of the Minutes of the Calcutta University for the year 1912.

These resolutions were submitted to the Senate in due course, and that body expressed no disapproval of them. The Senate having accepted the trusts, the formal act of affixing the common seal comes within the Executive Government of the University, which is vested in the Syndicate by S. 15 of Act VIII of 1904, and the authority given by the Syndicate fully qualified the Vice-Chancellor to affix the common seal on behalf of the University. My conclusion on the *second* issue, therefore, is that the two indentures dated the 15th June, 1912 and 8th October, 1912 and the deed of transfer of properties assured by the second indenture after Sir Tarak Nath's death, are valid and operative in law, and the University have acquired a good and indefeasible title thereunder.

I do not propose to deal with the other issues as the decision on the second issue disposes of the case.

This suit is dismissed with costs on scale No. 2.

The defendants Messrs. Lokendra Nath Palit and Sisir Kumar Mullick are also allowed their costs on the same scale.

Greaves, J.—The plaintiff in this action, who is one of the two sons of the late Sir Tarak Nath Palit, claims a declaration that the two indentures dated respectively the 15th June, 1912 and the 8th October, 1912, whereby Sir Tarak Nath Palit purported to grant certain properties to the Calcutta University upon certain trusts and conditions are invalid and inoperative in law and that the properties are unaffected thereby and form part of his estate. The plaintiff also asks for an order that the executor

defendants do administer in due course of law the properties as assets of the estate of the late Sir Tarak Nath Palit.

By the indenture of the 15th June, 1912, which was made between Sir Tarak Nath Palit (therein called the Founder) of the one part and the University of the other part, after reciting, among other things, that the Founder had for some time past contemplated doing something of a permanent character for the foundation and diffusion of Scientific and Technical Education in Bengal and the cultivation and advancement of Science, Pure and Applied, amongst his countrymen and in the belief that this object could be best attained by the establishment of University Professorships of Science as a first step towards the foundation of a University College of Science and Technology, had approached the University and offered to make over to them the properties specified in the schedules thereto on the conditions and upon the trusts following, namely, (*a*) that the University should found two Professorships or Chairs, one of Chemistry and the other of Physics, and apply the entire income of the scheduled properties or so much as they might deem necessary to the maintenance thereof, and in the event of the said entire income being found insufficient for the purpose, the said University should make such a recurring grant or contribution as would supplement such deficiency, (*b*) that the Founder's object being the promotion and diffusion of Scientific and Technical Education and the cultivation and advancement of Science, Pure and Applied, amongst his countrymen by and through indigenous agency, such Chairs should always be filled by Indians to be nominated by the Governing Body therein after mentioned, (*c*) that in connection with the said two Chairs the University should from its own funds provide suitable Lecture Rooms, Libraries, &c., and out of its own funds earmark and set apart a sum of Rs. 2,50,000, and apply the same to or towards the construction, on the site of 92, Upper Circular Road, of permanent and substantial structures and their proper and adequate equipment, (*d*) that the Governing Body should consist of (1) the Vice-Chancellor of the University as *ex officio* President, (2) the Director of Public Instruction of Bengal (who by the provisions of Clause 5 of the Indian Universities Act, Act VIII of 1904, is *ex officio* a Fellow of the University), (3) the Dean of the Faculty of Science of the University, (4) the Dean of the Faculty of Engineering of the University, (5) four members of the University to be annually elected by the Senate, (6) four members to be nominated every three years by the Founder and after his death by his representatives as therein provided, (7) two representatives of the Professorial Staff, and that the proceedings of the Governing Body should be laid before the Syndicate and might be revised by it, (*e*) that the University should from its own funds make such recurring and periodical grants as might be required for the maintenance of the said two Professorships, the Libraries, Laboratories, &c., the maintenance and repairs of 92, Upper Circular Road, and for payment of the rates and taxes thereof, (*f*) that it should be the duty of the Professors to arrange for the adequate instruction of students for scientific degrees and also of other students exceptionally qualified in any of the subjects of study, though not undergraduates of any University, if recommended by the Governing Body, and further reciting that the University had agreed to accept the Founder's offer of the said properties as and by the way of endowment on the conditions and upon the trusts therein before set forth in pursuance of the agreement and in consideration of the premises, the founder granted, transferred and conveyed the scheduled properties to the University upon the trusts and to and for the ends, intents and purposes thereinbefore as also thereinafter declared, expressed and contained of and concerning the same, and it was thereby agreed and declared between and by the parties thereto that the University should hold the endowed properties on the conditions and upon the trusts following, which are the conditions and trusts previously recited. The indenture was executed on behalf of the University by Sir Asutosh Mookerjee, the Vice-Chancellor of the University, the common seal of the University being affixed by him. By the indenture of the 8th October, 1912 which was made between Sir Tarak Nath Palit (thereinafter called the Settlor) of the first part, Sir Tarak Nath Palit, Sir Asutosh Mookerjee, Sisir Kumar Mullick and the University

(thereinafter called the Trustees) of the second part, and the University (thereinafter called the Trustee University) of the third part, the Settlor granted, assigned and transferred to the Trustees the premises mentioned and described in the schedules thereto, and it was thereby declared and agreed that the Trustees should hold the scheduled premises (thereinafter called the Trust Estate), (A) upon trust during the Settlor's life-time to permit him to collect and receive the income of the Trust Estate and apply and dispose of the same for his absolute use and benefit, (B) upon the death of the Settlor, upon trust to transfer the Trust Estate to the University, who should thenceforth become the sole trustee of the said indenture, and should hold the Trust Estate upon trust (*a*) to collect the income thereof, (*b*) to set apart out of the Trust Estate Rs. 1,00,000 upon trust to apply the income in perpetuity in establishing Scholarships, the number and value thereof to be determined by the Governing Body mentioned in the indenture of the 15th June, 1912, who should have the right of nomination thereto; (*c*) and (*d*) to provide and transfer out of the Trust Estate to certain institutions called respectively the Sakhi Shilpa Samity and the Albert Victoria Hospital, Calcutta, the respective sums of Rs. 15,000 and Rs. 50,000, (*e*) to pay out of the income of the Trust Estate to Sreemutty Rani Palit Rs. 15 per month during her life, (*f*) to apply the entire balance of the income of the Trust Estate in aid of and for the better carrying out of the trusts of the indenture of the 15th June, 1912.

Clause 9 of the indenture provided that during the Settlor's life-time the Trustees should never be less than three in number, and by Clause 11 it was declared that during the Settlor's life-time he, in conjunction with any of the Trustee's, should be competent to do all the acts required to be done by the Trustees, or to exercise all the powers conferred upon them.

The indenture was executed by the parties thereto, the seal of the University being affixed by Sir Asutosh Mookerjee, the Vice-Chancellor of the University.

The Calcutta University was established and incorporated by Act II of 1857 and the preamble to this Act states that it had been determined to establish a University at Calcutta for the purpose of ascertaining by means of examination the persons who had acquired proficiency in different branches of Literature, Science and Art, and of rewarding them by Academical Degrees, and the Act goes on to constitute certain named persons and others as one Body Politic and Corporate by the name of the University of Calcutta, and provides that such body shall have perpetual succession and a common seal. By Clause II of the said Act it is provided that the Body Corporate shall be able and capable in law to take, purchase and hold any property, movable or immovable, which may become vested in it for the purpose of the University by virtue of any purchase, grant, testamentary disposition or otherwise and by Clause VIII, that the Chancellor, Vice-Chancellor, and Fellows for the time being shall have the entire management of and superintendence over the affairs, concerns and property of the University, and that in all cases unprovided for by the Act, it shall be lawful for the Chancellor, Vice-Chancellor and Fellows to act in such manner as shall appear to them best calculated to promote the purposes intended by the University.

By the Indian Universities Act 1904 (VIII of 1904), it is provided (*inter alia*) by Clause III that the University shall be and shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University Professors and Lecturers, to hold and manage educational endowments, to erect, equip and maintain University Libraries, Laboratories and Museums, and to do all acts consistent with the Act of Incorporation and this Act, which tend to the promotion of study and research. Clause IV provides for the constitution of the Body Corporate of the University, and that such body shall be the Senate of the University and that all powers which by the Act of Incorporation or this Act are conferred upon the Senate, or upon the Chancellor, Rector, Vice-Chancellor and Fellows in their corporate capacity, shall be vested in and exercised by the Senate, and that all the duties imposed on the University by the Act of Incorporation shall be deemed to be imposed upon the Body Corporate as constituted under this Act. Clause XIV

provides that nothing contained in the Act of Incorporation shall be deemed to prohibit the constitution of a new Faculty or the abolition or reconstitution of any existing Faculty by the Senate under Regulations made in accordance with the provisions of this Act.

Clause XV provides that the Executive Government of the University shall be vested in the Syndicate, and also provides for the constitution of the Syndicate. Clause XXV provides (1) that the Senate with the sanction of the Government (that is to say, the Governor-General in Council) may from time to time make Regulations consistent with the Act of Incorporation as amended by this Act, and with this Act to provide for matters relating to the University, (2) that in particular and without prejudice to the generality of the foregoing power, such regulations might provide for, (3) the appointment and duties of Professors appointed by the University and Clause XXVI provides for the preparation of new Regulations. In accordance with the provisions of Clause XXVI of Act VIII of 1904, new Regulations were prepared—the appointment of University Professors is dealt with by Chapter IX of such Regulations, which provides (1) that when the funds of the University permit, the Senate with the previous consent of the Governor-General in Council shall found such Professorships as it may think fit, prescribe the conditions on which they shall be tenable, and provide in connection therewith Lecture Rooms, Libraries, Museums, Laboratories, Workshops and other facilities for teaching and research, (2) that the Senate shall likewise found and endow Professorships on particular subjects from funds specially given or bequeathed for the endowment of such Professorships, or, if it thinks fit, accept endowments of such Professorships made by individual or corporate donors.

It appears from the Minutes of the Syndicate (See Calcutta University Minutes, Part III, 1912, Vol. LVI, at pages 1124 and 1144) that Sir Tarak Nath Palit, in a letter dated the 14th June, 1912 addressed to the Vice-Chancellor of the University, forwarded a draft of the indenture of the 15th June, 1912, and that the Syndicate passed a resolution on that day requesting the Vice-Chancellor to sign the indenture on behalf of the University, and also resolved that the Syndicate recommend to the Senate (*i*) that the donation of Sir Tarak Nath Palit (then Mr. Palit) be accepted on the terms mentioned in the Trust-deed, (*ii*) that the two Professorships be instituted, one to be called the Tarak Nath Palit Professorship of Chemistry, and the other the Tarak Nath Palit Professorship of Physics, (*iii*) that on the land given to the University by Mr. Palit, a University Laboratory be erected, to be called the Tarak Nath Palit Laboratory. These recommendations of the Syndicate were submitted to the Senate on the 22nd June, 1912 and carried by acclamation, see Volume LVI, *supra*, at pages 1148 and 1149.

From Volume LVI, Part VII of the Calcutta University Minutes for 1912, at pages 2350, 2351 and 2352, it appears that the Vice-Chancellor on the 12th October, 1912 reported to the Syndicate the execution by Sir Tarak Nath Palit (then Mr. Palit) of the indenture of the 8th October, 1912, informing the meeting that he had accepted the trust on behalf of the University, and that the Syndicate thereupon resolved (*i*) that the action of the Vice-Chancellor be confirmed, (*ii*) that he be authorized to take such further steps in the matter on behalf of the University as he might deem necessary and (*iii*) that the gift be reported to the Senate, and it also appears that the Senate accepted the Syndicate's recommendations unanimously.

It appears from these Minutes that the Vice-Chancellor had reported to Lord Hardinge, Sir Tarak Nath Palit's first benefaction under the indenture of the 15th June, 1915, and that the Government of India had promised a grant of Rs. 12,000 a year for the maintenance of the College of Science.

Sir Tarak Nath Palit, by his will dated the 2nd May, 1914, appointed the defendants Lokendra Nath Palit and Sisir Kumar Mullick executors thereof, and after giving certain specific and pecuniary legacies devised and bequeathed all properties that might remain undisposed of to the University to be held and applied by the University upon the valid Trusts contained in the indentures of the 15th June, 1912 and the 8th October, 1912.

Sir Tarak Nath Palit died on the 3rd October, 1914, leaving him surviving his

widow Dame Kumud Kamini Palit and two sons, the plaintiff and the defendant Lokendra Nath Palit, his heirs under the Bengal School of Hindu Law, by which it is common ground he was governed.

Lady Palit is not a party to this suit, nor are the two institutions and the annuitant who are referred to in the indenture of the 8th October, 1912. No evidence was called on either side, but it is common ground between the parties to the suit that the University is in possession of the properties purported to be granted and assigned by the two indentures of the 25th June, 1912 and the 8th October, 1912, and that the University is carrying out the provisions of these two indentures in every particular, the two Chairs having been founded and Professors appointed and Rs. 2,50,000 applied for the purposes referred to in the indenture of the 8th October, 1912.

The contentions urged at the Bar on behalf of the plaintiff with regard to the validity of the trust and conditions contained in the two indentures are as follows :—

With regard to the first indenture, that of the 15th June, 1912, it is urged that it is *ultra vires* of the University to enter into the conditions therein contained, the main contentions urged being that these conditions involve

(*a*) The creation of a Governing Body, some members of which are foreign to the University and the others of whom, although members of the University. could not be nominated in such a manner to serve on this body.

(*b*) An agreement by the University that the new Chairs should always be filled by Indians, which might prevent the best available Professors being selected.

(*c*) The divesting by the University in favour of the Governing Body of certain of its statutory powers by a delegation to such Governing Body of

(1) The election of Professors.

(2) The determination whether the Professors should receive special training abroad before entering on their duties, and of the amount payable to them for allowances and travelling expenses.

(*d*) An obligation to make recurring periodical grants and contributions which will fetter the future discretion of the University, and which the University may hereafter refuse or fail to carry out.

(*e*) An obligation to provide for the instruction of students not members of the University, if recommended by the Governing Body.

(*f*) Leaving to the discretion of the Governing Body, with regard to the application of any surplus income, the number and value of the Scholarships to be given.

Certain subsidiary objections with regard to the validity of the deed were also raised, namely,

(1) That the previous sanction of the Governor-General in Council to the foundation of the Professorships was not obtained in accordance with Chapter IX of the University Regulations,

(2) That there was no acceptance by the Senate of the terms and conditions of the deed.

(3) That the University seal was affixed by the Vice-Chancellor without the express authority of the Senate, the proper person to affix the seal, in the absence of any resolution, being the Registrar as the custodian of the seal [see Chapter IV (7) of the Regulations].

With regard to the second indenture, that of the 8th October, 1912, the same objections that were raised with regard to the first deed were raised with regard to this also, and the following additional special objections were also raised with regard to it, namely :—

(*a*) That it was *ultra vires* of the University to act as trustee during the lifetime or Sir Tarak Nath Palit and for the purpose of enabling him to receive the life-interest reserved to him under the indenture.

(*b*) That if this is so, the surviving trustees on Sir Tarak Nath Palit's death could make no valid assurance or transfer of the properties to the University inasmuch as they were never vested in them.

(*c*) That it is *ultra vires* of the University to act as trustee in respect of the trusts created in favour of—

(1) Sakhi Shilpa Samiti.

(2) The Albert Victor Hospital,
(3) Rani Palit.

The following issues were raised for our determination :—

(1) Does the plaint disclose any cause of action, and is the suit maintainable in its present form in view of S. 42 of the Specific Relief Act?

(2) Are the two indentures of the 15th June, 1912 and the 8th October, 1912 and the deed of transfer of the properties assured by the indenture of the 8th October, 1912 after Sir Tarak Nath Palit's death valid and operative in law, and has the University acquired a good and indefeasible title thereunder?

(3) Has the University acquired a good and indefeasible title under the residuary devise and bequest in the will?

(4) Has not the Settlor, by the two indentures of the 15th June, 1912 and the 8th October, 1912, evinced a general intention to give his property to charitable and educational purposes for the use of the University to which the Court will give effect?

(5) Are not the Sakhi Shilpa Samiti, the Albert Victor Hospital and Sreemutty Rani Palit, who are beneficiaries under the indenture of the 8th October, 1912, and each of them, necessary and proper parties, and is not the suit bad for their non-joinder?

The 3rd and 4th issues were admitted subject to the plaintiff's objection that they did not arise and could not be decided in this suit. These issues were also objected to by the executors and by Counsel for the defendant Lokendra Nath Palit, who, after the admission of these issues, severed from his co-executor and was separately represented in his individual capacity. Lady Palit, who in the event of the two indentures being declared invalid, would in certain events be entitled to a Hindu widow's estate, was, as before stated, not a party to the suit.

The Advocate-General on behalf of the University stated that the University did not wish to rely on any technical objection that the plaintiff could not maintain the suit, having regard to the fact that the University were performing the trusts, and that even if their action in so doing was *ultra vires* of the University, the plaintiff, as having no interest in the University, was not entitled to complain of any *ultra vires* act on its part. The Advocate-General stated on behalf of the University that the University were desirous of having the question of *ultra vires* and the validity of the two indentures determined in this suit.

A considerable body of argument was addressed to us on behalf of the plaintiff with regard to the nature of the two indentures of the 15th June and the 8th October, 1912, it being urged that the two indentures were simply contracts between Sir Tarak Nath Palit and the University and nothing more, Sir Tarak Nath conveying certain premises to the University in consideration of the University covenanting to do certain things and to expend certain moneys. We were asked to consider the indentures as contracts and nothing more and to say that the usual results must follow when one party to the contract is acting beyond its statutory powers, and that if this once be established, the indentures are null and void. In my opinion we cannot so regard the indentures — they are indentures which make certain gifts to the University for the purposes of education coupled, it is true, with certain conditions to be performed by the University, and they constitute a charitable trust for the purposes of education.

I now propose to examine what exactly are the powers of the University under the two Acts, namely, Act II of 1857 and the Indian Universities Act, 1904, so far as concerns the purposes of this suit.

Under Clause II of the Act of 1857 the University is empowered to hold any property which may become vested in it for the purpose of the University by virtue of any grant. Under the general words of Clause VIII (and it is noticeable that whilst other Clauses of this Act have been repealed, this clause remains unrepealed) the Chancellor, Vice-Chancellor and Fellows in all cases unprovided for by the Act may act in such manner as shall appear to them best calculated to promote the purposes intended by the University.

Under Clause III of the Act of 1904 the University shall be deemed to have been incorporated for the purpose of making provision for the instruction of students with power to appoint University Professors, hold and manage educational endowments, erect, equip and maintain University Laboratories, &c., and to do all acts consistent with the Act of Incorporation

and this Act, which tend to the promotion of study and research. And Clause XIV provides for the constitution of new Faculties.

If one turns to the indenture of the 15th June, 1912, it provides (*a*) for the foundation of two Professorships or Chairs with a proviso that in certain events the University should make recurring grants for the upkeep—provisions which, in my opinion, clearly fall within the powers conferred by Clauses III and XIV of the Act of 1904, which enable the University to found new Faculties and appoint Professors.

(*b*) That they shall always be filled by Indians—a provision which, im my opinion, must be read in the light of the general words at the end of Clause III of Act VIII of 1904, that is to say, if, in the opinion of the University, the acceptance of the Palit endowment or trust tended as a whole to promote study and research, it was within the powers of the University to accept the endowment with this proviso attached.

(*c*) For the provision of Lecture Rooms, Laboratories, &c., and for the application by the University of a sum of Rs. 2,50,000 for the construction thereof on a certain site—provisions which, in my opinion, clearly fall within the words of Clause III of Act of 1904, "erect, equip, and maintain University Laboratories, &c."

(*d*) For the constitution of a Governing Body which, if the constitution thereof is examined, must contain a large preponderance of University representatives, all but the four to be nominated by the Founder or his representatives being office-holders in or members of the University, and, moreover, proceedings of the Governing Body are subject to revision by the Syndicate of the University, whose proceedings are in turn subject to revision or modification by the Senate of the University under the provisions of Chapter IV (15) of the Regulations of the University.

(*e*) For the making of periodical grants by the University for the maintenance and upkeep of the Professorships and of the Laboratories, &c., and repairs, &c., of certain premises—provisions which clearly fall, either expressly or by implication, within Clause III of Act VIII of 1904.

(*f*) For (*inter alia*) the instruction of exceptionally qualified students at the recommendation of the Governing Body, even if not undergraduates of any University—a provision within Clause III of Act VIII of 1904, which does not expressly, nor I think inferentially, limit the word "Students" in the clause to undergraduates of the University.

(*g*) For the application of surplus income to Scholarships, the number and value and award thereof to be determined by the Governing Body—provisions which, in my opinion, are not *ultra vires*, having regard to the constitution and control of this body as before stated.

With regard to what I have called the subsidiary objections to the first indenture, in my opinion, if one arrives at the conclusion that the trusts and provisions of the indenture are within the powers conferred on the University by Act II of 1857 and Act VIII of 1904, the fact that the internal Regulations of the University may not have been observed, that is, that (*a*) the previous sanction of Governor-General was not obtained, (*b*) that the Senate did not accept the trust, (*c*) that the seal was irregularly affixed, cannot invalidate the indenture, as no question of *ultra vires* arises, and these are merely irregularities which, if necessary, can be cured at any time. But if it is necessary to deal with these matters, it is sufficient to say that there is no evidence that the previous sanction of the Governor-General was not obtained, that it appears that the Senate did in fact accept the gift, and that Sir Asutosh Mookerjee was authorized to sign the indenture, if any execution of the deed by the University was necessary, (and, in my opinion, it was not in the view I take of the indenture as expressed above) in my opinion, under the circumstances of this case, was sufficient authority to him to affix the seal of the University: *In re Barned's Banking Company Ex parte Contract Corporation Co.* (1).

Before I come to deal with the second indenture, I want to make one observation with regard to the argument addressed to us that there was no guarantee that the persons who have the control of the affairs of the University in future years will observe the provisions of the indenture, and the observation I wish to make is, that this question

(1) (1867) 3 Ch. 105=17 L. T. 269=16 W. R. 193.

does not now arise, and that if and when this happens, will be the proper time to consider the position which then arises.

I now turn to the indenture of the 8th October, 1912 and to the special objections urged against it. Even assuming that the University could not act as a trustee of the life-estate thereby reserved to Sir Tarak Nath, and that the appointment of the University as trustee was therefore null and void, and as if it had never been made, the premises thereby transferred then vested during Sir Tarak Nath's life-time in Sir Tarak Nath himself, Sir Asutosh Mookerjee and Sisir Kumar Mullick, who were certainly not incapable of acting as trustees, and who, having regard to Clauses 9 and 11 of the indenture, constituted a sufficient number of trustees within the provisions of the indenture. And I fail to apprehend how the survivors could not on Sir Tarak Nath's death make a valid transfer of the trust property to the University. If and so far as it is contended that after the death of Sir Tarak Nath the University could not act as trustee with regard to the two sums to be transferred to the Shilpa Samiti and the Albert Victor Hospital, the answer is that there are no active trusts to be performed, and all the University has to do is to hand over certain sums of money, which can hardly be seriously argued to be acts *ultra vires* of the University. The only trust that remains is the payment of Rs. 15 a month to Sreemutty Rani Palit, and it is difficult to treat seriously the argument addressed to us that the existence of this provision can invalidate the indenture. Accordingly, in my opinion, the trusts or conditions attached by Sir Tarak Nath to his benefactions are within the express powers of the University.

Having regard to the view which I have expressed with regard to the validity of the two indentures, it is not necessary to deal with the questions raised by the 3rd and 4th issues or to decide if these questions can properly be raised in this suit as at present constituted.

In view of the desire of the University to have a decision of this Court upon the question of the validity of the two indentures having regard to the powers of the University, it is not necessary for me to express any opinion upon the *first* issue that was raised.

With regard to the *second* issue, I hold that the two deeds of trust and the deed of transfer are, each of them, valid and operative in law, and that the University has acquired a good and indefeasible title thereunder.

Having regard to the view expressed upon the 2nd issue, the 3rd and 4th issues do not arise.

With regard to the 5th issue, in my opinion, the two institutions and Srimati Rani Palit were necessary parties to the suit as being interested in maintaining the validity to the second indenture.

The result is that this action must be dismissed with costs.

V.B./R.K.

Suit dismissed.

A. I. R. 1916 Calcutta 310

CHITTY AND BEACHCROFT, JJ.

Jagannath Rahatgir — Complainant—Petitioner.

v.

Deokinandan and *another*—Accused—Opposite Parties.

Criminal Revn. Petn. No. 2045 of 1914, decided on 12th March, 1915.

(a) Stamp Act (2 of 1899), S. 33—Impounding of insufficiently stamped document, is optional.

Under S. 33 of the Stamp Act it is optional to the Magistrate to examine or impound the instrument if it appears to be insufficiently stamped. [P. 311, C. 1.]

(b) Stamp Act (2 of 1899), S. 35—Inadmissibility of insufficiently stamped document does not apply to criminal trial.

But the prohibition contained in the first part of S. 35 that no instrument chargeable with duty shall be admitted in evidence for any purpose or acted upon unless it be duly stamped, does not apply to proceedings in a Criminal Court. [P. 311, C. 1.]

(c) Indian Penal Code (45 of 1860), S. 405—Refusal to return property entrusted to servants amounts to conversion.

Where it is proved that the two accused or either of them were in fact entrusted with certain property as servants, and they set up a claim that it belongs to them, and refuse to return it, that in itself is evidence of conversion to justify a conviction under S. 405, Indian Penal Code. [P. 311, C. 1.]

Manmotha Nath Mukerjee — for Petitioner.

Probodh Kumar Das and *Kshitish Chandra Chakravarti* — for Opposite Parties.

Judgment.—In this case the Magistrate, in refusing to admit in evidence the

alleged agreement of service of the accused, Pandit Deokinandan, was clearly in error. It was optional to him under S. 33 of the Stamp Act to examine or impound the instrument if it appeared to be insufficiently stamped. But the prohibition contained in the first part of S. 35 that no instrument chargeable with duty shall be admitted in evidence for any purpose or acted upon unless it be duly stamped, does not apply to proceedings in a Criminal Court [see proviso (*d*) to that section]. The Magistrate, therefore, ought to have taken that document into consideration and come to a finding upon it. With regard to conversion, the opinion of the Magistrate is not correct. It is clear that a servant can be charged with criminal breach of trust under S. 405, Indian Penal Code. If in this case it is proved that the two accused (or either of them) were in fact entrusted with the property as servants and now set up a claim that it belongs to them, and refuse to return it, that in itself would be evidence of conversion, which might justify a conviction under the section. If the trial is continued against the accused Pandit Deokinandan, it should be continued also against the accused Baburam.

This Rule is made absolute against both the accused, and the order of discharge set aside. The trial will be resumed from the stage immediately preceding the order of discharge.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 311

FLETCHER, J.

Bireshwar Samanta and *others*—Defendants—Appellants.

v.

Priya Sakhi Debi—Plaintiff—Respondent.

Second Appeal No. 876 of 1913, decided on 3rd March, 1915, against the Decree of the Sub-Judge, 2nd Court, Burdwan, dated 3rd October, 1912.

Adverse possession—Mortgagor and mortgagee—Adverse possession against mortgagor binds mortgagee also.

When a mortgagor has been ousted from possession of the property, the possession of a third party becomes adverse as against the mortgagee as well. 33 Cal. 1015, not foll. Case law ref. to. [P. 312, C. 1.]

In a case of dispossession by a third party there is no distinction between the positions of the mortgagor and the mortgagee. 5 All. 1 (P.C.), foll. [P. 312, C. 1.]

Ram Chandra Mozumdar and *Sarat Kumar Mitra*—for Appellants.

Bepin Behary Ghose—for Respondent.

Judgment.—This is an appeal from a decision of the learned Subordinate Judge of Burdwan dated the 3rd October, 1912, reversing the decision of the Munsif. The suit was brought to enforce a mortgage security and the only question that arises in the present appeal is the question of limitation, and that question is whether when a mortgagor has been ousted from possession of the property, the possession of a third party becomes adverse also as against the mortgagee. The view that has been taken by a Division Bench of this Court in the case of *Aimadar Mondul* v. *Makhan Lal Dey* (1) is that the possession in such a case would not be adverse against the mortgagee. The decision has been commented upon by Mr. Justice Mukerjee in his judgment in the case of *Nandkumar Dobey* v. *Ajodhya Sahu* (2). The comments of the learned Judge will be found at pages 298 and 299. The case has been further observed upon and dissented from in the judgment of the Madras High Court in the case of *Ramasawmi Chetti* v. *Ponna Padayachi* (3). Of course, if the case in *Aimadar Mondul* v. *Makhan Lal Dey* (1) stands by itself I am bound by it and I must follow it here. But the learned Judge in that case seems to have overlooked several authorities that establish a contrary proposition. Those cases are the case of *Prannath Roy Chowdry* v. *Rookea Begum* (4) (at page 355 are the observations of their Lordships of the Judicial Committee where a different view was taken), the case of *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar* (5). The other decisions are cited in the course of the judgment of Mr. Justice Abdur Rahim in the case of *Ramasami Chetti* v. *Ponna Padayachi* (3). Then we have also got the decision of the Privy Council in the

(1) (1906) 33 Cal. 1015.

(2) 1911) 11 I. C. 465.

(3) (1913) 36 Mad. 97=9 Ind. Cas. 28.

(4) (1857-59) 7 M. I. A. 323=4 W. R. 37 (P. C.).

(5) (1870) 2 N. W. P. H. C. R. 223.

case of *Karan Singh* v. *Bakar Ali Khan* (6). That case seems to me, when carefully looked at, to be inconsistent with the case of *Aimadar Mondul* v. *Makhan Lal Dey* (1). It was assumed by the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan* (6) that in a case of dispossession by a third party there is no distinction between the positions of the mortgagor and the mortgagee. That seems to me clear upon reading the judgment. I think, having regard to the decisions of the Privy Council, I am bound to follow the views taken in those cases. The clear finding of fact made by the Court of first instance is that the mortgagors of the plaintiff were ousted some time in the year 1892. This suit was not brought till the 23rd August, 1905. In that view, the present appellants must have been in possession, adverse to the mortgagors of the plaintiff for more than twelve years prior to the institution of the suit, and, in my opinion on a consideration of the decision of the Privy Council, that possession was also adverse to the plaintiff, the mortgagee of the defendants Nos. 1 and 2. That finding of fact by the Court of first instance has not been overruled or dissented from by the lower Appellate Court. I think, therefore, that the judgment and decree passed by the lower Appellate Court ought to be set aside and the decree of the Munsif restored. The respondents will pay to the appellants their costs in all Courts.

V.B./R.K.

Appeal allowed.

(6) (1883) 5 All. 1=9 I. A. 99=4 Sar. 382 (P. C.).

A. I. R. 1916 Calcutta 312

MOOKERJEE AND RICHARDSON, JJ

Kunjamani Dasi—Plaintiff—Appellant.

v.

Nikunja Behary Das—Defendant—Respondent.

Appeal No. 283 of 1912, decided on 30th August, 1915, from the Original Decree of Sub-Judge, Sylhet, dated 1st April, 1912.

Hindu Law—Religious Endowment—*Shebait*—Position of *shebait* stated—*Shebaitship* vests in the then heirs of founder unless last *shebait* has taken it absolutely—Where it vests in the heirs it passes by succession unless the successor is incompetent by usage to fill the office being incompetent to perform the duties—Further held—Heir-at-law is not deprived of his right of inheritance when valid devise to some other person is affected—(Obiter)—Hindu law does not permit successive life-interest in endowment.

The position of a *shebait* is analogous to that of a Hindu female (widow, daughter, or mother) in possession of the estate of the last full owner rather than to that of the holder of a life-estate. [P. 314, C. 2.]

When the founder of an endowment for a deity has given valid directions as to the devolution of the *shebaitship* upon the death of the last *shebait*, the office vests in persons who at the time constitute the heirs of the founder, provided the last *shebait* has not taken it absolutely; and when the office has so vested in them, upon the death of each member it passes by succession to his heir, subject to the principle that the rule that when a worship of a *thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution, cannot be applied so as to vest the *shebaitship* in persons who, according to the usages of the worship, cannot perform the rights of the office.

[P. 314, C. 2 & P. 315, C. 1.]

An heir-at-law, though in terms excluded from benefit under a will, cannot be excluded from his general right of inheritance without a valid devise to some other person. [P. 315, C. 1.]

Obiter dictum.—The rule in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*, 1 I.A. Sup. 47 at p. 66, is applicable to an hereditary office and endowment quite as much as to other immovable property and the Hindu Law of inheritance does not permit the creation of successive life-estates in an endowment.

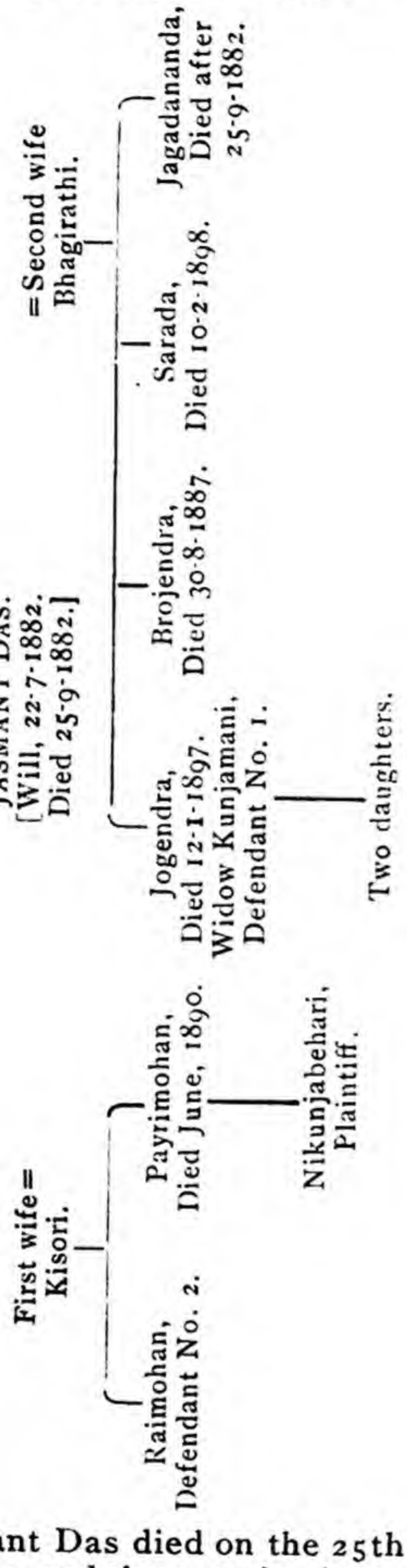
[P. 314, C. 1.]

Tarakishore Chowdhury and *Gopal Chandra Das*—for Appellant.

Dwarkanath Chakrabarty and *Kalikinkar Chakrabarty*—for Respondent.

Mookerjee, J.—This is an appeal by the first defendant in a suit for declaration that the plaintiff has a four annas share in the *shebaitship* of a deity, Syamsundar, established by his paternal grandfather and for confirmation or recovery of possession of the corresponding share of the properties of the endowment. The claim was contested by the widow of the step-brother of the father of the plaintiff. The Subordinate Judge held that the title of the plaintiff to the *shebaitship* was established and made a decree accordingly. On the present appeal, that decision has been assailed as founded on an erroneous construction of the will of the founder. The relationship between

the parties may be elucidated by the annexed genealogical table :—



Jasmant Das died on the 25th September, 1882, and the question in controversy turns upon the true construction of the will he executed on the 22nd July, 1882. The testator provided that all his properties would devolve on his family deity Syamsundar and his widow Bhagirathi would be executor in respect of the same. He further laid down that on the death of his widow, his youngest son Jagadananda and on the death of the latter, his son Brojendra would be successively installed in the office of executor, and all acts would be done under their management. The will concluded that his sons by his first wife were disobedient and accordingly would not be appointed executors.

On the death of the testator, Bhagirathi proved his will, but died before she could take out Probate. Meanwhile, Jagadananda also died. Probate was accordingly granted to Brojendra, who himself died not many years later on the 30th August, 1887. Jogendra then took out Letters of Administration with copy of the will annexed, but he died on the 12th January, 1897, leaving a widow Kunjamani, the first defendant in the present suit, as also two daughters by her. Sarada died on the 10th February, 1898, unmarried, like his brothers Jagadananda and Brojendra. Pyarimohan died in June, 1890 leaving an infant son Nikunjabehari, who is plaintiff in this suit. Sarada had applied for Letters of Administration after the death of Jogendra, but he died before orders were passed. After this, applications were made for the same purpose by Raimohan, Kunjamani and others, but on the 3rd September, 1902 this Court held that no Letters of Administration could be issued as the estate had been completely administered, and the only object of the rival applicants was to secure indirectly a decision upon the question of title to the *shebaitship*. In 1906, a suit was instituted by Kunjamani against Raimohan and some of the kinsmen of his father for declaration that she was the *shebait* of the deity Syamsundar. The Court held that she was *shebait* to the extent of an eight annas share and made a decree accordingly. Nikunjabehari had not been made a party in that suit and he consequently instituted the present litigation on the 26th September, 1910 for declaration that he himself was interested to the extent of a four annas share in the *shebaitship*. This claim was unsuccessfully contested by Kunjamani in the Court below and the substantial question in controversy now is, whether the plaintiff has the title claimed.

We are of opinion that the effect of the will was to constitute Bhagirathi, Jagadananda and Brojendra successive *shebaits* of the endowment, though they are described as executors in respect of the endowed property. The testator did not prescribe how the *shebaitship* would devolve after the death of Brojendra. In these circumstances, the devolution of the office of *shebait* follows the line of

inheritance from the founder; in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution. *Rajah Muttu Ramalinga Setupati* v. *Perianayagam* (1), *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (2), *Janoki Debi* v. *Gopal Acharjia Gosswami* (3), *Gosswami Sri Gridhariji* v. *Romanlalji Gossami* (4); *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5), *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (6), *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (7), *Sital Das Babaji* v. *Pertap Chunder Sarma* (8), *Sheo Prasad* v. *Aya Ram* (9) and *Mohan Lalji* v. *Madhsudan Lala* (10). In this connection, we must bear in mind the observation of Sir Richard Couch in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5) that the rule in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (11) is applicable to an hereditary office and endowment quite as much as to other immovable property and that the Hindu Law of inheritance does not permit the creation of successive life-estates in an endowment [see also *Manorama Dassi* v. *Kali Charan Banerjee* (12) and *Gopal Chunder Bose* v. *Kartick Chunder Dey* (13)]. What then is the result of the application of these principles to the case before us? The founder had nominated Bhagirathi, Jagadananda and Brojendra as successive *shebaits*, and had given no further direction as to the devolution of the office thereafter. Consequently, upon the death of Brojendra the *shebaitship* vested in Raimohan, Pyarimohan, Jogendra and Sarada, who were the heirs of the founder at the time. On the death of Pyarimohan the interest in the *shebaitship* vested in him passed to his son Nikunjabehari. Upon the death of Jogendra his interest devolved upon his widow Kunjamani. Upon the death of Sarada his interest in the office passed to his step-brother Raimohan. Consequently, at the date of the institution of the suit, Raimohan had a half share in the office, while Nikunjabehari and Kunjamani had one-fourth share each.

But it has been argued for the appellant that Bhagirathi, Jagadananda and Brojendra took successive life-estates in the office, with the result that the remainder at the death of the founder constituted a vested interest in the hands of his six sons. In this view, Nikunjabehari would get through his father Pyarimohan one-sixth share, while Jogendra would ultimately receive a half share by transmission to him of the interests vested in Jagadananda and Brojendra; Raimohan would thus have a third share by absorption of the interest of Sarada. We are of opinion that this contention is unsound and that the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life-estate, as expounded by their Lordships of the Judicial Committe in *Rewun Persad* v. *Radha Beeby* (14), has no application to cases of the description now before us. No doubt, a *shebait* holds his office for life [*Rajeshwar Mullick* v. *Gopeshwar Mullick* (15)]; but this does not signify that he has a life-interest in the office with the remainder presently vested in the next taker. The entire office is vested in him, though his powers of alienation are qualified and restricted. [Cf. *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami* (16), where Subrahmania Ayyar, J., describes the spiritual head of a Mutt as a "corporation sole".] The position of a *shebait* is analogous to that of a Hindu female (widow, daughter or mother) in possession of the estate of the last full owner rather than to that of the holder of a life-estate. When a Hindu female is thus in possession, she represents the estate completely and though her powers of disposition may be of a restricted character, no one else has a vested interest in the estate during her life-time. Similarly, when a founder has given valid directions as to the devolution

(1) (1873-74) 1 I. A. 209 (P. C.).
(2) (1876-78) 1 Mad. 235=4 I. A. 76 (P. C.).
(3) (1883) 9 Cal. 766=10 I. A. 32 (P. C.).
(4) (1890) 17 Cal. 3=16 I. A 137 (P. C.).
(5) (1900) 23 Mad. 271=27 I. A. 69 (P. C.).
(6) (1905) 32 Cal. 129=31 I. A. 203 (P. C.).
(7) (1913) 35 All. 283=19 I. C. 337=40 I. A. 97 (P. C.).
(8) (1909) 3 I. C. 408.
(9) (1907) 29 All. 663.
(10) (1910) 32 All. 461=6 I. C. 77.
(11) (1873) I. A. Sup. 47=9 B. L. R. 377=18 W. R. 359 (P. C.).
(12) (1904) 31 Cal. 166.
(13) (1902) 29 Cal. 716.
(14) (1867) 4 M. I. A. 137=7 W. R. 35 (P. C.).
(15) (1908) 35 Cal. 226=12 C. W. N. 323.
(16) (1904) 27 Mad. 435=14 M. L. J 105.

of the *shebaitship*, as in the present case, upon the death of the last *shebait*, the office vests in persons who at the time constitute the heirs of the founder, provided the last *shebait* has not taken it absolutely ; when the office has so vested in them, upon the death of each member of the group, it passes by succession to his heir, subject to the important qualification formulated by the Judicial Committee in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (7), namely, that the rule that when a worship of a *thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution, cannot be applied so as to vest the *shebaitship* in persons who, according to the usages of the worship, cannot perform the rights of the office. We hold accordingly that on the death of Brojendra, the last *shebait* named by the founder, the office vested in the four sons of the founder then alive ; and this, notwithstanding the fact that the founder intended to exclude his sons by his first wife, for as Willes, J., said in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (11), the heir-at-law, though in terms excluded from benefit under the will, cannot be excluded from his general right of inheritance without a valid devise to some other person. We may add that precisely the same result follows if we hold, on the authority of the decision of the Judicial Committee in *Tripurari Pal* v. *Jagat Tarini Dasi* (17), that the *shebaitship* vested absolutely in Brojendra, and, on his death, devolved on his heirs, namely, his four surviving brothers, Raimohan, Pyarimohan, Jogendra and Sarada. The decree made by the Subordinate Judge correctly determines the rights of the parties and as no question of limitation really arises on the evidence, that decree must be affirmed.

The result is that the appeal is dismissed with costs. We assess the hearing fee at ten gold *mohurs*.

V.B./R.K.

Appeal dismissed.

(17) (1913) 40 Cal. 274=17 I. C. 696=40 I. A. 37 (P. C.).

A. I. R. 1916 Calcutta 315

HOLMWOOD AND IMAM, JJ.

Jogendra Nath Haldar and *another* — Defendants Appellants.

v.

Joggeswar Mondal and *others*—Respondents.

Appeal No. 2832 of 1913, decided on 29th February, 1916, from the Appellate Decree of Sub-Judge, 3rd Court, 24 Parganas, dated 31st July, 1913.

Bengal Tenancy Act (7 of 1885), S. 170 (3)—Deposit by transferee of non-transferable holding—Withdrawal of deposit by landlord does not amount to recognition of transfer.

A withdrawal by a landlord of the deposit of rent made under S. 170 (3) of the Bengal Tenancy Act by a transferee of a non-transferable holding on behalf of the *raiyat*, does not amount to a recognition of the transfer of the holding, even if the transferee in making the deposit described himself as the "man in possession by virtue of purchase." [P. 316, C. 2 & P. 317, C. 1 & 2.]

Mohendra Nath Rai, *Mohini Mohan Chatterjee* and *Satyendra Nath Mitter*—for Appellants.

Provas Chandra Mitter and *Khirode Narayan Bhuiyan*—for Respondents.

Judgment.—This second appeal arises out of a judgment and decree of the Subordinate Judge, 3rd Court, of the 24 Parganas dismissing the appeal from the learned Munsif's judgment in a suit for recovery of possession of a holding upon declaration of the plaintiff's right thereto. The appeal is on behalf of defendants Nos. 1 and 2, the defendant No. 2 being the transferee of an occupancy holding which was not transferable by custom and defendant No. 1 being the mortgagee from defendant No. 2. The holding belonged to defendant No. 4. On the 14th July, 1896, defendant No. 4 sold the holding to defendant No. 2 without obtaining the consent of the landlord. The rent appears to have been always paid on behalf of the recorded tenant, who appears not to have been the defendant No. 4 but a lady whose connection with the other defendants is unknown. In June 1902 when the landlord, defendant No. 3, had obtained a decree for rent against defendant No. 4 whom he had recognised as tenant, the defendant No. 2 deposited the decretal amount in order to save the holding. The deposit was made by defendant No. 2 on behalf of defendant No. 4, but in making it he

used the words "*dakhalikar kharid sutre*" or "the man in possession by virtue of purchase." The landlord withdrew this deposit: he again sued defendant No. 4 and obtained a decree on the 19th January 1910. He sold the holding in execution of this decree. The plaintiff purchased the holding at auction-sale for Rs. 175. On the 19th September, 1910, the sale was set aside by the Court of first instance on the application of the mortgagee, defendant No. 1. But in appeal the District Judge on the 16th December, 1910 set aside that order and confirmed the sale, holding that the interest of defendant No. 1 was not affected by the sale as the landlord had recognised the defendant No. 2 as the tenant, and neither defendant No 1 nor defendant No. 2 are affected. He advised the defendant No. 1 that he could resist the possession of the plaintiff as not being the holder from defendant No. 4.

The contention in the lower Courts and in appeal was that the suit was barred by the doctrine of *res judicata* and that there had been recognition by the landlord. It would be difficult to say that the finding of fact by the learned Judge in the miscellaneous proceeding, dated the 19th December, 1910, in which he says it is proved that Dino Paik has been recognised by the landlord as tenant of the land, can in itself operate as *res judicata* on the question of fact; and it is perfectly obvious that the Judges who have successively decided this case were and we ourselves are still fully competent to decide that question of fact for ourselves, and indeed it is one branch of this appeal before us that there was legal recognition. What the Judge in that case held as a matter of law was that defendants Nos. 1 and 2 had no *locus standi* to contest the sale, and that therefore, the sale must be restored without prejudice to their interest, and upon this it is urged before us to-day that although there is no *res judicata* there may be estoppel, inasmuch as the plaintiff got the advantage of having his sale confirmed on the footing that defendant No. 2 had been recognised by the landlord and he, therefore, cannot now be heard to deny the fact upon which he obtained the advantage in the execution Court. To begin with it cannot be said that the advantage, if any, obtained by the plaintiff was obtained on any other ground than that stated by the learned Judge to which we have just referred, namely, that the defendants Nos. 1 and 2 had no *locus standi* and that reduced the question of estoppel to exactly the same principles as the question of *res judicata*. But there is a further objection to any estoppel, and that is the finding of fact by the learned Munsif, which has not been set aside by the Judge and with which we entirely agree, that the plaintiff got no advantage whatever from the judgment of the learned District Judge. Therefore there is no reason why he should not now seek to establish his rights through the medium of a regular suit.

We are, therefore, left with the question whether the wording of the deposit *chalan* Exhibit 2 is such as to give the landlord notice that Dino Paik was paying the money under S. 170 (3), Bengal Tenancy Act, as his in possession by purchase, and that the landlord withdrew the money upon that footing. We think that the statement in this *chalan* is altogether insufficient for that purpose, and we may note that the applications upon which this deposit was based had been kept back from the cognizance of the Courts. The order sheet, which has not been printed in the appeal before us but which we have looked at from the record, appears to show that defendants Nos. 1 and 2, as mortgagee and transferee of the land respectively, both applied to make the deposit on behalf of the judgment-debtor, and the question before the Munsif was not the question under S. 170 (3) because if it had been, he would have been bound to accept the deposit offered by the encumbrancer if the defendant No. 2 was the real tenant, but the question, which of these persons should be allowed to act on behalf of the judgment-debtor, and he decided that the purchaser was the proper person to act on behalf of the judgment-debtor and accept the deposit not under S. 170 as the Munsif erroneously supposed, for in the circumstances of the case there can be no such deposit under S. 170, but as deposit made on behalf of the judgment-debtor; and it must be taken that the landlord took away the money on that footing and did not in any way recognise that the words used by Dino Paik describing himself as the person in possession by purchase indicated that

there had been a valid transfer of the holding.

Many cases have been laid before us and we are of opinion that the question, so far as it is a question of law, is concluded by authority. In the case of *Jatindra Mohan Tagore* v. *Durga Dabe* (1) it was held that when a tenure is advertised for sale for arrears of its own rent, the purchaser of the tenure from the tenant has no right to make the deposit under sub-S. 3 of S. 170 of the Bengal Tenancy Act, as he is not a person having interest in the tenure voidable upon the sale, and in the case of *Digbijoy Roy* v. *Ata Rahaman* (2) it was held that the acceptance of rent from the transferee of a non-transferable occupancy-holding not as a transferee but as the agent or representative of the original tenant does not amount to the recognition of the validity of the transfer. Against this we are asked to consider the case decided by the Judicial Committee of the Privy Council in *Naba Kumari Debi* v. *Behari Lal Sen* (3) and the case of *Tarak Das Pal Chowdhry* v. *Harish Chandra Banerjee* (4), which was a case decided by the same learned Judge who decided the case of *Digbijoy Roy* v. *Ata Rahaman* (2), to which we have just referred, and a very recent case of *Ahmadullah Chowdhury* v. *Harkaru Saha* (5), where the Full Bench ruling in the case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (6) has been applied to a case of this nature. The Privy Council case was with regard to statements made in rent receipts which showed that the landlord recognised the transferee as the tenant, although such receipts when particularly examined did not expressly describe the transferee as tenant of the holding. But in that case the rent receipts described the rent paid as rent of the holding and the person paying as occupier of the holding and as paying it on his own account, and that is a very great distinction between that case and this. Conceding that in this deposit the defendant No. 2 described himself as paying rent of the holding and being himself the occupier of the holding he went on to say that he was not paying rent on his own behalf but on account of the judgment-debtor; so that the observations of the Privy Council do not in any way apply.

Then as regards the case of *Tarak Das Pal Chowdhury* v. *Harish Chandra Banerjee* (4) it appears that it was cited by the learned Judges in *Ahmadullah* v. *Har Karu Saha* (5) by a mistake in the head-note of the case, which lays down a proposition almost the reverse of what the learned Judges decided. But a reference to the judgment shows us that the question which was decided was, whether such interest or interest of the applicant if the holding is transferable by custom is voidable on the sale and that is another question altogether. That judgment, therefore, was no authority for what was held in the case of *Ahmadullah* v. *Har Karu Saha* (5) and the application of the Full Bench case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (6) to this question, even if that case did decide anything connected with the question, which is very doubtful, would not serve to make the law any different in 1910 from what was laid down by this Court previous to the passing of the Full Bench decision. If the Full Bench has made any alteration in the law, or laid down any rule different to that contained in the previous cases, it does not seem to us that at the time the deposit was made the law could have been held to be what is somewhat doubtfully stated in this case of *Ahmadullah* v. *Har Karu Saha* (5). Our own opinion is that the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy Choudhuri* (6) does not in any way touch the question before us. But it is not necessary to go further in detail into the question of law, since it is perfectly clear that Dino Paik did not make the deposit under S. 170 (3) and did not make it on his own account and, therefore, the withdrawal of the deposit by the landlord could not operate as recognition of the tenancy.

The result is that the appeal must be dismissed with costs.

V.B./R.K.

Appeal dismissed.

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(1) (1906) 10 C. W. N. 438.
(2) (1912) 15 I. C. 156.
(3) (1907) 34 Cal. 902=34 I. A. 160 (P. C.).
(4) (1912) 16 I. C. 977.
(5) (1915) 27 I. C. 176.
(6) A.I.R. (1915) Cal. 242=42 Cal. 172=27 I. C. 61.

A. I. R. 1916 Calcutta 318

D. CHATTERJEE AND CHAPMAN, JJ.

Sivaprosad Ram and *others*—Plaintiffs—Petitioners.

v.

Tricomdas Coverje Bhoja—Defendant No. 1—Opposite Party.

Civil Rule No. 1302 of 1914, decided on 2nd February, 1915, from the Order of Sub-Judge, Burdwan, dated 17th December, 1914

(a) Civil P. C. (5 of 1908), S. 10—Requirements of S. 10 stated—Court not competent to decide question of *res judicata*—It can only stop the proceedings.

S. 10 of the Code of Civil Procedure, 1908, requires, among other things, that the suit should be between parties litigating under the same title and the issue should be the same in both suits. [P. 318, C. 2.]

A Court has no jurisdiction to decide the question of *res judicata* in a proceeding under S. 10 of the Code of Civil Procedure. Its only jurisdiction in the proceeding is to stop the new suit if it finds the existence of the circumstances mentioned in the section as conditions precedent to the passing of the order. [P. 319, C. 1.]

(b) Letters Patent (Bengal), S. 15—High Court can interfere in interlocutory orders when justice requires it.

A High Court can interfere under S. 15 of the Charter Act with interlocutory orders when they might lead to failure of justice or irreparable injury. 14 Cal. 768; 4 I. C. 364 and 6 I. C. 574, foll. [P. 319, C. 1.]

Bipin Behary Ghose and *Mohini Nath Bose* - for Petitioners.

Rash Behary Ghose, Dwarka Nath Mitter and *Turakeswar Pal Chowdhury*—for Opposite Party.

Chatterjee, J.—The petitioners and the opposite party hold two contiguous collieries under the Maharaja of Pachoti. The Maharaja brought a suit, No. 391 of 1910, in the Court of the Subordinate Judge of Burdwan against the opposite party for the recovery of extra royalty for coal said to have been appropriated by him by encroaching on the lands of the colliery of the petitioners who were made *pro forma* defendants. The claim was based on the terms of the contract entered into by the opposite party with the Maharaja. In that suit the opposite party pleaded that the encroachment, if any was made not by him, but by his vendor who was not a party to the said suit. One of the issues in that suit was whether the opposite party had made any encroachment on the lands of the petitioners and the Court found that they had. Pending the decision of that suit, the petitioners brought the present suit in the same Court against the opposite party as defendant No. 1 and his vendor as defendant No. 2 for damages for the encroachment found in the previous suit as well as further encroachment and loss caused by flooding the petitioners' mine and other reliefs. The opposite party also filed a suit against the petitioners' making counter-charges of encroachment. These two fresh counter-suits were ordered to be tried together. The opposite party then made an application under S. 10 of the Civil Procedure Code for stopping the suit of the petitioners and the learned Subordinate Judge has passed an order which has the effect of stopping the trial of the petitioners' suit for an indefinite time, whilst the opposite party is at liberty to proceed with his suit against the petitioners' The petitioners obtained this Rule on the ground that the order was incompetent, illegal and irregular. I think that the order made by the learned. Subordinate Judge ought not to stand S. 10 of the Civil Procedure Code requires among other things that the suits should be between parties litigating under the same title. The Maharaja was suing in the previous suit as landlord for royalty under contract and the present suit is by one tenant of the Maharaja against another and based on tort. Then again the issue can hardly be said to be the same, as the encroachment charged in this suit covers a larger area than that found in the prior suit. This is quite sufficient to take the case out of the purview of S. 10, but the learned Subordinate Judge says he is clearly of opinion that the decision in the previous suit would operate as *res judicata* between the two defendants in that case and would, therefore, bar this suit. I do not think it proper to express any opinion on this point at this stage of the case and the learned Subordinate Judge was not called upon to express the opinion that he has expressed in this connection in a proceeding under S. 10.

It is contended by the learned Vakil for the opposite party that we cannot interfere with the order of the Court below, as it does not violate any rule of

jurisdiction. Reliance is placed on the decision of the Privy Council in the case of *Amir Hussan Khan* v. *Sheo Baksh Singh* (1). It is also contended that the case has not been decided and we have no jurisdiction to interfere with an interlocutory order.

As regards the question of jurisdiction I feel no difficulty. The learned Subordinate Judge had no jurisdiction to decide the question of *res judicata* in a proceeding under S. 10. His only jurisdiction in this proceeding was to stop the new suit if he found the existence of the circumstances mentioned in the section as conditions precedent to the passing of the order. He has come to no finding as to whether the parties were litigating under the same title. If he had come to a finding, right or wrong, that would have been another matter, but he has come to none and I think he had no jurisdiction to pass the order : but supposing he had the jurisdiction, he has exercised it in violation of the provisions of the law and under a misapprehension of the question at issue and has, therefore, acted with material irregularity in the exercise of his jurisdiction. See *Venkubai* v. *Lakshman* (2), *Sew Bux Bogla* v. *Shib Chunder Sen* (3), *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (4) and *Tarini Charan* v. *Chandra Kumar Dey* (5).

As regards the second objection there is ample authority in this Court for our interference with interlocutory orders when they might lead to failure of justice or irreparable injury. See *Dhapi* v. *Ram Pershad* (6), *Gobinda Mohan* v. *Kunja Behari* (7) and *Amjad Ali* v. *Ali Hussain Johar* (8). Even if it were doubtful whether S. 115 does empower us to interfere in a case of this kind, I think that our powers under S. 15 of the Charter Act are wide enough to enable us to do justice. In this case the opposite party may go on encroaching on the petitioners' land, he may flood the petitioners' mine or even let down the surface and make investigation impossible and yet the petitioners would not have a word to say until the previous suit is finally decided years later when investigation may be impossible, when evidence may have disappeared and when a decree may be nugatory ; and while the petitioners are thus handicapped by the order of the Court, the opposite party may run his own suit against the petitioners unhampered by either the suit of the Maharaja or the suit of the petitioners. I cannot conceive of a greater injustice and I have no hesitation in setting aside the order of the learned Subordinate Judge and making the Rule absolute with costs, five gold *mohurs*.

Chapman J.—I agree.

V.B./R.K.

Rule made absolute.

(1) (1885) 11 Cal. 6=11 I. A. 237=4 Sar. 559 (P. C.).
(2) (1888) 12 Bom. 617.
(3) (1886) 13 Cal. 225.
(4) (1888) 15 Cal. 47.
(5) (1910) 6 I. C. 193.
(6) (1887) 14 Cal. 768.
(7) (1909) 4 I. C. 364.
(8) (1910) 6 I. C. 574.

A. I. R. 1916 Calcutta 319

CHAUDHRI, J.

Basir Ali—Plaintiff.

v.

Nazir Ali—Defendant.

Original Suit No. 288 of 1906, decided on 30th April, 1915.

Civil P. C. (5 of 1908), O. 40, R. 1 (d)—Receiver can be authorised to execute sale deeds.

Under O. 40, R. 1, Clause (*d*) of the Civil Procedure Code, 1908, the Court may confer on a Receiver all such powers for the realization of properties and the execution of documents as the owner has. [P. 320, C. 2.]

Therefore, in a partition action in which a Receiver is authorized to sell properties he may be directed to convey the properties. [P. 320, C. 2.]

Judgment.—Formerly it was the practice of this Court to grant sale certificates in respect of sales by Receivers under orders of the Court. In the case of *Minatoonnesssa Bibee* v. *Khatoonnessa Bibee* (1), Sale J., held after a careful consideration of the earlier cases that a sale by the Receiver was a sale by the Court. In *Gulam Hossein Cassin Arif* v. *Fatima Begum* (2) Fletcher, J., disallowed an application for confirmation of such a sale and for a sale certificate, drawing a distinction between "sales by the Court" and "sales under the Court." Owing to this decision great difficulties have arisen and sales effected by Receivers or Commissioners of Partition under orders of the Court have in many instances not yet been completed.

(1) (1894) 21 Cal. 479.
(2) (1910) 6 I. C. 300.

The difficulty has been in purchasers obtaining proper conveyances. In this particular case by the decree in Appeal No. 56 of 1910, dated the 11th May, 1911, it was amongst other things ordered that one Shaikh Mahboob Ali should be appointed Receiver of certain properties which included the premises No. 2, Ryod Street, and he was directed as such Receiver to sell the said premises by private treaty or public auction at a price not less than the valuation which was directed to be made by a well-known firm of Engineers in Calcutta. Liberty was given to the parties to the suit other than Hafiz Nazir Ali to buy the said property. The Receiver had the property valued as directed and on the 2nd May, 1913 at a meeting of the parties accepted the offer of the petitioner, who is the plaintiff in this case, to purchase the premises for Rs. 95,000. An agreement for sale was executed and a draft conveyance was prepared. Some of the parties to the suit being infants, a question arose as to who was to approve the draft conveyance on their behalf and execute the conveyance. An application was made to me on the 8th January last praying for an order that the Registrar of this Court do settle the draft conveyance and execute same on behalf of the infants-defendants. Following what I thought was the established practice of this Court I made the order. This was a partition action. An inquiry as to the parties interested was unnecessary, in view of the fact that the order for sale was made in their presence and there was no contest as to the share of the infant in respect of which there was a decree passed. The only question was who was to execute the conveyance on behalf of the infant. When the order came before the Registrar for settlement, a question was raised about the effect of a conveyance if executed by him on behalf of the infants, as to whether it would pass good title to the purchaser. The Registrar thereupon submitted a note to me. The following passage occurs in Trevelyan's Book on Minority, 3rd Edition, page 294 "when a sale is ordered by the Court, the Court may itself execute or may direct one of its officers to execute a transfer in the name of the minor." The authority for this is given as Ss. 261-262 of the Civil Procedure Code, 1882 (O. 21, R. 34 of the present Code). The Registrar correctly points out that that rule refers to a judgment-debtor who has been ordered to execute a document but has refused or neglected to do so. It was held by Kennedy, J., that the corresponding section (S. 202) of the Code of 1859 did not apply to minors, and our present R. 28, Chapter 17, does not appear to be applicable. The Registrar also correctly points out that there is difficulty in applying the provisions of Chapter 28, R. 51 of our new rules. They refer to sales by the Registrar and not to sales by Receivers. In England when a sale is ordered in a partition action, for the purpose of effecting the sale, infants who are interested are declared trustees of their shares for the purchaser, within the meaning of the Trustees Act, 1893, and persons are appointed by the Court to convey their shares to the purchaser [see Halsbury's Laws of England, Volume 17, page 82, and *Davis* v. *Ingram* (3), where the next friend of the infant was appointed to convey]. Under the Indian Trustees Act by virtue of S. 8, the High Court may make a vesting order having the effect of a conveyance with regard to property held by a minor trustee or mortgagee, and Ss. 20 and 32 may be used in the same way as similar sections in the English Act. The Indian Act, however, is only applicable to cases as governed by the English law. There may be certainly cases as between Hindus or Muhammadans where the provisions of the Indian Act may be held not inapplicable, but a general order following the English practice in the case of Hindus and Muhammadans may lead to complications. Having regard to the decision of Mr. Justice Fletcher and a break in the practice in consequence, I have carefully considered the matter. I have also had the advantage of discussing the question with the learned Chief Justice with the assistance of the Registrar's note. I think that in a partition action in which a Receiver is authorised to sell properties, there can be no difficulty in directing him to convey the properties. Under O. 40, R. 1, Clause (*d*) of the Code, the Court may confer on a Receiver all such powers for the realization of properties and the execution of documents as the owner has.

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(3) (1897) 1 Ch. 477=66 L. J. Ch. 386=45 W. R. 459.

In England a sale under an order of Court includes a sale "with the approbation of the Judge" where it proceeds throughout under the directions of the Court, and also a sale "out of Court" in which case O. 41, R. 1, Cl. (*a*), applies. Careful provision has been made in the English Judicature Act and in the Orders and Rules thereunder relating to sales, conveyances and sale certificates, but our Code is silent except as to execution and mortgage sales. In the High Court, mortgage sales are held by the Registrar and sale certificates are granted. I have compared the form of such certificate with that which was used in respect of sales by the Receivers under orders of Court. It is practically the same form. I do not see why a certificate reciting the order of the Court authorising the Receiver to sell and stating that the sale has been effected thereunder and also reciting that the sale has subsequently been confirmed by the Court, when so confirmed, cannot be granted, when the purchaser applies for it and is content to take it as evidence of his title without asking for conveyance. It saves considerable costs and trouble, and I feel disposed to encourage granting such certificates. One of the grounds for refusal in *Golam Hossein Cassim Arif's* case (2) was that in sales "under the Court" the Court does not make any title to the purchaser. But a sale certificate merely records an already accomplished fact, and states what has been sold. In execution sales there is no warranty by the Court that the title is good. The quantity and nature of the right and interest existing in the debtor at the time of attachment and advertisement of sale, alone pass by the sale. In mortgage suits, the right, title and interest both of the mortgagor and the mortgagee pass. In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity and title of the thing sold just as much as if he were purchasing the same under private contract. I do not see what the difference is. The sale certificate does not transfer the title. It is evidence of the transfer. But since the question is of some considerable importance, it is desirable to adopt a course which seems to me to be sanctioned by Statute, and not merely to follow a practice in which there has been a break as above stated, however recent. In this case I authorise the Receiver and direct him to execute the conveyance. I think that if this course is followed the difficulty which I have mentioned will be avoided. Cases may arise where it may be considered expedient to follow the English procedure and apply the Indian Trustees Act where it may not be inapplicable, but it is unnecessary to deal with that question on this application. I have referred to it as the point has been raised in the Registrar's note. Sales by Commissioners of Partition are eventually confirmed by the Court when the final decree is made and formal conveyances may not be at all necessary. To get a guardian of an infant's property first appointed authorising him to sell, in order to effectuate a sale in a partition action, is a dilatory and expensive procedure and should, in my opinion, be discouraged unless imperatively necessary.

V.B./R.K.

A. I. R. 1916 Calcutta 321

CHATTERJEE AND BEACHCROFT, JJ.

Abdul Hamid and *others*—Defendants—Appellants.

v.

Udoy Chandra Acharjee and *others*—Plaintiffs—Respondents.

Appeal No. 3627 of 1913, decided on 11th January, 1916, from the Appellate Decree of Sub-Judge, Mymensingh, dated 10th July, 1913.

Bengal Tenancy Act (8 of 1885), S. 49 (6)—Tranfer of non-transferable under-*raiyati* holding to knowledge of landlord—Landlord continuing to receive rent from transferees—Transferees cannot be ejected without notice under S. 49 (6).

The landlord of a non-transferable under-*raiyati* holding, who after being aware of its transfer (by exchange) continues to receive rent from the transferees in the name of the original under-*raiyat*, cannot eject them without notice under Clause (6) of S. 49 of the Bengal Tenancy Act.

[P. 321, C. 2. & P. 322, C. 1.]

Kumar Sanka Roy—for Appellants.

A. K. Fazlul Haq—for Respondents.

Judgment.—The plaintiff is an occupancy *raiyat*. One Zamir Khan was an under-*raiyat* under him under a lease of 1303, which was to last up to 1311. It appears that in or about 1304 Zamir exchanged the land of his sub-*raiyati* holding with the defendants and put

them in possession. It has been found that the plaintiff was aware of this. The plaintiff nevertheless continued receiving rent of this holding in the name of Zamir. It was admitted in the case that such a sub-*raiyati* holding is not transferable without the consent of the *raiyat*-landlord. The exchange was evidently a transfer and the conduct of the parties seems to show that the plaintiff did not treat the exchange as working forfeiture of the rights of Zamir. He, therefore, accepted the exchange as one that was valid and if he did so he accepted the defendants-appellants as his tenants. Having done so, the plaintiff cannot treat the defendants as trespassers and eject them without notice under Clause (6), S. 49 of the Bengal Tenancy Act. As the cause of action upon which the plaintiff came to Court, was that he had received an *istafanamah* from his tenant, Zamir, in 1317 and was thereby empowered to take *khas* possession, has failed and as the facts show that he had accepted the defendants as his sub-*raiyats* by the exchange, the suit for ejectment must fail.

The appeal is, therefore, decreed with costs.

V.B./R.K.

Appeal decreed.

A. I. R. 1916 Calcutta 322

HOLMWOOD AND MULLICK, JJ.

Naresh Chandra Bose—Plaintiff—Petitioner.

v.

Hira Lal Bose and *others*—Defendants—Opposite Parties.

Civil Rule No. 627 of 1915, decided on 25th November, 1915.

Land Acquisition Act (1 of 1894), S. 53—Special Tribunal has power to call for records of other Courts—Calcutta Improvement Act (1911), S. 71.

The power to call for records from another Court is a power which is inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal which has been constituted a Court under the Land Acquisition Act, I of 1894, to hear cases from the orders of the Calcutta Improvement Trust. [P. 322, C. 2.]

Mohendra Nath Roy, Gunada Charan Sen, Monmotha Nath Roy and *Surendra Nath Das Gupta*—for Petitioner.

Ram Charan Mitter—for Government.

Judgment.—The question that is raised in this Rule is one of considerable importance to the public having dealings with the Special Tribunal constituted to hear cases from the orders of the Calcutta Improvement Trust. It is perfectly clear that some *modus operandi* must be devised by which the Tribunal may have access to land acquisition and other records that are necessary for the purpose of their business. But there appeared to be technical difficulties under the law. We, therefore, asked the learned Government Pleader, Babu Ram Churn Mitter, to give us his assistance in the matter, and we have also heard the learned Vakil Babu Mohendra Nath Roy for the petitioner, and it appears to us fairly clear that in the exercise of our powers of supervision under the Charter, we ought to give directions to the lower Court in the same way in which a Bench of this Court appears to have done in the case of *Golap Coomary Dossee* v. *Soondur Narain Deo* (1). There the Court also dealt with administrative orders of this Court. Now as the shortest way to get over the difficulty, we may point out that the Special Tribunal has been constituted a Court under the Land Acquisition Act, 1894, and under S. 53 of that Act the Land Acquisition Court is governed by the provisions of the Code of Civil Procedure and has the powers of a Judge under the Code. It is not necessary to follow the learned Judge in the Court below to the extent of holding that the Special Tribunal would be able to compel the production of records from another Court. It is this power of compulsion which seems to have been a stumbling block in the learned Judge's mind. Nobody ever heard of an attempt to compel a Court to send its records to another Court, and we are not apprehensive that any such question will ever arise. The power to call for records is a power which is undoubtedly inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal.

For these reasons we think that the Rule should be made absolute and the District Judge should be directed to send the record asked for by the President of the Tribunal.

We make no order as to costs.

V.B./R.K.

Rule made absolute.

(1) (1879) 4 C. L. R. 36.

A. I. R. 1916 Calcutta 323

CHATTERJEA AND MULLICK, JJ.

Bonomali Banikya—Petitioner—Appellant.

v.

Joy Kumar Baidya and *others*—Opposite Parties—Respondents.

Appeal No. 99 of 1914, decided on 21st April 1915, from the Order of Dist. Judge, Noakhali, dated 28th November, 1913.

(a) Civil P. C. (5 of 1908), S. 47 and O. 21, R. 16—*Ex parte* mortgage-decree assigned—Assignee failed to apply under R. 16—*Ex parte* decree setaside against original decree holder, transferee not being made party—Held transferee could not execute until order setting aside decree is set aside.

An *ex parte* decree obtained in a mortgage suit was transferred but the transferee neither got his name substituted in the place of the decree-holder nor was any notice under O. 21, R. 16 of the Civil Procedure Code served either upon the decree-holder or upon the judgment-debtor. The judgment-debtor applied to set aside the *ex parte* decree making only the decree-holder party to it. The decree-holder failed to appear and the *ex parte* decree was set aside. The transferee of the decree thereafter applied for execution :

Held, that the transferee could not proceed with the execution before the order setting aside the *ex parte* decree was set aside.

[P. 324, C. 1.]

(b) Civil P. C. (5 of 1908), S. 151—Order setting aside *ex parte* decree cannot set aside under S. 151.

That the Court could not set aside the order setting aside the *ex parte* decree under S. 151, Civil Procedure Code. [P. 324, C. 1.]

Dhirendra Nath Kastgir—for Appellant.

Bepin Chandra Bose—for Respondents.

Judgment.—This appeal arises out of an application under S. 47 of the Civil Procedure Code. The facts are these : One Rajdhar Shaha obtained a mortgage-decree against the appellant and some other persons in Suit No. 1124 of 1903 on the 22nd February, 1904. Rajdhar having died, his widow Bidya Sundari obtained the final decree in the mortgage suit on the 20th March, 1906. She executed the decree in 1907. Then she transferred the decree to certain persons from whom the present respondents purchased it on the 16th March, 1910. On the 3rd May, 1910, the respondents applied for execution of the decree in Execution Case No. 314 of 1910. No notice under O. 21, R. 16, was issued or served upon the decree-holders or the judgment-debtors, but, on 2nd June, 1910 a notice under O. 21, R. 22, Code of Civil Procedure, was served upon the judgment-debtors, and on the next day, the execution case was dismissed. On the 18th September, 1912, the appellant applied under O. 9, R. 13, to set aside the *ex parte* decree. The application was made against Bidya Sundari alone as the opposite-party. Bidya Sundari did not appear in that application and the *ex parte* decree was set aside on the 15th February, 1913 and the original suit was revived, but, as Bidya Sundari did not appear to prosecute the suit, it was dismissed for default on 12th March, 1913. Meanwhile, on the 29th November, 1912, the respondents applied for execution of the *ex parte* decree and a notice under O. 21, R. 22, Code of Civil Procedure, was again served upon the judgment-debtors on the 30th December, 1912. The suit having been dismissed for default on the 12th March, 1913, the present application was made by the appellant under S. 47, Code of Civil Procedure, on the 1st May, 1913 objecting that the execution case could not proceed on the grounds that no notice under O. 21, R. 16, had been served, that the respondents had not acquired any interest in the decree by transfer and that the *ex parte* decree sought to be executed, having been already set aside, could not be executed at all. A petition of objection was filed on behalf of the present respondents and they urged that the Court, having regard to the circumstances, ought to exercise powers under S. 151, Code of Civil Procedure, and set aside the order by which the *ex parte* decree had been set aside.

The Court of first instance held that the appellant had notice of the transfer in favour of the respondents, that he, therefore, ought to have taken steps to have the respondents brought on the record of the case for setting aside the *ex parte* decree and that having taken proceedings, in the case in the absence of the persons who were interested, he did not act *bona fide* and it accordingly disallowed the application of the judgment-debtors. On appeal, the learned Judge although he agreed generally with the Munsif, held that no notice having been served under O. 21, R. 16, the execution could not proceed until the service of the

notice and remanded the case to the Court of first instance, in order that the question whether the respondents had really a right to execute the decree might be determined after service of the notice under O. 21, R. 16, Code of Civil Procedure. One of the judgment-debtors has appealed to this Court.

It appears that the respondents who claimed under a transfer from Bidya Sundari did not get themselves substituted in the place of Bidya Sundari under any order of the Court, and no notice under O. 21, R. 16, Code of Civil Procedure, having been served either upon Bidya Sundari or upon the judgment-debtors, the execution could not proceed under the express terms of O. 21, R. 16 of the Code. The respondents not having been substituted by the order of the Court in the Execution Case No. 314, the appellant was not bound to proceed against these persons in the application for setting aside the *ex parte* decree which was made against the only person on the record, *i.e.*, Bidya Sundari, and, although a good deal of suspicion arises out of the circumstances of the case, we do not see how the respondents can proceed with the execution before the order setting aside the *ex parte* decree is set aside. We are unable to give effect to the contention that the order setting aside the *ex parte* decree should be set aside under S. 151 of the Civil Procedure Code, and that for two reasons: the *first* being that the present proceedings have arisen in the course of execution proceedings, and, *secondly*, that the question whether there had been real transfer of the interest in the decree to the respondents has not yet been determined by the Court. It seems to us that it is necessary for the respondents to take steps for setting aside the order by which the *ex parte* decree was set aside. So long as the dismissal of the original suit stands, we think the respondents cannot execute the decree. Under the circumstances, the orders of the Courts below will be set aside, but, having regard to the circumstances of the case, each party will bear its own costs in all the Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 324

JENKINS, C. J. AND WOODROFFE, J.

Akhoy Kumari Debi and *another*—Appellants.

v.

Hazari Dassee Debi—Respondent.

Appeals from Original Civil Orders Nos. 9 and 10 of 1915, decided on 23rd February, 1915.

Guardian and Wards Act (8 of 1890), S. 7 (3) —Minor's welfare alone gives jurisdiction to Court to appoint a guardian if appointment does not interfere with another guardian appointed —Even unprobated will has to be considered under Cl. (3).

There is no power in a Court to appoint a guardian, unless the Court is satisfied that it is for the welfare of the minor that the order should be passed, and that appointment of the guardian will not infringe sub-S. (3) of S. 7 of the Guardians and Wards Act.

[P. 324, C. 2 & P. 325, C. 1.]

In such cases where a will is set up a Judge has jurisdiction and is bound to consider that there is a will although Probate has not been granted. 17 Bom. 560; 16 Mad. 380 and 29 Bom. 832, Ref. to. [P. 325, C. 1.]

Norton and *Langford James*—for Appellants.

S. P. Sinha—for Respondent.

Judgment.—There are two appeals from an order appointing a guardian of a Hindu widow aged 14. There is no power in the Court to appoint a guardian unless the Court is satisfied that it is for the welfare of the minor that the order should be passed. In support of the application there is no affidavit on which the Court can act. More than that, it seems to us that in the circumstances the case should have waited until the return of Maharaja Tagore, the head of the family, in order that it might be seen whether he was willing to accede to a course which was apparently acceptable to both parties and would have solved the present difficulty. As it is, we have the curious position that an order appointing a guardian has been made on materials which do not comply with the requirements of the law and at the same time a Rule has been issued on another application and is pending for the determination of the question whether some one else should not be appointed guardian.

The proper course now to follow is this. We set aside the order of Mr. Justice Imam and send back the case in

order that it may be re-heard by him if the petitioner thinks fit to put in proper evidence in support of her application. Her application should be heard together with the application of Mr. Langford Jame's client and also of Mr. Norton's client, if she thinks fit to make an application ; and in any case nothing should be done until the views of Maharaja Tagore have been ascertained. Finally we think before making any order the Court must be satisfied that the application is for the welfare of the minor and that the appointment of the guardian will not infringe sub-S. 3 of S. 7 of the Act.

In our opinion the Judge had jurisdiction and was bound to consider that there was a will although Probate had not been granted ; and that appears to us to be the result of several authorities : *Sayad Shahu* v. *Hapiji Begam* (1), *Chinnasami* v. *Hariharabhadra* (2) and *Pathan Ali Khan Badlukhan* v. *Bai Panibai* (3). The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, as for instance, it may possibly defer deciding on the question of guardianship until the question of Probate has been determined. But it is not open to the Court to say that it will refuse to take notice of the will.

We allow the appeals. The respondent will pay the costs of the appellant (Mr. Norton's client). We make no order as to the costs or Mr. James' client.

V.B./R.K.

Appeal allowed.

(1) (1893) 17 Bom. 560.
(2) (1893) 16 Mad. 380.
(3) (1895) 19 Bom. 832.

A. I. R. 1916 Calcutta 325

MOOKERJEE AND NEWBOULD, JJ.

Jaharaddi Mandal—Plaintiff—Appellant.

v.

Debnath Nath Chaudhury and *others*—Defendants—Respondents.

Appeal No. 2824 of 1913, decided on 3rd August, 1915, from the Appellate Decree of Addl. Sub-Judge, 2nd Court, Dacca, dated 15th August, 1913.

(a) Possession—Suit for—Plaintiff held entitled to decree for possession—Doctrine of acquiescence held not applicable—Estoppel.

In a suit for recovery of possession of land on a declaration that it was included within the plaintiff's tenancy under the landlord defendants, the defence was that the plaintiff had willingly given up the land to the defendant for the erection of a market in exchange for lands granted to him elsewhere. This defence having been found to be untrue, it was contended on behalf of the defendants that the plaintiff's claim for recovery of possession was barred by the doctrine of estoppel or acquiescence and his remedy was by way of a suit for recovery of the price of the land or for specific performance of the alleged agreement to give other lands in exchange :

Held, that as the plaintiff had received neither money nor land in exchange, he was entitled to a decree for possession of the land.

[P. 325, C. 2 & P. 326, C. 1 & 2.]

(b) Evidence (Act I of 1872), Ss. 115 and 116—Estoppel — Doctrine of — Applicability of — Conduct of party found to be oppressive—He cannot claim benefit of doctrine.

That the doctrine of acquiescence had no application in the circumstances of the case ; mere quiescence being not acquiescence.

[P. 326, C. 1 & 2.]

A Court of Equity will not have recourse to the doctrine of estoppel or acquiescence for the benefit of a party who does not come into Court with clean hands and whose conduct has been found to be oppressive. *De Bussche* v. *Alt*, (1878) 8 Ch. D. 286, expl. [P. 326, C. 2.]

Dwarka Nath Chakrabarty and *Ramani Mohan Chatterjee* for Appellant.

Mukunda Nath Roy and *Joges Chandra Dey*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of possession of land, on declaration that it is included within his tenancy under the landlord defendants. The defendants disputed the title of the plaintiff to the eastern half of the land : as regards the western half, they pleaded that the plaintiff had willingly given it up for the establishment of a market thereon and had been granted lands in exchange elsewhere. The defendants further contended that the plaintiff was barred by the doctrine of estoppel or acquiescence. The Court of first instance found upon the question of title in favour of the plaintiff, held that he was not barred by the doctrine of estoppel or acquiescence and decreed the suit. On appeal the Subordinate Judge has affirmed the findings of the Trial Court, but, as in his opinion the plaintiff did not take active steps " to prevent this spoliation," he has allowed the appeal and dismissed the suit. On the present appeal the decision of the Subordinate Judge has

been assailed on the ground that the doctrine of estoppel by conduct or acquiescence has no application to the facts found, and that as the substantial defence to the claim, namely, that the plaintiff had been given lands in exchange for the disputed property, has completely failed there is no answer to the suit. In our opinion the decree of the Subordinate Judge cannot possibly be supported.

As the title of the plaintiff to the entire land in dispute has been found by both the Courts below, he is *prima facie* entitled to succeed. The defendants contend, however, that the claim is barred, because the plaintiff willingly gave up this land for the erection of a market and was given lands elsewhere on exchange. This allegation was specifically found untrue by the Court of first instance there is no discussion by the Subordinate Judge upon this point, possibly for the reason that the defendants, who were appellants before him, did not challenge the finding. The question, consequently, arises, whether there is a valid defence to the claim. We cannot discover any plausible defence. It is argued, indeed, that the remedy of the plaintiff was by way of a suit for specific performance of the alleged agreement to give him land elsewhere. In this connection, reference may be made to the written statement, where it is alleged that the plaintiff and other tenants similarly situated whose lands were taken by the defendants agreed to give up possession thereof in favour of the landlords in return for consideration or in exchange of lands situated elsewhere. It has been found that the plaintiff has not been given either cash consideration or land in exchange. Consequently, the act of the defendants has been rightly characterised as "spoliation," by the Subordinate Judge who has decided in their favour. The doctrine of acquiescence has plainly no application, in these circumstances.

Stress has been laid upon a passage from the judgment of Thesiger, L J., in the case of *De Bassche* v. *Alt* (1) where reference is made to the decision of Lord Cottenham in *Duke of Leeds* v. *Earl of Amherst* (2): "If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." This doctrine is of no assistance to the defendants. Mere quiescence is not acquiescence [*Ananda Chandra Sen* v. *Parbati Nath Sen* (3)]. The plaintiff did not stand by in such a manner as to induce the defendants to believe that he assented to the acts of the defendants. Even according to the defendants the, plaintiff demanded restitution for the loss of the lands which his landlord proposed to take up for the market: he insisted on the payment of consideration in cash or grant of land in exchange. He has received neither money nor land, although the defendants have falsely alleged that he had received land in exchange. We cannot possibly accede to their contention that the remedy of the plaintiff is by way of a suit for recovery of the price of the land or for specific performance of the agreement to give other lands in exchange. They have acquired no title to the land, and we are clearly of opinion that we should not assist them, in disregard of the principles of justice, equity and good conscience, to retain possession of land which they have seized by very questionable methods. A Court of Equity will not have recourse to the doctrine of estoppel or acquiescence for the benefit of a party who does not come into Court with clean hands and whose conduct has been properly described as spoliation or oppression.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

V.B./R.K.

Appeal allowed.

(1) (1878) 8 Ch. D. 286.
(2) (1846) 2 Phil. 117.
(3) (1906) 4 C. L. J. 198.

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HOLMWOOD AND MULLICK, JJ.

M. G. Malachi—Plaintiff—Appellant.

v.

Ahalad Mahato and *others*—Defendants—Respondents.

Appeal Nos. 950 and 1153 of 1912, decided on 7th January, 1915, from the Appellate Decrees of Dist. Judge, Manbhum, in Title Appeal No. 165 of 1911, dated 23rd January, 1912.

(a) Bengal Putni Regulation (8 of 1819)—*Putni* sale—Purchaser can eject tenants with no protected right—Purchaser holding land as third person and not as *Putnidar* merger does not result—Purchaser cannot obtain original holding before *Putni*, though he is in possession.

A purchaser under the Putni Regulation (VIII of 1819) is entitled to eject tenants from their holdings when they have no protected right. [P. 327, C. 1 & P. 328, C. 1.]

There is no merger where the purchaser possesses the land as a third person wholly distinct from the *patnidars*, although he happens to be the son of one of them. [P. 327, C. 2.]

The purchaser cannot obtain the original holding before the *patni* was created, though he is in possession of the same holding. 18 Cal. 349 (P. C.), ref. and foll. [P. 327, C. 2.]

(b) Bengal Rent Act (10 of 1859)—Effect of transfer of original holdings with landlord's consent is that old tenancy is relinquished and new one is created — Effect of the Act on Khudkasht raiyats stated.

The effect of a transfer of such a holding with the consent of the landlord under Act X of 1859 can only be that the original tenant is considered to have relinquished the holding altogether and that a new tenancy is created in the transferee. [P. 327, C. 2.]

After the enactment of Act X of 1859 the original *khudkasht raiyats* continued to hold the same rights as they held before, but the *khudkasht* right ceased to exist as a right that can be acquired after the passing of the Act. [P. 327, C. 2.]

D. N. Mitter, *Babus N. N. Banerjee* and *N. N. Mitter* for Appellant.

Babu Satya Charan Sinha, for *Babu Sarat Chandra Roy Chowdhury* and *Babu Govinda Chandra Chakravarti*—for Respondents.

Judgment.—These two appeals arise out of suits brought by the plaintiff to eject certain defendants from their holdings, on the grounds that he is the purchaser under Putni Regulation VIII of 1819, and that they have no protected rights. The cases appear to have been based upon quite different circumstances and pleadings, and the learned Munsif tried them separately and passed separate judgments, Reading the judgment of the Court of Appeal below which professes to deal with both the cases in one judgment, we are unable to find that he has directed his attention to Suit No. 1288 at all. His judgment seems to apply exclusively to Suit No. 1287 out of which Appeal No. 950 arises.

As far as Appeal No. 950 is concerned two points have been raised in appeal, one that the purchase of Shibram can only have resulted in the merger of the *jote* with the *putni*, and the other that there being no transfer of a right of occupancy under Act X of 1859, Shibram cannot be considered to be holding the same tenancy which Khusal held before the creation of the *putni* and that his is a new tenancy created after the *putni* and is, therefore, in no way protected. On the findings of fact of the learned Judge in the Court below we cannot hold that there was any merger. He finds that Shibram purchased and possessed the land as a third person wholly distinct from the *putnidars*, although he happened to be the son of one of them. But as regards the question of his now being in possession of the same holding as Khusal had before the *putni* was created, we are of opinion that in view of the Privy Council decision in *Chandrabati Koeri* v. *Harrington* (1) it is impossible to hold that Shibram obtained the original holding of Khusal. The effect of a transfer of such a holding with the consent of the landlord under Act X of 1859 can only be that the original tenant is considered to have relinquished the holding altogether and that a new tenancy is created in the transferee.

It has been argued before us by the learned Vakil for the respondent that Khusal was a *khudkasht raiyat* and that his *khudkhast* right may have been transferable; but this position does not seem to be tenable. After the enactment of Act X of 1859 the original *khudkhast raiyats* no doubt continued to hold the same rights as they held before, but the *khudkhast* right ceased to exist as a right that can be acquired after the passing of the Act.

We are, therefore, of opinion that Appeal No. 950 must be allowed and the judgments and decrees of both the lower

(1) (1891) 18 Cal. 349=18 I. A. 27 (P. C.).

Courts set aside and the plaintiff's suit decreed with costs in all Courts.

With regard to Appeal No. 1153 the case is different. There the Munsif decided that as far as the rights of Kanta Mahato were concerned there was no doubt that his tenancy was created after the *putni* and it was admitted that the defendant took a fresh settlement and did not step into the shoes of Kanta Mahato. But the learned Munsif said that the plaintiff's case must fail by reason of the fact that two separate holdings belonging to Khusal and Kanta have been mixed together in the plaint, and he found the description of these lands in one joint boundary was a fatal defect. This question has not been touched upon by the learned Judge in the Court below at all, and the parties are entitled to a decision from him upon the matter.

It is clear as far as Khusal is concerned that if any of the land in suit belongs to him, he being Khusal's *raiyat* cannot be ejected. But there does not *prima facie* seem to be any reason why the transferee from Kanta should not be ejected. But it is not clear whether the Munsif means that Khusal is now in actual occupation of a part of this holding, or whether the defendant is a transferee from Khusal. If he is a transferee from Khusal, then the same principle would apply to him as we have laid down in Appeal No. 950. The learned Judge must consider this objection and come to a decision whether the suit is bad for this reason or not. The case is, therefore, remanded to the lower Court and costs will abide the result.

V.B./R.K.

Appeal No. 950 allowed ;
Appeal No. 1153 remanded.

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D. CHATTERJEE AND N. R. CHATTERJEA, JJ.

Asir Mahomed Sheikh and *others*—Defendants—Appellants.

v.

Raja Probhat Chandra Barua—Plaintiff—Respondent.

Second Appeal No. 2840 of 1912, decided on 21st July, 1914, against the Decree of Sub-Judge, Goalpara, dated 22nd July, 1912.

Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 18—What is prevailing rate under S. 18 is stated.

A rate brought into existence by the landlord pending disputes with the tenants regarding enhancement of rent is not contemplated by the term 'prevailing rate' mentioned in S. 18 of Act VIII of 1869. [P. 329, C. 1.]

Sarat Chandra Roy Chowdhury and *Gobinda Chandra Chakerbutty*—for Appellants.

Rash Behari Ghose, *Basanta Kumar Bose* and *Mohini Mohan Chuckerbutty*—for Respondent.

Judgment.—These appeals arise out of suits for enhancement of rent under S. 18 of Act VIII of 1869 B. C. The only ground upon which enhancement has been allowed is that the defendants paid rent below the prevailing rate of rent paid by tenants in the places adjacent. The defendants have appealed to this Court, and several questions have been raised in these appeals.

The main contention, and that which applies to all the appeals, is that the decision of the Courts below as to the prevailing rate is incorrect.

The holdings of the defendants are situated in *Mouzah* Bidyapara. Some of the tenants of Bidyapara pay rent at a higher rate than that paid by the defendants, but they do not form a majority of the tenants of the *mouzah*. The Courts below, however, have taken the rate of rent in the neighbouring *mouzahs*, along with the rate paid by the minority of the tenants of *Mouzah* Bidyapara itself, to be the prevailing rate.

It has been contended that neighbouring *mouzahs* are not 'places adjacent' within the meaning of S. 18 of Act VIII of 1869. It is unnecessary, however, to discuss the question, having regard to the view we take of the 'prevailing rate' in the present case. It appears that the plaintiff, who is the proprietor of *Mouzah* Bidyapara and the neighbouring *mouzahs*, held a survey of all these *mouzahs* and demanded enhancement of rents from the tenants.

The tenants of the neighbouring *mouzahs* and some of the tenants of *Mouzah* Bidyapara agreed to the enhancement, but the defendants in these cases refused to do so. They were accordingly served with notices of enhancement under S. 14 of Act VIII of 1869. These notices

were served so far back as 1907, and the present suits were instituted in 1910. Now the enhanced rates paid by the tenants of the neighbouring *mouzahs* and by some of the tenants of Bidyapara *Mouzah* came into existence since the defendants were called upon to pay the enhanced rents. It is true that plaintiff has succeeded in realising rents at the enhanced rates from the other tenants, but that was shortly before the notices of enhancement were served upon the defendants, and the plaintiff cannot by merely delaying the institution of the suits rely upon the rate at which he had succeeded in realising rents since the commencement of the disputes as to rates in the locality. We do not think the prevailing rate mentioned in S. 18 of Act VIII of 1869 contemplates a rate brought into existence, so to say, by the landlord pending disputes with the tenants regarding enhancement of rent.

We are accordingly of opinion that the Courts below are in error in relying upon the rates paid by the minority of the tenants of Bidyapara and the tenants of the neighbouring *mouzahs* under the circumstances stated above as the prevailing rates and that the plaintiff has failed to prove the prevailing rate according to law.

In this view it is unnecessary to consider the other questions raised on behalf of the appellants.

In the result, the claim for enhancement is disallowed. The plaintiff will get a decree for rent at the rates admitted by the defendants in each case with interest at the legal rate. Under the circumstances we direct each party to bear his own costs in all the Courts.

V.B./R.K.

Appeals allowed.

A. I. R. 1916 Calcutta 329

CHATTERJEE AND BEACHCROFT, JJ.

In re Poorna Chandra Addy—Petitioner.

Reference No. 6 of 1915, decided on 22nd December, 1915, made by Dist. Judge, Cuttack.

(a) Legal Practitioners Act (1879), Ss. 13 (*l*) 14—Execution case of pleader and his cousin unjustifiably struck off—Notice written by pleader and signed by cousin given to Court threatening him with suit for damages—Refusal by pleader to apologise—Reference under S. 14 *held* incompetent — Action of pleader *held* to be in capacity of suitor—Error committed by pleader *held* to be error of law.

A Pleader practising in a Munsif's Court and his cousin had an execution case before the Munsif, which being unjustifiably struck off, a notice signed by the cousin and written out by the Pleader was given to the Munsif threatening him under erroneous legal advice with a suit for damages. On the report of the Munsif the District Judge asked the Pleader to apologize, which he refused to do. A reference was then made against him under S. 14 of the Legal Practitioners Act.

Held, that the reference was incompetent, not being one warranted by Clause (*l*) of S. 13 of Act XVIII of 1879, inasmuch as what was done by the Pleader was done in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character or anything done by him professionally. *In re Wallace*, (1866) 1 P. C. 283; 5 C. W. N. 48 and 18 M. L. J. 184, appl. [P. 330, C. 1.]

Held, also, that the error committed by the Pleader was an error of law which could not be treated as professional misconduct. 4 C. W. N. 663, foll. [P. 330, C. 2.]

(b) Legal Practitioner—Rights and duties—Bench and Bar—Relations between.

Amity and mutual understanding should always exist between the Bench and the Bar. [P. 330, C. 2.]

(c) Contempt—Contempt of Court—Anonymous communications to Court—Nature of.

Anonymous communications to a Court against a party to a pending case amount to gross contempt of Court. [P. 331, C. 1.]

Sarat Chander Roy Chowdhury, *Satya Charan Sinha* and *Dhirendra Krishna Roy*—for Petitioner.

Ram Churn Mitter—for Opposite Party.

D. Chatterjee, J.—Babu Purna Chandra Addy is a Pleader practising in the Court at Puri. He and his cousin Mohes had an execution case before the Second Munsif of Puri. On the date fixed for sale, the decree-holders found out that the sale proclamation had not been duly published. They applied for the issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court officers. If the facts were, as stated above, the most proper and just course for the learned Munsif would have been to grant the application. He rejected it, however, and struck off the case and the whole cost of the execution was lost for no default of the decree-holders. They were naturally annoyed and took legal advice as to whether they could recover damages from the Munsif. It is said that they were advised that such a case would lie, their

advisers relying on the case of *Tarucknath Mookerjee* v. *Collector of Hooghly* (1). Mohes insisted upon fighting out this case and a notice was given to the Munsif signed by Mohes but written out by Babu Purna Chandra to the following effect :—"We have by your illegal and unwarrantable conduct as aforesaid suffered a loss of Rs. 7-7-3, being the amount of costs incurred as specified below...I hereby give you notice, that both the aforesaid Babu Purna Chandra Addy and myself shall adopt legal proceedings against you for the said sum." The learned Munsif made a report to the District Judge of Cuttack and the said officer instituted proceedings under S. 14 of the Legal Practitioners Act against Babu Purna Chandra for grossly improper conduct in the discharge of his professional duty, inasmuch as the letter of notice was in his handwriting and must have been written with his knowledge and by his advice and inasmuch as he knew that no such suit would lie, his action in writing it and allowing it to be signed by Mohes was not *bona fide* and was dictated by a desire to harass the Munsif. Babu Purna Chandra in showing cause said that the notice was given under legal advice without any intention of harassing the learned Munsif and even if the advice was wrong, he had acted *bona fide* as a litigant in the exercise of his legal rights and not as a Pleader acting for a client, and no charge of professional misconduct would lie.

The learned Judge asked him to apologize, but he chose to stand upon his legal rights and did not. The learned Judge has, therefore, made this reference under S. 14 of the Legal Practitioners Act, holding that the Pleader was guilty of grossly improper conduct in the discharge of his professional duty.

It is contended before us that the reference is incompetent and should be discharged.

I think that this contention is right. What was done in this case was done "by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character, or anything done by him professionally." See *In re Wallace* (2), *In the matter of Jogendra Narayan Bose* (3), *In re a Pleader* (4) and *In the matter of a first grade Pleader* (5). The learned Senior Government Pleader, who appeared in this case on notice from the Court, did not support the reference as one warranted by Clause (*b*) of S. 13, but he said that the language used was intemperate and as the Pleader did not accept the invitation of the Judge to make an apology, he deserved some censure by this Court. The language was perhaps a little harsh, but it was the language of a litigant smarting from what he considered a wilful disregard of his just rights merely for the sake of administrative despatch when the greater part of the fault was not with him but with the office of the Court. Then, again, the part that he took in helping his co-litigant to give the notice was an insignificant one: he merely copied the letter and refrained from joining openly in the assertion of what he was advised was his legal right. It is admitted by his learned Vakil that the advice was wrong, and in the absence of malice his client had no right to maintain a suit for damages for a judicial act, but that does not take the case further than this that he and his advisers committed an error of law. No doubt the error was rather serious in this case, as it led to a breach of that amity and mutual understanding which should always exist between the Bench and the Bar. Justice to the litigant is the end for which the Bench and the Bar are the means and the powers of the one and the privileges of the other are ordained for the attainment of that end by their harmonious co-operation. It is to be regretted, therefore, that there was a discord in this case. The error, however, was nevertheless an error of law which cannot be treated as professional misconduct. See *In the matter of a Sarat Chandra Guha* (6). He has, however, in this Court through his Vakil expressed his regret for what has happened and there is an end of the matter.

I may, in this connection, mention that while the case was awaiting judgment, I

(1) (1870) 13 W. R. 13.

(2) (1866) 1 P. C. 283=4 Moore P. C. (N. S.) 140 (P. C.)
(3) (1901) 5 C. W. N. 48.
(4) (1908) 18 M. L. J. 184.
(5) (1901) 24 Mad. 17.
(6) (1900) 4 C. W. N. 663.

received a type-written envelope posted at Puri and enclosing some newspaper cuttings containing aspersions against the Munsif concerned in this case. Babu Purna Chandra, through his Vakil, disowns all knowledge of this and expresses his regret that anybody should have done it. I accept his statement and hold him blameless in the matter. I think it my duty, however, to say that whoever may be responsible for the sending of these cuttings in an anonymous cover with a type-written superscription which cannot be identified, is guilty of a gross contempt of Court. It is an attempt to interfere with the due administration of justice ; it is unfair to the party for whose benefit it is done; it is unfair to the party slandered who has no means of meeting it, and it is unfair to the Court which might, humanly speaking, be unconsciously influenced without being able to deal with the perpetrator in due course of law. Conduct like this is cowardly, ungentlemanly, and in the highest degree reprehensible and I hope no one connected with the Puri Bar had any hand in it.

In this view of the case, I discharge the Rule.

Beachcroft, J.—I agree that the reference ought to be discharged on the ground that the case is not one within S. 13 (*b*) of the Legal Practitioners Act. I am, however, sceptical of the truth of the Pleader's allegation that he took and acted on other legal advice in sending the objectionable letter to the Munsif. But even if it be assumed that it was sent with the intention of annoying the Munsif, I do not think it necessary to take any further notice of the matter.

We have no explanation from the Munsif as to why he rejected the prayer for issuing a fresh sale proclamation in the execution proceedings, but on the facts stated his orders dismissing the execution case appear to be wholly indefensible. The Munsif ought to have been thankful to the decree-holders for bringing to his notice the defect in the execution proceedings, and incidentally in the working of his office, instead of penalizing them for it. Human nature being what it is, one must not view the action of the Pleader too seriously. Having had time for reflection, he would have been well advised to accept the suggestion of the learned District Judge and offer an apology to the Munsif. I am not impressed by the offer of an apology in this Court at the eleventh hour when the Pleader felt that he might get into trouble. But in the circumstances the matter may now be allowed to rest.

I associate myself with the strictures of my learned brother on the sending of anonymous communications.

V.B./R.K.

Rule discharged.

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SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

In re Gobardhan Seal and *another*—Insolvent—Appellant.

v.

Rai Kissori Dassi and *another*—Respondents.

Appeal No. 61 of 1915, decided on 2nd February, 1916, from the Original Order of Chawdhuri, J., dated 16th March, 1915.

(a) Presidency Towns Insolvency Act (3 of 1909), S. 57—Real owner adjudicated insolvents—Subsequent *bona fide* purchaser for value from *benamidar* of owner does not acquire any title as against Official Assignee.

A person purchasing property from a *benamidar of* the owner, subsequent to his adjudication in insolvency under Act III of 1909, does not acquire any title to the property as against the Official Assignee, even though the purchase was made *bona fide* for value and without notice. Case-law discussed. [P. 337, C. 1.]

(b) Presidency Towns Insolvency Act (3 of 1909), S. 57—Real owner adjudicated insolvent—Subsequent *bona fide* purchaser from *benamidar* cannot establish good title by estoppel against Official Assignee—Equitable estoppel.

Per *Mookerjee, J.*—Such a purchaser may establish a good title by estoppel against the owner, but he cannot do so against the Official Assignee unless the conduct of the Official Assignee himself was such as would have made the equitable doctrine of estoppel applicable against him. [P. 336, C. 1.]

Langford James and *N. C. Sarkar*—for Appellant.

B. K. Lahiri and *K. N. Majumdar*—for Respondents.

Sanderson, C. J.—This was a petition by Sreemutty Rai Kissori Dassi that certain transfers should be set aside and should be held to be void as against the Official Assignee.

The petitioner was the mother-in-law of the insolvent, and the transfers in question were, *first* of all, a conveyance by the insolvent to his wife which was

dated the 9th of November, 1911, and, *secondly*, a conveyance from the insolvent's wife dated the 12th of October, 1912 to the appellant, who is the sister-in-law of the insolvent, she being the wife of the insolvent's brother.

Now, apparently the mother-in-law, the petitioner, filed a suit against the insolvent in the Small Cause Court for Rs. 1,942 on the 7th of September, 1911. The proceedings in that suit occupied a considerable time, as far as I understand, and the judgment was not in fact obtained until the 23rd of February, 1912. On the 27th of February, 1912, the insolvent against whom the judgment was obtained filed his petition, and he was adjudicated an insolvent on the same date. In the meantime the insolvent had, as I have already stated, on the 9th of November, 1911 purported to convey his share in the property in question to his wife.

Now, the learned Judge who heard this petition, after hearing the evidence, came to the conclusion that that conveyance was a fictitious one, to use his own words (at page 94, he says), "Taking all the evidence into consideration, I am of opinion that the sale by the insolvent to the wife was a fictitious sale." I understand him to mean by that, that the transaction was intended to be nothing more than a blind, that the insolvent never intended to pass the property to his wife, that he intended to retain the property and through his wife to retain control over it, and in that sense it was a fictitious transaction. On the face of it, it was a conveyance to the wife, but in fact it was no conveyance at all.

On the evidence, I think the learned Judge was quite justified in coming to that conclusion. I am not going through the evidence; it is unnecessary for me to do that; it was read fully yesterday by the learned Counsel for the appellant, and commented upon by him and also by the learned Counsel for the respondent. Therefore, the position was this: that on the 27th of February, immediately before the adjudication, the property in his share of the premises in question remained in him, because, as I have already said, this so-called sale was entirely a fictitious transaction. The result was that the property vested in the Official Assignee as soon as the adjudication took place.

What happened afterwards is that on the 12th of October, 1912, the insolvent's wife purported to sell the one-third share in the premises to the appellant, the sister-in-law of the insolvent. Now, the learned Judge has held that that transaction also was a fictitious transaction. I am not prepared to go as far as that upon the evidence. I think there are certain elements which make me hesitate in finding that that transaction was a fictitious one, as for instance, there is the fact that somewhere near Rs. 3,000 had to be found by the person who was put forward as the purchaser, namely, the appellant. There is no doubt whatever, as far as I can see, that there was a mortgage upon the premises, that the mortgagee was in no way connected with the insolvent or his wife or the purchaser —he was a total stranger— and that upon the sale by the insolvent's wife to the appellant that the mortgage was paid off to the extent of Rs. 1,150. In addition to that, within two or three days after this transaction, a house was bought for Rs. 1,700 in the name of the insolvent's wife, and the vendor of that property was a man, whose name was Babu Kali Kumar Pyne; and, there again, I cannot find any trace that Babu Kali Kumar Pyne was in any way connected with the insolvent, his wife or the purchaser. Therefore, it must be taken that the vendor of that property and the mortgagee, who were total strangers to these parties, were paid the sum of Rs. 2,850, and it is difficult for me on those facts to come to the conclusion that this second transaction was a fictitious transaction. Therefore, if it were necessary for me to come to a definite conclusion, I should be inclined to say that this transaction has not been proved to be a fictitious transaction. However, for the purpose of my judgment I will assume that it was not a fictitious transaction and that it was a *bona fide* purchase by the appellant. But even assuming that conveyance to be a *bona fide* conveyance and assuming that the purchaser had no notice—I am only assuming that in her favour—I am bound to say that I think there are facts which would give rise to very serious consideration as to whether the appellant, the purchaser, who was the sister-in-law of the insolvent, did not know all about the circumstances

under which the first transaction took place—I say even upon the above-mentioned assumption I still think that the conveyance of 12th October, 1912 cannot be upheld as against the Official Assignee, and for this reason : Inasmuch as the first transaction, namely, that of the 9th of November, 1911, has been rightly held to be a fictitious transaction and nothing more than a fictitious transaction, the property vested in the Official Assignee. S. 57 of the Presidency Towns Insolvency Act provides :—

"Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency (*a*) any payment by the insolvent to any of his creditors ; (*b*) any payment or delivery to the insolvent ; (*c*) any transfer by the insolvent for valuable consideration ; or (*d*) any contract or dealing by or with the insolvent for valuable consideration :

"Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor."

Therefore, in order to make any of the above-mentioned transactions with the insolvent, which takes place after the presentation of an insolvency petition by or against the debtor, valid, two things are necessary: (1) The transaction must take place before the date of the order of adjudication, and (2) the person with whom the transaction takes place must have no notice of the petition.

Now, I will assume that the lady in question had no notice, but it is quite clear that the transaction in this case, namely, of the 12th of October, 1912 took place after the order of adjudication : and, therefore, in my opinion, it cannot be held to be a valid conveyance as against the Official Assignee, because it must be taken in this case that the transaction of the 12th October, 1912, was in effect a transaction between the insolvent himself and the appellant. Now, the cases which Mr. James has quoted do not seem to me to be really relevant to this question ; provided that it is once recognized that the first transaction, namely, of the 9th of November, 1911, was nothing more than a fictitious transaction, and the second transaction must be regarded as between the insolvent himself and the appellant on the other.

The case upon which Mr. James has placed the greatest reliance in *In re Slobodinsky, Ex parte Moore* (1) and the judgment of Mr. Justice Wright at page 524. The conveyance in that case was by Slobodinsky to a Company. Mr. Justice Wright in the first instance had to consider the effect of that conveyance, just as we have to consider the effect of the conveyance to the wife. The learned Judge in this case has held that the transaction was a fictitious transaction, and I agree with him. Now, what Mr. Justice Wright held in that case was that the conveyance to the Company was a fraudulent conveyance liable to be set aside on certain events happening ; still, it was a conveyance by which it was intended by the debtor to pass the property, and a conveyance which would pass property to the Company until the conveyance was set aside. He says : "This having been a fraudulent conveyance or transfer of the debtor's property so far as he was concerned, how does the law stand ? One case which the trustee might make might be that the Company was an entirely sham Company, that it was really the debtor himself, and that the conveyance to the Company ought not to stand inasmuch as it was in substance a conveyance to himself. I am not, however, prepared to go that length and to say that I think this was entirely a sham Company. It seems to me that Millinsky's business was a genuine one, and the *bona fide* transfer of his business to the Company and his presence on the board are elements that go some way to show that there was an independent Company. There are also some *bona fide* shareholders who hold some 665 shares. I think there was some prospect of the success of the Company, and that it was *not a mere fiction.*" If he had held that it was a mere fiction, I gather from his judgment that it would not be necessary for him to consider the other points which he did in that case. It has been held in the present case that the conveyance which purported to be made by the insolvent to his wife was a *mere fiction*, and, therefore, that distinguishes the present case from

(1) (1903) 2 K. B. 517=72 L. J. K. B. 883= 89 L. T. 190.

Slobodinsky's case (1), on which so much reliance has been placed.

Another case, *In re Hart; Ex parte Green* (2), that was cited raises a different question. The facts, broadly speaking, were these: A certain gentleman Mr. Hart, who was a Director of a Company, transferred, as far as we know perfectly *bona fide*, some shares of the Company to his daughter Miss Hart, on the 14th of October, 1909. On the 13th of April, 1910, his daughter sold these shares to Miss Lomas for good consideration, and Miss Lomas had no notice of the act of bankruptcy committed by Mr. Hart. But in the meantime Mr. Hart had on the 31st of March, 1910, committed an act of bankruptcy, and there was a receiving order on the 22nd April, 1910.

I draw attention to that date because that date was not only after the voluntary settlement by Hart to his daughter, but it was after the sale by the daughter to the appellant. There was a great distinction between that case and the present. In *Hart's* case (2) there was a voluntary settlement which passed the property or was intended to pass the property to his daughter, and the transaction which passed the property to the claimant Miss Lomas was between Miss Lomas on the one hand and Miss Hart on the other. In the present case the transaction must be taken to have been between the claimant, Mr. James' client, on the one hand, and the insolvent on the other hand, because the conveyance of the 9th of November, 1911 was nothing more than a fictitious transaction, the property remaining in the insolvent until the adjudication.

For these reasons, I do not think this case is covered by those two decisions. I think it is clear that inasmuch as the conveyance of the 12th of October, 1912 was not made until after the adjudication of insolvency, which took place on the 27th of February, 1912, that transfer ought to be set aside, as against the Official Assignee.

I have only one word to add and that is this: Mr. James says that it is very hard upon the purchaser. It may be; but on the other hand, one has to remember that this estate is in insolvency, and there are creditors, and the rights of the creditors have to be considered just as much as the rights of the purchaser of this particular property: and it seems to me that if we were to hold contrary to the above conclusion we might as well have no insolvency laws at all, because all that would be necessary for the insolvent to do would be to imitate the conduct of the insolvent in this case, and he would then be able to defeat the claims of any creditor or creditors whom he wished to damage.

For these reasons, I think this appeal should be dismissed with costs.

Woodroffe, J.—The conveyance by the insolvent to his wife was clearly a *benami*. It may be a question whether the judgment under appeal can be supported in so far as it holds that the sale to Srimati Lakhi Priya was fictitious in the sense of *benami*. There are grounds for thinking that it was an arrangement made in pursuance of the original *benami* with a view to defeat and delay the creditor, the respondent. It is not necessary, however, to determine this question, as the second conveyance which was really that of the insolvent, having taken place after the adjudication, cannot stand. It was sought to be effected after the title to the insolvent's property has vested in the Official Assignee. I am myself not disposed to think that the party who took under this conveyance was unaware either of the previous *benami* or of the insolvency, for it is to be observed that the parties are all related to one another and not strangers. There is, therefore, in my opinion no hard case here as alleged. But in any case the conveyance is not protected, having been made after the adjudication.

I agree, therefore, that the appeal should be dismissed with costs.

Mookerjee, J.—This is an appeal from a determination by Mr. Justice Chaudhuri that the title claimed by the appellant cannot prevail as against the Official Assignee. The disputed property is the share of the insolvent in his dwelling-house. On the 9th November, 1911 he executed a conveyance in favour of his wife in respect of this share. On the 12th October, 1912 the wife executed a conveyance in respect of the same property to the present appellant. In the interval, there had been dealings with the property by the wife who on the 16th May, 1912 executed a mortgage, and on

(2) (1912) 3 K. B. 6=81 L. J. K. B. 1213=107 L. T. 368.

the 7th June following executed a deed of further charge thereon; these incumbrances were discharged on the 12th October, 1912. The adjudication in insolvency was made on the 27th February, 1912.

The case for the appellant is that she acquired a good title to the property, because she acquired it in good faith and for consideration from the wife of the original owner, who had effectively divested himself of all interest therein before his adjudication as an insolvent. Mr. Justice Chaudhuri has found upon the evidence that the conveyances of the 9th November, 1911 and the 12th October, 1912 were both fictitious transactions. The correctness of the finding as to the true nature of the first of these deeds is, I think, unimpeachable. No consideration passed from the wife to the husband at the time when the conveyance was executed and registered. The deed was, besides, executed at a time when the transferor was in a state of considerable pecuniary embarassment. Indeed, a suit had already been instituted against him on the 7th September, 1911 by his mother-in-law in the Calcutta Small Cause Court for recovery of a large sum of money; she subsequently obtained a decree against him on the 25th February, 1912, and now impeaches the title of the appellant as a nominal transferee. As regards the conveyance of the 12th October, 1912, however, I am not prepared, upon the record as it stands, to adopt the conclusion of the Trial Judge. The evidence makes it plain that some consideration was paid by the purchaser to the vendor on the basis of this conveyance, and the money was apparently applied, partly in discharge of the debt due to the encumbrancer Norendra Krishna Mitra, and partly in payment to one Kali Kumar Pyne, who sold a house to the wife of the insolvent on the 14th October, 1912. There is nothing to indicate that the transactions with Norendra Krishna Mitra and Kali Kumar Pyne were not perfectly genuine. The question consequently arises, in what way is the position of the appellant affected by the fact that the lady who transferred the disputed property to her was the holder of a nominal conveyance from her husband.

Mr. Langford James has contended that the position of the wife under the nominal conveyance of the 9th November, 1911 is analogous to that of a person who accepts a voluntary settlement under the law of England. In my opinion, this view cannot possibly be sustained. It is well settled that when there is a fictitious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents; the transaction may fittingly be described as essentially a mask of the real ownership. In this case, notwithstanding the execution of the conveyance by the insolvent in favour of his wife, he continued to be the owner of the property; he never intended to divest, and, consequently, never did, in fact or in law, divest himself of the ownership thereof. There is ample authority for the position that a *benamidar* is in no sense an owner of the property. For instance, the Judicial Committee observed in the case of *Musammat Thukrain Sookraj Koowar* v. *Government* (3) that the real owner may sue the ostensible owner to establish his title and to recover possession. This view can be maintained only on the hypothesis that the title has never passed from the real owner under the conveyance executed by him. Conversely, it was held by the Judicial Committee in the case of *Ramanugra Narain* v. *Mahasundur Kunwar* (4) that if the holder of the deed attempts to enforce his apparent title against the real owner, the latter may establish the real nature of the transaction and thus successfully defend himself against an unfounded claim. It has further been ruled by the Judicial Committee that the creditors of the real owner may seize the property in satisfaction of their claim against him on the assumption that he has never divested himself of his title thereto: *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Shoostry* (5) and *Abdul Hye* v. *Mir Mahammed Bozaffer Hossein* (6). Conversely, it has been ruled that if the creditor of the nominal owner attempts to seize the property as his, the real owner is competent to intervene and stop the execution: *Tara Soonduree Debee* v. *Oojul*

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(3) (1870-72) 14 M. I. A. 112=2 Sar P. C. J. 705.

(4) (1874) 12 B. L. R. 433=3 Sar P. C. J. 277.

(5) (1854-57) 6 M. I. A. 27=8 Moo. P. C. 90 =1 Sar. P. C. J. 489 (P. C.).

(6) (1884) 10 Cal. 616=11 I. A. 10 (P.C.).

Monee Dossee (7). The true position, thus, is that notwithstanding the execution of the conveyance of the 9th November, 1911, the husband still continued to be in fact the owner of the property. What then was the legal effect of the adjudication order passed on the 27th February, 1912? The property, by operation of law, vested in the Official Assignee. Consequently, when we turn to the conveyance of the 12th October, 1912, executed by the wife in favour of the appellant, the inference becomes irresistible that she did not acquire any title, as she took her conveyance from a person who herself had no title whatsoever. It may be conceded, as repeatedly ruled by the Judicial Committee [*Ram Coomar Koondoo* v. *John* (8), *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (9) and *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (10)], that if the property had still continued with the husband, the appellant might have established a good title by estoppel against him on proof that she was a *bona fide* purchaser for value without notice of his secret title. It is not suggested that there was any thing in the conduct of the Official Assignee himself which would make the equitable doctrine of estoppel applicable against him ; consequently, there is no room for application of the class of cases of the type of *Troughton* v. *Gitley* (11), *In re Rawbone's Trust* (12), *Tucker* v. *Hernaman* (13), *Engleback* v. *Nixon* (14), *Wadling* v. *Oliphant* (15), *Ex parte Bolland*, *In re Dysart* (6) and *Ex parte Cooper*, *In re Green* (17). Consequently, the only question we are called upon to consider is, whether the title by estoppel which might have been claimable against the owner by reason of his conduct may, after his adjudication, be claimed equally as against the Official Assignee by a person whose title has accrued after the adjudication order. In my opinion the answer must be in the negative. If the contention of the appellant were to prevail, the fundamental policy of the bankruptcy laws would be defeated. The policy is that as soon as an adjudication order has been made, the entire estate of the insolvent should vest in the Official Assignee for the benefit of his creditors. In a limited sense, the Official Assignee may be deemed the representative of the insolvent ; but he cannot, for all purposes, be regarded as his successor-in-interest ; for the property is vested in him with a view to paralyse the hand of the insolvent, who becomes by operation of law incompetent to deal with the estate to the detriment of his creditors. If the appellant were to succeed in her contention, the result would follow that although the insolvent himself could not possibly convey a good title to her after the adjudication order, yet it was open to him, through the medium of his nominal transferee, to effectuate the same fraudulent purpose. It would be lamentable if the beneficent object of the bankruptcy laws were permitted to be circumvented by so transparent a device.

The contention of the appellant is, I may add, in no way assisted by the cases discussed in the course of argument namely, *In re Vansittart*, *Ex parte Brown* (18), *In re Brall*, *Ex parte Norton* (19), *In re Carter and Kenderdine's Contract* (20). *In re Slobodinsky*, *Ex parte Moore* (1), *In re Hart*, *Ex parte*, *Green* (2) and *In re Branson*, *Ex parte Moore* (21). These decisions are distinguishable on two obvious grounds. In the *first* place, the persons who claimed protection there as against the trustee in bankruptcy derived their title from a person who had acquired a real title from the insolvent under a voluntary setlement. In the case before us, the person from whom the appellant claims title was at no time, in law or in fact, the owner of the disputed property. In the *second* place, the title of the persons,

(7) (1870) 14 W. R. 111.
(8) (1873) 11 B. L. R. 46=18 W. R. 166 (P. C.).
(9) (1895) 22 Cal. 909=22 I. A. 129 (P. C.).
(10) (1873) 19 W. R. 292.
(11) (1766) Ambler 629=27 E. R. 408.
(12) (1857) 3 K. & J. 476=112 R R. 243=63 E. R. 1197.
(13) (1853) 4 De. G. M. & G. 395=102 R. R. 186=22 L. J. Ch. 791.
(14) (1875) 10 C. P. 645=44 L. J. C. P. 396=32 L. T. 881.
(15) (1875) 1 Q. B. D. 145=45 L. J. Q. B 173 33 L. T. (N.S.) 837.
(16) (1878) 9 Ch. D. 312=47 L. J. Bk. 74=38 L. T. 693.
(17) (1878) 39 L. T. 260.

(18) (1893) 2 Q. B. 377=62 L. J. Q. B. 279.
(19) (1893) 2 Q. B. 381=5 R. 440=69 L. T. 323.
(20) (1897) 1 Ch. 776=66 L. J. Ch. 408=76 L. T. 476.
(21) (1914) 3 K. B. 1086=83 L. J. K. B. 1763 =30 T. L. R. 604.

who were afforded protection, had accrued before the receiving order was made. In the case before us, the title of the appellant accrued after the adjudication order had been made, and was in essence a title derived from the insolvent himself.

Finally S. 57 of the Presidency Towns Insolvency Act, to which reference has been made, does not avail the appellant, in the absence of both the elements requisite to make that provision applicable. In the *first* place, the title of the appellant was not acquired before the order of adjudication was made. In the *second* place, it is not shown that the title was acquired without notice. It is reasonably plain, in all the circumstances disclosed in the evidence, that the appellant was aware of the circumstances of the insolvent and cannot be deemed a purchaser without notice ; and there can be no question that unless she is a purchaser in good faith, she cannot be afforded protection in insolvency proceedings [*Ex parte Rabbidge*, *In re Pooley* (22), *In re Badham*, *Ex parte Palmer* (23), *Shears* v. *Goddard* (24), *In re Jukes*, *Ex parte Official Receiver* (25) and *In re Dunkley & Son*, *Ex parte Waller* (26)].

On these grounds I hold that the order made by Mr. Justice Chaudhuri must be affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(22) (1878) 8 Ch. D. 367=38 L. T. 663=26 W. R. 646.
(23) (1893) 10 Morrell 252=69 L. T 356=5 R. 521.
(24) (1896) 1 Q. B. 406=65 L. J. Q. B. 344=74 L. T. 128.
(25) (1902) 2 K. B. 58=71 L. J. K. B. 710=50 W. R. 560.
(26) (1905) 2 K. B. 683=74 L. J. K. B. 963=93 L. T. 248.

A. I. R. 1916 Calcutta 337

CHATTERJEE AND CHAPMAN, JJ.

Nistarini Dassya and *others*—Plaintiffs—Appellants.

v.

Sarat Chandra Mojumdar—Defendant—Respondent.

Second Appeal No. 1646 of 1913, decided on 21st May, 1915, against the Decree of Offg. Sub-Judge, Jessore, dated 17th February, 1913.

(a) Civil P. C. (5 of 1908), O. 1, R. 10—Plaintiff by *bona fide* mistake erroneously represented—Plaintiff allowed to rectify mistake and appear personally—It does not amount to addition of a party—Substance and not form is to be considered—What is *bona fide* mistake stated.

Where by a *bona fide* mistake it is erroneously supposed that a plaintiff should be represented in a particular way and subsequently the plaintiff is permitted to rectify the mistake and appear personally, this does not amount to the addition of a new plaintiff within the meaning of S. 22 of the Limitation Act. 14 Cal. 400 ; 2 All. 296 and 32 Cal. 582, foll. [P. 339, C. 1.]

In matters of this kind the substance is to be looked to rather than the form. 6 W. R. (P. C.) 43 and 16 Cal. 40 (P. C.) foll. [P. 339, C. 1.]

Where a mistake is not made deliberately and where it is honestly made, the mistake is *bona fide*. [P. 338, C. 1.]

(b) Limitation Act (9 of 1908), S. 22—Where plaintiff erroneously represented was brought on record—It does not amount to addition of party and S. 22 does not apply.

Where, therefore, a suit upon a registered mortgage-bond was originally instituted within the period of limitation by a widow not for her own benefit, but as administratix for the benefit of her sons, and subsequently the names of the sons were added as plaintiffs after the period of limitation :

Held, (1) that the change was one of form only and not of substance and that there was no introduction of new plaintiffs when the sons were brought on the record ; [P. 338, C. 2 & P 339, C. 1.]

(2) that, therefore, the suit was not barred. [P. 339, C. 1.]

Brojo Lal Chakravarti and *Harendra Nath Ganguly*—for Appellants.

Sarat Chandra Roy Choudhry, *Satya Chandra Sinha* and *Bhudar Halder*—for Respondent.

Judgment.—This appeal arises out of a suit upon a registered mortgage-bond. The Munsif decreed the suit. In the Court of first appeal the suit has been dismissed on the ground of limitation. The plaintiffs appeal now to this Court.

The bond was executed in October 1895, the due date being April 1900. It was executed in favour of one Gopal Chandra De. The suit was brought on the 29th April, 1911, shortly before the expiry of 12 years after the due date by the widow of Gopal Chandra De, who had been appointed administratrix to his estate. On the 30th November, 1911, the widow presented a petition supported by an affidavit stating that her Pleader had discovered that her powers as administratrix had come to an end before the

suit was instituted. It appeared that under the Letters of Administration her appointment as administratrix was to terminate when the eldest son of Gopal Chandra De attained majority and this had occurred some years prior to the institution of the suit. She prayed that the three sons of Gopal Chandra De who were his heirs should be added as plaintiffs. The Munsif made the order prayed for. It will be observed that the three sons were added as plaintiffs some months after the period of limitation had expired.

The order of the Munsif was made under Clause (1), R. 10, O. 1 of the first Schedule to the Code of Civil Procedure. The Munsif held in the terms of the clause that the suit had been instituted through a *bona fide* mistake in the name of the wrong person as plaintiff and accordingly ordered that the right persons, namely, the three sons, be added as plaintiffs. He held the suit was not barred by limitation and decreed it on the merits.

The learned Subordinate Judge has held in first appeal that the mistake was not *bona fide*. In his opinion *bona fide* means with due care and attention and he held that with the least care and attention, the plaintiff could well understand that her powers had come to an end. He inferred that the suit must be taken to have been instituted when the three sons came in as plaintiffs. This was after the period of limitation. He accordingly dismissed the suit without going into the merits.

We are of opinion that the Court of first appeal erred in the interpretation of the word *bona fide*. Where a mistake is not made deliberately and where it is honestly made, the mistake is *bona fide*. The widow was illiterate and *pardanashin*. The eldest son was 26 when the suit was brought, but it is clear from his deposition that he is not very intelligent. He says that for the last five or seven years he looks after his suits and collection of rent, but it is not said in whose name these suits to which he refers were instituted. The management was really done, it seems, by agents. No dishonest motive can be suggested: the mistake was brought to notice by the widow herself. We hold that the mistake was *bona fide* and that the order adding the three sons as plaintiffs was properly made under Clause 1, R. 10, O. 1.

It is then contended that the provisions of S. 22, Indian Limitation Act, apply, which are to the effect that where after the institution of a suit a new plaintiff or defendant is substituted or added the suit shall, as regards him, be deemed to have been instituted when he was made a party.

The contention is that even though it be held that the three sons were properly added as plaintiffs yet, inasmuch as this was done after the period of limitation had expired, the suit must under the provisions above referred to be held to be barred.

In the present case, however, when the suit was originally instituted within the period of limitation it was instituted by the widow not for her own benefit, but as administratrix for the benefit of the three sons. They were the real persons throughout who were to benefit. The change that was made after the period of limitation was one of form only, not of substance.

In the case of *Subodini Debi* v. *Cumar Ganoda Kant Roy* (1) it was held that where a suit was originally instituted in the name of a manager and the names of the employers were subsequently substituted as plaintiffs after the period of limitation, the suit was not barred. It is true that the decision rests partly on a consideration of the wording of the Code as it then stood. The learned Judges say, "the answer is that this suit is the original suit and was brought in time." This is a general observation, the principle of which is applicable to the present case.

In the case of *Manni Kasundhan* v. *Crooke* (2) where a suit was brought originally against a Municipal Committee represented by the Secretary, instead of by their President, as it should have been, and where the plaintiff applied after the expiry of the period of limitation for substituting the name of the President for that of the Secretary, it was held that by reason of such substitution the suit could not be deemed to have been instituted against the Municipal Committee when such substitution was made. The judgment was referred to in the case of *Raja*

(1) (1887) 14 Cal. 400.
(2) (1878-80) 2 All. 296.

Peary Mohan Mookerjee v. *Narendra Nath Mookerjee* (3), in which the learned Judges stated the rule to be that where relief is originally claimed against a party who has to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a "new defendant" to the suit. We are of opinion that a similar principle is applicable to a case such as the present where by a *bona fide* mistake it is erroneously supposed that a plaintiff should be represented in a particular way and subsequently the plaintiff is permitted to rectify the mistake and appear personally, this is not the addition of a new plaintiff within the meaning of S. 22 of the Limitation Act.

That in matters of this kind the substance is to be looked to rather than the form will be apparent from the judgments of the Privy Council in the cases of *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (4) and *Hari Saran Moitra* v. *Bhubaneswari Debi* (5). In both these cases a minor was treated as if he had been a party to the litigation, although in fact he never had been made a party and the litigation had been prosecuted by his mother in her personal capacity. "The suit must," their Lordships say in the first case, "be considered to have been prosecuted by her in her name for the minor's benefit". So, in the present case, the suit must be considered to have been originally instituted by the widow for the benefit of her sons and there was thus no introduction of new plaintiffs when the sons were brought on to the record.

We hold that the suit was not barred by limitation. We set aside the judgment and decree of the learned Subordinate Judge and remand the case for disposal on the merits. Costs to abide the result.

V. B./R. K.

Decree set aside ; Case remanded.

(3) (1905) 32 Cal. 582.
(4) (1866) 6 W. R. 43=3 M. I. A. 229 (P. C.).
(5) (1889) 16 Cal. 40=15 I. A. 195 (P. C.).

A. I. R. 1916 Calcutta 339

CHITTY AND WALMSLEY, JJ.

Atul Hazra and *others*—Petitioners.

v.

Uma Charan Changdar and *others*—Opposite Party.

Criminal Revn. No. 188 of 1910, decided on 10th March, 1916.

Criminal P. C. (5 of 1898), S. 145—Proceeding under S. 145—Land purchased in execution of decree and delivery of possession obtained by decree-holder—Judgment-debtor should not be allowed to retain possession of same as against decree-holder auction-purchaser.

In a proceeding under S. 145, Criminal Procedure Code, concerning a land which was purchased and of which delivery of possession was obtained by a decree-holder, the judgment-debtor should not be allowed to retain possession of the same as against the decree-holder auction-purchaser so as to drive him back to the Civil Court for a further declaration of his right, even though it is found that the decree-holder was never in actual possession and the judgment-debtor grew crops upon the land. 40 Cal. 982, dist. [P. 339, C. 2 & P. 340, C. 1.]

Manmatha Nath Mukerjee—for Petitioners.

Dasarathi Sanyal and *Debenda Narain Bhattacharjee*—for Opposite Party.

Judgment.—In this case, the five petitioners, who are the second party to the proceedings, obtained a decree against Bhusan Changdar (one of the first party) and Nando Changdar, who are entitled to an undivided one-fourth share in a property. This one-fourth share was brought to sale in execution and was purchased by the decree-holders. They obtained delivery of possession through the Court. The present proceedings were taken between the first party, of whom Bhusan Changdar, one of the judgment-debtors, was one, and the second party who were the decree-holders. The learned Magistrate has found that, though the second party are undoubtedly entitled by virtue of their purchase to an undivided one-fourth share, they were never in actual possession of the property and that the crop was grown entirely by the first party. He has accordingly declared in favour of the possession of the first party and directed the second party to go to the Civil Court.

We do not think that the order in this particular case can stand. It seems contrary to all principles of justice that a judgment-debtor should be allowed to

retain possession against his decree-holder who has actually been given possession against him by a Civil Court, and, in a criminal proceeding, to assert that possession and, by force of the order of the Magistrate, drive the decree-holder and auction-purchaser back to the Civil Court for a further declaration of his right. This element in the case before us distinguishes it from the case of *Basanta Kumari Dasi* v. *Mohesh Chandra Laha* (1). With the principles laid down in that case we are fully in accord. We think that the present order cannot be allowed to stand and must be set aside and we order accordingly.

If there is still any likelihood of a breach of the peace, the Magistrate will have power to take steps under S. 107, Criminal Procedure Code, to bind down the aggressive parties.

V.B./R.K.

Order reversed.

(1) (1913) 40 Cal. 982 = 19 I. C. 541.

A. I. R. 1916 Calcutta 340

JENKINS, C. J. AND WOODROFFE AND MOOKERJEE, JJ.

John Innes Marshall—Opposite Party—Appellant.

v.

Grandhi Venkata Ratnam—Applicant—Respondent.

Appeal No. 30 of 1915, decided on 28th April, 1915, from the Original Order of Greaves, J, dated 31st March, 1915.

Contempt of Court—Injunction against firm—Disobedience by assistant servant or agent is not contempt as not named in order.

Where an injunction is issued by a Court restraining the defendant firm from disposing, selling or dealing in any manner with the goods referred to in the plaint, but where the injunction makes no mention of *X* an assistant in the firm or of servants and agents.

Held, that *X* not being named in the order cannot be punished for contempt of Court for disobeying the injunction. [P. 340, C. 2.]

Zorab and *Hyam*—for Appellant.

N. Sircar and *C. C. Ghose*—for Respondent.

Jenkins, C. J.—This is an appeal from an order of Mr. Justice Greaves, which has been treated before us as an order finding that there had been a contempt by the appellant Marshall which merited, if not imprisonment, at any rate the payment of the costs of the motion. The notice of motion called upon J. I. Marshall, an assistant of the defendant firm, to take notice that on Monday, the 29th of March, 1915, an application would be made on behalf of the plaintiff for an order that he, J. I. Marshall, do stand committed to the custody of the Superintendent of the Presidency Jail for having committed a breach of the injunction granted by Mr. Justice Greaves on the 20th March, 1915, restraining the defendant firm, their servants and agents from disposing, selling or dealing in any manner with the goods referred to in the plaint. That notice of motion is erroneous, for the injunction makes no mention of Mr. Marshall or of servants and agents. It necessarily follows from this that the procedure which had been adopted was misconceived. The proceeding against Mr. Marshall, if any, should have been for assisting in a contempt of Court. But the case need not be disposed of on that ground, because on the merits it has not been made out that Mr. Marshall in any way assisted in a contempt of Court. He did nothing. He did not dispose of, sell or deal with the goods nor did he in any way assist in disposing, selling of or dealing with them after service on him of the injunction. All that he did was done prior to the injunction. It has been suggested before us that he is in some way responsible for the delivery which is said to have taken place after the injunction. But on the facts it appears, that the delivery was prior to the injunction. There was no contempt or participation in contempt on Mr. Marshall's part. In my opinion the order of the learned Judge is erroneous and must be set aside and the motion dismissed with costs of the hearing before Mr. Justice Greaves and before us.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree.

V.B./R.K.

Order set aside.

A. I. R. 1916 Calcutta 341 (1)

CHITTY AND WALMSLEY, JJ.

P. L. Causley—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 921 of 1915, decided on 20th December, 1915.

Indian Penal Code (45 of 1860), Ss. 463 and 464—Signing of certificates by purchaser of revolvers in false name and address amounts to forgery.

The signing by a purchaser of revolvers and ammunition of certificates, required for the identification of the purchaser, in a false name and with a false address, amounts to forgery, as the act though not dishonest is fraudulent. 1 Den. C. C. 492; 9 Cal. 53 and 25 Cal. 512, appl. [P. 341, C. 1.]

Norton and *Santosh Kumar Bose*—for Appellant.

Orr—for the Crown.

Judgment.—In this case the appellant Phillip Lloyd Causley was found guilty on three charges under S. 465, Indian Penal Code, and sentenced to two years' rigorous imprisonment, *i. e.*, eight months on each charge. The appellant is stated in the Magistrate's judgment to be a lad of 16 or 17 years of age. We are told by his mother that he is only 15. The appeal was admitted on the question of sentence, but has been argued before us also on the question of law arising in the case. The facts are not in dispute. They are fully set out in the judgment of the Magistrate and need not be re-stated here. The question is whether the signing of the certificates in a false name, and giving in each case an address which was not his, amounts to forgery on the part of the appellant. It may be that the action of the appellant was not "dishonest," taking that word in the sense ascribed to it by the Indian Penal Code, Ss. 23 and 24. There can, however, be no doubt that he acted "fraudulently." His intention was undoubtedly to deceive both the firms, who sold him these revolvers and ammunition, and also the Government, which has prescribed the formalities to be observed in such sales. He must be taken to have known that the certificate was required for the identification of the purchaser and the weapons purchased. This purpose he deliberately defeated by his action in making out false certificates. His acts came directly within the definition of forgery as contained in Ss. 463 and 464, Indian Penal Code. The cases of *Reg* v. *Toshack* (1), *Empress* v. *Dhunum Kazee* (2) and *Queen-Empress* v. *Abbas Ali* (3) are in point and support the view which we take in this case. The conviction must, therefore, be upheld.

With regard to the sentence, we take into consideration the extreme youth of the appellant. On the other hand, the offence is a very serious one, and it has been aggravated in his case by the fact that he has declined to give any information regarding the revolvers purchased by him or the use to which they have been put. We think, however, that he will be sufficiently punished if he be kept in Jail for one year, that is to say, for four months on each charge, and we reduce the term of imprisonment accordingly.

V.B/R.K.

Conviction upheld; Sentence reduced.

(1) (1850-51) 1 Den. C. C. 492 = T. & M. 207 = 13 Jur. 1011 = 4 Cox. C. C. 38.
(2) (1883) 9 Cal. 53.
(3) (1898) 25 Cal. 512.

A. I. R. 1916 Calcutta 341 (2)

MOOKERJEE AND BEACHCROFT.

Hira Lal Chatterjee and *others*—Defendants—Appellants.

v.

Giribala Debi—Plaintiff—Respondent.

Appeal No. 2471 of 1914, decided on 22nd July, 1915, from the Appellate Decree of Sub-Judge, Dacca, dated 29th July, 1914.

(a) Practice — Pleadings — Every variance between pleading and proof is not fatal.

Though the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, every variance between pleading and proof is not fatal. [P. 342, C. 2.]

(b) Practice—Pleadings—Rule that allegations and proof must correspond—Object of.

The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the defendant, distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. [P. 342, C. 2.]

(c) Practice—Pleadings—Suit for recovery of possession on declaration of title to share in property—Precise title set up in plaint not

made out—Allegations in pleadings with respect to share not essential for purpose of pleadings —*Held* decree that plaintiff was entitled to one-half of claim on consideration of evidence not improper.

Where in a suit for recovery of possession of land on declaration of title to a certain share in a property, the plaintiff failed to make out the precise title set up in the plaint, but the Court came to the conclusion upon the entire evidence that the plaintiff was entitled only to one-half of what she claimed and gave her a decree accordingly :

Held, that, as the defendants were not taken by surprise and as the allegations made in the plaint with respect to the shares were not essential for the purposes of the pleadings, the objection of the defendants, that relief must be refused to the plaintiff because she had not made out the precise title set up by her in the plaint, should not be given effect to.

[P. 343, C. 1.]

Rajendra Chunder Guha for *Brojendra Nath Chuckkerbutty*—for Appellants.

Chandra Sekhar Sen—for Respondent.

Mookerjee, J.—This is an appeal by the defendants in a suit for recovery of possession of land on declaration of title. The plaintiff claims one-third share in the disputed property by right of inheritance from her husband. The Courts below have found that she is entitled only to one-half of what she claims and have made a decree accordingly. The defendants contend that there is a variance between pleading and proof and that the plaintiff should not be allowed to succeed on a case different from what she made in her plaint. To appreciate the force of this objection, it is necessary to bear in mind that although in the Court of first instance, the plaintiff claimed only one-third share, and it was consequently unnecessary for her to deal with the devolution of the other shares, yet she went on to state that another one-third share belonged to Durga Charan and the remaining one-third share to Kalinath. The defendants did not dispute these latter allegations ; in fact, they claim to have purchased the share of Durga Charan. Consequently, the contest in the Trial Court upon the pleadings was, whether Mahesh, the husband of the plaintiff, or Kalikumar, the father of the defendants, was entitled to one-third share of the property. The Court found that Kalinath was entitled to one-third share ; upon this point both parties were agreed. The Court also found that Kalikumar, the father of the defendants was entitled to another one-third share. As regards the remaining one-third share, the Court held that it was jointly owned by Durga Charan and Mahesh. On this basis, the Court made a decree for one-sixth share in favour of the plaintiff. This decree was challenged before the lower Appellate Court, on the ground, amongst others, that the plaintiff had been allowed to succeed on a case different from what she had set out in her plaint. This objection was overruled by the Subordinate Judge, who held on the merits that the view taken by the Trial Court was supported by the evidence on the record. On the present appeal, the contention has been reiterated that the suit should be dismissed, because the decree is contrary to the allegations in the plaint.

It may be conceded, as was stated by Lord Westbury in the case of *Eshenchunder Singh* v. *Shamachurn Bhutto* (1) and by Sir Barnes Peacock in *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeokay* (2), that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. This principle was recently confirmed by Judicial Committee in the case of *Shivabasava* v. *Sangappa* (3). But in the application of this doctrine, we must bear in mind the reasons whereon it is founded. As explained in *Nabadwipendra Mookerjee* v. *Madhu Sudan Mondal* (4), the rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the defendant, distinctly and specifically, of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise ; and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. We cannot consequently hold that every variance between pleading and proof is fatal ; we must carefully consider, whether, in the words of the Judicial Committee in the case of *Radha Mohun Mundal* v. *Jadoomonee Dossee* (5), the objection is one of form or of

(1) (1866-67) 11 M.I.A. 7=6 W. R. 57 (P.C.).
(2) (1887) 14 Cal. 801=14 I.A. 168=5 Sar. 50 (P.C.).
(3) (1905) 29 Bom. 1.
(4) (1912) 16 I. C. 741.
(5) (1875) 23 W. R. 369.

substance. In that case, the Court of first instance dismissed the suit for possession of property, on the ground that the Hindu widow who had instituted it had established a title different from what she had alleged in the plaint. This Court on appeal reversed the decision and the view of this Court was ultimately approved by the Judicial Committee. In the case before us, it was essential for the plaintiff to state that her husband was entitled to a share in the disputed property and that she had succeeded to that share by inheritance. It was not necessary for her to deal with the devolution of the other shares. Consequently, the allegations made in the plaint with respect to those shares were not essential for the purposes of the pleadings. It is further clear that the defendants were not taken by suprise. Evidence was adduced by both the parties in support of their respective cases, to show how the title to the different shares had devolved from time to time. The Court came to the conclusion upon the entire evidence, that the allegtions of the plaintiff as also of the defendants were incorrect, and, as happens not infrequently, the truth lay midway; the plaintiff was entitled only to one-half of what she claimed. It is further clear that, as the Trial Court stated, the evidence incontestably proves that the husband of the plaintiff had a share in the disputed property. In these circumstances, we are of opinion that we should not give effect to the objection taken by the appellants, namely, that relief must be refused to the plaintiff because she has not made out the precise title set up by her in the plaint in respect of the shares wherewith she had no concern. The view we take is in accord with two Full Bench decisions of the Allahabad High Court: *Balmakund* v. *Dalu* (6); and *Abdul Ghani* v. *Musammat Babni* (7).

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(6) (1903) 25 All. 498.
(7) (1903) 25 All. 256.

A. I. R. 1916 Calcutta 343

WOODROFFE AND MULLICK, JJ.

Eakuf Ali and *others*—Plaintiffs—Appellants.

v.

Meajan and *others*—Defendants—Respondents.

Second Appeal No. 203 of 1913, decided on 4th June, 1915, against the Decree of Sub-Judge, Chittagong, dated 4th October, 1912.

(a) Landlord and Tenant—Mortgage—Defendants holding under a mortgagee from *raiyat*—Landlord purchased it in rent decree against heirs of *raiyat*—Held occupancy rights of defendants were not affected.

Where a *raiyat* under the landlord mortgaged the property to a third person, who got possession and inducted the present defendants on the land, and the landlord brought a suit for rent against the heirs of the *raiyat* and bought up the holding at a sale for arrears of rent:

Held, that the occupancy holding still continued to exist even after the purchase by the landlord. 20 I. C. 698, ref. to.

[P. 343, C. 2 & P. 344, C. 1.]

(b) Landlord and Tenant—Merger—Transfer of permanent *raiyati* right—Lease by purchaser from landlord—Plaintiff holding under purchaser can eject defendant holding under original *raiyat* against whom rent decree was passed.

Where the landlord sold, the permanent *raiyati* right to another who also took a lease from the landlord and then sold it to the plaintiff, who intending to eject the defendant served him with notice:

Held, that the defendant, having been duly served with notice to quit, must be ejected.

[P. 344, C. 1.]

Probode Kumar Das—for Appellants.

Manmatha Nath Roy—for Respondents.

Woodroffe, J.—This appeal has been heard at very great length; but I think the appellant has established his argument. The facts are that under the landlord there was a *raiyat* of the name of Fakir Mahamed. Fakir Mahamed mortgaged the property to one Ishan Poddar, who got possession. Ishan inducted the present defendants on the land. The landlord brought a suit for rent against the heirs of Fakir Mahamed and he bought up the holding at a sale for arrears of rent. The first and perhaps the main question in this appeal is, what is the effect of such purchase? Did it, as has been contended by the respondent, effect a complete merger of the holding and of the occupancy right in the landlord's right or did it, as the appellant

contends, keep alive the occupancy holding though merging the occupancy right? This question has been discussed in the case of *Akhil Chandra Biswas* v. *Hasan Ali Sadagar* (1), where a distinction is drawn between an occupancy holding and an occupancy right. I should state here that this case has been decided on the old law as it existed prior to 1907. Following the principle enunciated in the decision to which I have just referred, I would hold that the occupancy holding still continued to exist even after the purchase by the landlord. The landlord then sold to one Magan Ali the permanent *raiyati* right. Magan Ali also took a lease from the landlord and the plaintiff has bought from Magan Ali and was now desirous to eject the defendant who had been inducted into possession, as stated.

The first Court held that he was entitled to a decree. This decision was reversed on appeal, For the reasons I have stated the landlord was able to transfer the holding to Magan Ali, through whom it came to the plaintiff. The defendant continued to be what he was, an under-*raiyat*, and it has been found that he has been duly served with notice. The learned Judge has referred at the conclusion of his judgment to S. 167. In my opinion this does not stand in the way. A further question was sought to be argued, and that is this, that in the suit to which Magan Ali was a party it was held that he could not get possession except by proceeding under S. 167. This question is not a point which has been either raised or dealt with in the judgment under appeal and, therefore, cannot be entertained now. The defendants, having been duly served with notice to quit, must be ejected.

I, therefore, would allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the first Court with costs of this Court and of the lower Appellate Court.

Mullick, J.—I agree.

V.B./R.K.

Appeal accepted.

(1) (1913) 20 I. C. 698.

A. I. R. 1916 Calcutta 344

CHITTY AND WALMSLEY, JJ.

Emperor.

v.

Sheikh Abdul and *others*—Accused.

Criminal Ref. No. 2 of 1915, decided on 21st March, 1916.

(a) Criminal P. C. (5 of 1898), Ss. 110, 118 and 511—Presidency Magistrate must also take strict proof of previous convictions.

Presidency Magistrate are not absolved from the ordinary rules of evidence in taking proof of previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under S. 75, Indian Penal Code, or in proceedings under Chapter VIII of the Criminal Procedure Code, such previous convictions must be proved strictly and in accordance with law. Unless they are so proved no Court can properly take such previous convictions into consideration against an accused person. [P. 345, C. 1.]

(b) Criminal P. C. (5 of 1898), Ss. 110, 118 and 511—Charge of bad livelihood under S. 110—Evidence vague and general—Order under S. 118 should not be confirmed.

Where the evidence against persons charged with bad livelihood under S. 110, Criminal Procedure Code, is general and vague, a High Court would refuse to confirm the Presidency Magistrate's order under S. 118, Criminal Procedure Code, against such persons. [P. 347, C. 1.]

C. R. Das for *B. C. Mitter* and *Tarak Nath Sadhu*—for the Crown.

Manmatha Nath Mukerjee, Tarakeswar Pal Chowdhury and *Heramba Chander Guha*—for Accused.

Judgment.—This reference has now been returned with the further evidence recorded by the learned Second Presidency Magistrate under our order of 3rd January, 1916. The learned Magistrate has also, in accordance with that order, recorded an opinion. We regret, however, to find that he has not taken steps to carry out our directions to the full extent. The additional evidence which has been recorded is of very much the same type as the evidence recorded in the first instance of which we had reason to complain, and the statements now made by the additional witnesses do not carry the case much further against any one of the six accused.

With regard to the statement of the learned Magistrate as to the procedure adopted in the Police Court for the proof of previous convictions, we may say at once that we cannot accept the learned Magistrate's suggestion that the Presidency

Magistrates are absolved from the ordinary rules of evidence in taking proof of such previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under S. 75, Indian Penal Code, or in proceedings under Chapter VIII of the Criminal Procedure Code, such previous conviction must be proved strictly and in accordance with law. Unless they are so proved, no Court, whether it be that of a Presidency Magistrate or not, can properly take such previous convictions into consideration against an accused person.

In the present case, the learned Magistrate says that against the accused No. 1, Sheik Abdul, five previous convictions have been proved, against No. 3, Abdul Rahim, one previous conviction, against No. 5, Ishak Khan, two previous convictions, and against No. 6, Sheik Bombia, eight previous convictions. Apart from the proof of previous convictions with which we will deal in discussing the case of each accused, additional evidence was directed to proving instances of picking pockets against the accused or some or one of them. Speaking generally, we may say that at the second hearing, no attempt was made in the Court below to fix these witnesses to any particular time or detail by which their statements might be tested. Their statements are of the vaguest possible character.

Taking the case of each accused in turn, we start with Sheik Abdul who has a number of *aliases*. He is said to have been convicted 5 times. The last conviction was on 20th January, 1914, when he was sentenced to one year's rigorous imprisonment under S. 379, Indian Penal Code. He, therefore, emerged from jail presumably in January 1915. Since then there is no evidence of his having committed any offence except the statement of Abdul Wahid (P. W. No. 40), who says that he saw the first accused pick a pocket once about seven or eight months ago near the statue of Kristo Das Pal, when he was accompanied by accused No. 2. This witness admits that, though he saw accused No. 3 throw the purse which had been stolen into Jumman's shop, he did not inform the person whose pocket had been picked. That man, he says, raised a hue and cry; and yet the witness went away without saying anything. This is evidence on which no Court could possibly place any reliance. Another witness Abdur Rahim (P. W. No. 28), speaking of the accused picking pockets at the crossing of Harrison Road, says that he last saw the first three accused picking a pocket about a year and half ago. Allowing due latitude for the statement of a witness of this class when speaking of time, it is impossible that he could have seen the first accused picking a pocket about a year and half ago (he was giving evidence on 24th January, 1916), inasmuch as the first accused was safely in jail for almost the whole year 1914. This evidence, therefore, cannot be accepted. It has been held in this Court that accused persons should be given some chance of reforming their characters and that they should not be proceeded against under this section soon after they have emerged from jail. In this case the first accused had been out of jail for about eight months only when the present proceedings were started. There is no definite evidence of his having committed any offence during those eight months. Though he may be and possibly is a man of bad character we do not think that, on evidence such as this, an order under S. 118, Criminal Procedure Code, ought to be passed against him.

The cases against the other accused are much weaker than against accused No. 1. Against Sheik Doma and Sheik China no previous convictions at all are alleged. The learned Magistrate himself, who bound down Sheik China in the first instance, now, on the single statement of the witness Moulvi Abdul Hamid (P. W. No. 31) who says China is a good man, recommends that he should be discharged. Against these two men the evidence is wholly insufficient to support the order. With regard to Abdul Rahim it appears that he was imprisoned under S. 379, Indian Penal Code, for three weeks on 10th May, 1910, *i.e.*, nearly six years ago. Ishak Khan was imprisoned under the same section for two weeks on 12th April, 1913 and for three months on 13th October, 1914. So far as the period which has lapsed between his last release from jail and the commencement of these proceedings, he stands on much the same footing as accused No. 1. Against these two men there is nothing but general

statements of witnesses who say that they have seen them picking pockets. They have, however, never taken steps to bring those cases of theft home to the accused. The learned Presidency Magistrate considers that the evidence of Superintendent Farrow (P. W. No. 41) is of great importance. We are unable to see that it carries the case against the accused of whom he speaks, *i. e.*, Nos. 1, 3 and 6, much further. He says that he often wanted to find them after a man's pocket had been picked but never succeeded. We think, therefore, that the evidence against these two men is also insufficient to justify an order under S. 118, Criminal Procedure Code.

We come to the case of accused No. 6, Sheik Bombia, who is said to be a bad character, who left Bombay because that place was too hot to hold him, and is now carrying on the profession of a thief in Calcutta. This man is said to have posed under a number of *aliases* giving sometimes Mahomedan and sometimes Hindu names. No less than eight previous convictions are alleged against him and the learned Magistrate considers that they have been proved. We may say at once that, with the exception of the order under S. 109, Criminal Procedure Code, which was passed against this accused at Howrah on 22nd May, 1912, when he was sentenced to one year's rigorous imprisonment for being without visible means of subsistence, none of the previous convictions alleged has been properly proved. It was sought to prove the seven previous convictions which were all in Bombay, by the evidence of the two witnesses Suresh Chandra Mukerjee (P. W. No. 35) and K. A. Kumudakar (P. W. No. 37). The first of these witnesses was a certified expert in finger prints and he produced what has been marked as Exhibit 4 (1) from the Central Bureau. That purports to be a register of the thumb impressions of the accused on the first page and on the reverse his descriptive roll and a list of his previous convictions. No evidence has been recorded as to how this paper comes to be made and lodged in the Central Bureau nor from what particulars the previous convictions on the reverse are recorded and certified. There is, therefore, nothing on this paper except the two certificates at the foot to show that the person convicted seven times in Bombay is the same man as was convicted at Howrah on 22nd May, 1912. The witness K. A. Kumudaker is a clerk in the common prison at Bombay. He produced an extract from the jail register showing previous convictions of one Mahomed Hussain *alias* Ambalal Amritlal *alias* Faiz Mahomed signed by the Superintendent, and certified copies Exhibits 9 (1 to 5) of previous convictions of the same man. There is nothing, however, to show that the man who was convicted at Howrah is the same man who was convicted at Bombay. There is a gap here in the evidence to which the learned Magistrate has not alluded and which, when he expresses the opinion that the previous convictions have been proved, he has obviously disregarded. We may notice that the witness K. A. Kumudaker was directed by the learned Magistrate to examine the sixth accused Sheik Bombia to see if the marks which had been attributed to the convict in Bombay were to be found on the accused Sheik Bombia and he expressed the opinion that they were. This was not the proper method of identifying those marks. But there are other difficulties in the way of the proof of these previous convictions. We notice, in the first place, that the first conviction mentioned in Exhibit 4 (1) is said to have been on 23rd August, 1901. The certified copy from Bombay gives the date as 28th August, 1901. This, however, may be a slip in copying. In the extract. Exhibit 4 (1), produced from the Central Bureau the age of the accused person is given as 27 years and it is recorded that he has no particular mark. If he was 27 years of age in 1912 and his first conviction was in 1898, it follows that he must have been a boy of about 13 years of age when he commenced his career of crime. The Bombay certificates, however, put him down as 18 in 1898, 25 in 1901, 25 again in 1902 and in 30 in 1904. If he appeared to be 30 in 1904 it is difficult to see how he could appear to be only 27 in 1912. With regard to the marks, though no particular mark was attributed to him in the Alipur jail in 1912 the Bombay convictions all give very definite marks, such as a scar on the right eyebrow, a scar on the right temple, a scar on the right leg, which marks purport to have been compared by the witness K. A. Kumudaker. They can

hardly have been overlooked when his descriptive roll was made out at Alipur in 1912. It may be that the man Sheik Bombia is the same person as was convicted on previous occasions in Bombay; but it would be idle to maintain that that has been satisfactorily proved in the present case. Some two years elapsed from his release from jail on the Howrah conviction and the commencement of proceedings in the present case. Whether this would be a sufficient time for reformation we do not express an opinion. It was held in the case of *Junab Ali* v. *Emperor* (1) that 15 months would not be sufficient period in which to give a convict an opportunity of reform. Against this accused there are no definite acts of picking pockets alleged, certainly nothing which would point to his having committed that offence on any particular occasion or with regard to any particular individual. The evidence against him is as general and consequently as vague and as weak as that against the other five accused.

We regret to have to come to this conclusion in this case because there are grounds for suspecting that these men are members of a gang; but having regard to the way in which the evidence against them has been recorded and the general state of the record we are quite unable to confirm the Magistrate's order under S. 118, Criminal Procedure Code. We accordingly set it aside and direct that the six accused be released. In the case of those who are on bail their bail-bonds will be discharged.

V. B./R. K.

Order set aside.

(1) (1904) 31 Cal. 783.

A. I. R. 1916 Calcutta 347

FLETCHER AND RICHARDSON, JJ.

Ram Krishna Bose and *another*—Defendants—Appellants.

v.

Bhagwan Ramanuja Das—Plaintiff—Respondent.

First Appeal No. 267 of 1912, decided on 15th July, 1915, against the Decree of Sub-Judge, Cuttack, dated 28th March, 1912.

Jurisdiction—High Court—Application to set aside *ex parte* decision in appeal by a Bench lies before the same Bench other Bench cannot restore and order it to be heard.

Where on an appeal being heard *ex parte* and decreed by one Bench of the Calcutta High Court another Bench of the Court, on an application made to them, set aside that judgment and directed the former Bench to re-hear the appeal:

Held, that the whole procedure was *ultra vires* for one Bench of the High Court had no jurisdiction to set aside the judgment of another Bench and direct the re-hearing of the appeal, and that if there were grounds for setting aside the judgment of the former Bench, the application for re-hearing the appeal ought to have been made to that very Bench that heard the appeal, and to no other Bench. [P. 347, C. 2.]

Rash Behari Ghose, *Provash Chundra Mitter* and *Satish Chandra Bose*—for Appellants.

C. R. Das, *Broja Lal Chakravarty* for *Dwarka Nath Chakrabarty* and *Kalimkinkar Chakrabarty* for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned Subordinate Judge of Cuttack, dated the 28th March, 1912. The appeal was heard by us *ex parte* and it was decreed on the 28th May of the present year. Subsequently another Bench of this Court on an application made to them set aside our judgment and directed us to re-hear the appeal. With all deference, I doubt the jurisdiction of another Bench of this Court to set aside our judgment and direct us to re-hear the appeal. If there were grounds for setting aside our judgment, the application ought to have been made to us. I understand from Sir Rash Behari Ghose, that he mentioned the matter to the Chief Justice who also expressed his doubt as to the jurisdiction of another Bench to do so. However, Sir Rash Behari Ghose, on behalf of the appellants, has not pressed the point and is willing that the appeal should be re-heard by us.

The point that we dealt with on the last occasion was a point of law arising on the findings of fact made by the learned Subordinate Judge in his judgment. On that occasion, Sir Rash Behari Ghose on behalf of the appellants accepted the findings of fact made by the learned Subordinate Judge and argued that the learned Judge had arrived at a wrong conclusion on a point of law. We accepted the argument put forward by Sir Rash Behari Ghose and decreed the appeal. On the appeal coming on before us for re-hearing, both sides agree that, on the findings of fact made by the learned Judge at the Court below, his judgment

cannot stand. But the learned Counsel for the plaintiff-respondent has asked us to dissent from the findings of fact made by the learned Subordinate Judge on which his judgment is based. The defendants, who are the appellants before us, claim through their grandfather who had got a lease of the property for 18 years in the *benami* of Bishnu Priya. That lease expired in 1880. The story put forward by the plaintiff is that there was a verbal lease or arrangement between one Hari Ballav Sur and the former Mohant, Hayagriba, in the year 1287. The evidence shows that the late Mohant, Hayagriba, was gathered to his fathers before the date of the lease. An attempt was made by some of the plaintiff's witnesses to place this verbal arrangement at an earlier date before the death of Hayagriba. That was the case which the plaintiff invited the learned Judge to express his opinion on and when that case failed as false the learned Judge clearly and rightly refused to enter into a consideration of the case that this man Hariballav had entered into some arrangement other than that set up resulting in his possession of the property as a licensee. In that, I think, the learned Subordinate Judge was quite right. The documentary evidence read to us leaves no doubt on my mind that Hariballav was connected with the property solely as a relative or guardian of the two present defendants. The documentary evidence seems to me to be conclusive on that. This story about the verbal lease to Hariballav on his entering into possession of the property as licensee in his own right, I am satisfied, is wholly untrue. On the evidence, I am clearly of opinion that the learned Subordinate Judge came to a correct conclusion. That being so, the learned Judge was right when he held that the said suit was barred by limitation. We pointed out in our former judgment that on that finding, the learned Judge was not entitled to give to the plaintiff the relief that he has given. For the second time I must express my dissent from the result arrived at by the learned Judge of the Court below. The appeal must, therefore, be decreed and the plaintiff's suit dismissed with costs in both Courts.

Richardson, J.—I agree.

V.B./R.K.

Appeal decreed.

A. I. R. 1916 Calcutta 348 (1)

CHITTY AND WALMSLEY, JJ.

Purna Chandra Chakrabarty—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 38 of 1916, decided on 28th January, 1916.

Criminal P. C. (5 of 1898), S. 109—Sureties—Fitness of—Their immovable properties should be taken into consideration.

In deciding as to the stability of sureties for a person bound down under S. 109, Criminal Procedure Code, their immovable properties should be taken into consideration.

[P. 348, C. 2.]

Gobinda Chandra Dey Roy and *Birendra Kumar De*—for Petitioner.

Judgment.—In this case we have read the explanation of the Deputy Magistrate. We make the Rule absolute on the ground on which it was granted, namely, that the immoveble properties belonging to the sureties should have been taken into consideration in deciding as to the stability of their position. We set aside the order of the Deputy Magistrate rejecting the sureties and direct that he do further consider the matter in the light of our remarks in Revision Case No. 1498 of 1915: See *Nasiruddi Karikar* v. *Emperor* (1) to which he refers. We must, however, notice the suggestion of the Additional Magistrate that the acceptance of the sureties should be made conditional on the deposit by them of a substantial sum in cash or Government securities. We cannot accede to this suggestion, which would practically nullify the effect of our remarks with regard to the general position of sureties. The order for bail will continue until the order regarding the sureties is passed.

V.B./R.K.

Rule made absolute.

(1) (1916) 32 I. C. 833.

A. I. R. 1916 Calcutta 348 (2)

SANDERSON, C. J. AND MOOKERJEE, JJ.

Satikantha Banerjee—Plaintiff—Appellant—Petitioner.

v.

Ram Chandra Chatterjee and *others*—Defendants — Respondents — Opposite Parties.

Application No. 636 of 1915, decided on 29th May, 1916, from the Judgment of

Calcutta High Court, dated 10th January, 1915.

Appeal—Limitation—Amendment of decree beyond period of limitation—Party appealing from decree should be restricted to grounds of appeal which refer to amendment—Limitation Act (1908), S. 5.

A party who prefers an appeal from a decree after its amendment beyond the period of limitation from the date of the decree but within it from the date of the amendment, is to be limited to his grounds of appeal which refer to the amendment, unless he is entitled to an extension of time under S. 5 of the Limitation Act. 3 C. L. J. 188, appr. [P. 349, C. 2.]

Jadu Nath Kanjilal and *Taradas Chatterjee*—for Petitioner.

Dwarka Nath Chakrabutty and *Karunamoi Bose*—for Opposite Parties.

Sanderson, C. J.—I am of opinion that this Rule should be made absolute, and that the case should go to the Bench which would in the ordinary course have jurisdiction over the matter, so that that Bench may consider all the facts which are set out in the various affidavits. We have only had the opportunity of reading the facts set out in the affidavit of the 14th of April 1915, filed on behalf of the plaintiff. We now understand that there are other affidavits filed on behalf of the defendants, and the facts in the affidavit of the 14th of April are not accepted but are denied in material respects. Therefore, we think that this matter should go to the Bench as I have already intimated, so that that Court may consider all the facts which are material to the question, whether the time for entering the appeal should be extended. Supposing that that Court comes to the conclusion on the merits that the time for appealing should be extended, then no further question will arise. But supposing that that Court comes to the conclusion on the merits that the time should not be extended, then arises the question of law we have discussed this morning, as to whether the plaintiff is entitled as a matter of right to have his appeal filed. The plaintiff alleges that inasmuch as the decree was amended on the 27th of January 1915, the time for entering the appeal would not begin to run until that date, and that, therefore, inasmuch as the appeal was filed or attempted to be filed on the 21st of April it was within time. I think the proper rule to apply to such a condition of affairs is that laid down in the case of *Brojo Lal Rai Chowdhury* v. *Tara Prasanna Bhattacharji* (1). The head-note expresses that part of the judgment to which I wish to refer, and it is as follows: "Every amendment made in a decree under S. 206, Civil Procedure Code, does not necessarily entitle a party, who prefers an appeal against the decree, to claim an extension of time under the second paragraph of S. 5 of the Limitation Act; whether there is sufficient cause for such extension must depend upon the circumstances of each individual case. If the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, such appeal should not be admitted out of time. On the other hand, if the grounds on which the appeal is based are intimately connected with the amendment of the decree, or if the grounds are directed against the decree only in so far as it has been amended, the Court should exercise in his favour the discretion vested in it by paragraph 2 of S. 5 of the Limitation Act." Applying this principle, what I mean to say is that if the Bench which is to hear this case does come to the conclusion on the merits of the case, as set out in the various affidavits to which I have referred, that there is no ground for extending the time for appealing, then the plaintiff ought to be limited to his grounds of appeal which refer to the amendments which were inserted in the decree on the 27th of January, 1915, and to those amendments only.

This Rule is, therefore, made absolute with costs hearing fee, one gold *mohur*.

The Bench to which this is sent after hearing the material facts will either allow the whole appeal to be admitted or part of the appeal only as above mentioned.

Mookerjee, J.—I agree.

V.B./R.K.

Rule made absolute.

(1) (1906) 3 C. L. J. 188.

A. I. R. 1916 Calcutta 349

MOOKERJEE AND ROE, JJ.

Krishna Kumar Nandy—Plaintiff—Appellant.

v.

Joy Krishna Nandy and *others*—Defendants—Respondents.

Second Appeal No. 2607 of 1913, decided on 19th May, 1915, against the

Decree of Sub-Judge, Barisal, dated 9th May, 1913.

(a) Transfer of Property Act (4 of 1882), S. 53—S. 53 renders transaction voidable and void—Besides fraudulent intention existence of creditors intended to be defrauded must be proved.

S. 53 of the Transfer of Property Act does not render a transaction void, but it is only voidable at the option of any person defrauded, defeated or delayed thereby. [P. 351, C. 1.]

In order to bring a case within the scope of S. 53 fraudulent intention alone is not enough, there must also be evidence to show that there were other creditors at the time of the transaction who were intended to be defrauded or defeated. [P. 351, C. 1.]

(b) Transfer of Property Act (4 of 1882), S. 53—Mortgage can be enforced to extent of consideration proved.

A mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor. [P. 351, C. 2.]

(c) Transfer of Property Act (4 of 1882), Ss. 60 and 91—Purchaser of a portion of equity of redemption cannot object to the sale of other part of the mortgaged property in mortgage decree.

Where the defendant No. 1 executed a mortgage of two properties, a parcel of land and a hut on another parcel, in favour of the plaintiff and the derendant No. 2, a creditor of the defendant No. 1, obtained a money-decree against him and in execution thereof purchased the hut; in a suit to enforce the mortgage security.

Held, (1) that defendant No. 2 as purchaser of the equity of redemption in the hut alone was in no way interested in the first parcel of land which belonged to the mortgagor and could not, therefore, object to the sale of that parcel by the mortgagee. A. I. R. (1914) P. C. 137 (P. C.), dist. [P. 350, C. 2.]

(d) Civil P. C. (5 of 1908), O. 21, R. 65—Purchaser taking property subject to lien must satisfy it.

(2) that it being plain from the orders in the execution proceedings, wherein defendant No. 2 became the purchaser, that he acquired, the hut subject to the lien of the plaintiff, he could get relief only on condition that he satisfied that lien. 35 Cal. 1051 and 36 Mad. 29; ref. to. [P. 351, C. 2.]

Brojendra Nath Chattarjee - for Appellant.

Gunoda Chandra Sen for *Chandra Kanta Ghose*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit to enforce a mortgage security, which comprised two properties, namely, a parcel of land and a hut on a second parcel. The mortgage was executed by the first defendant in favour of the plaintiff on the 11th October, 1909. The second defendant, a creditor of the first defendant, obtained a decree for money against the mortgagor on the 27th August, 1909, and in execution of that decree, purchased the hut on the second parcel for a sum of Rs. 50. The present suit has been defended by the purchaser, who has been joined as a party, on the ground that he has acquired an interest in the equity of redemption subsequent to the mortgage. The Court of first instance found that the plaintiff had failed to prove that any money was advanced on the mortgage and consequently dismissed the suit. Upon appeal the Subordinate Judge found that though the consideration for the mortgage was stated to be Rs. 150, the plaintiff had established that a sum of Rs. 50 only was due to him from the mortgagor under a prior mortgage of the 25th March, 1909. The second defendant thereupon contended that a decree should not be made in favour of the plaintiff even for this sum together with interest thereon, because the transaction was voidable under S. 53 of the Transfer of Property Act inasmuch as the mortgage had been created with a view to defeat or delay the creditors of the mortgagor. The Subordinate Judge overruled this contention and gave the plaintiff a decree for realization of the mortgage-money by sale of the first property alone. He exempted the second party from the mortgage lien, on the ground that the transaction was void as against the second defendant, who is a *bona fide* purchaser at a sale held in execution of a decree of his own against the first defendant. Neither party is satisfied with this decision. The plaintiff has appealed and contended that a decree should have been made against both the properties included in the security. The second defendant has appealed and urged that on the facts found by the Subordinate Judge, no decree should have been made even in respect of the first property.

As regards the cross-appeal of the second defendant, we are of opinion that it cannot possibly succeed. The second defendant, as purchaser of the equity of redemption in the hut, is in no way interested in the first property, which still belongs to the mortgagor, he cannot consequently be permitted to impeach the decree for the sale of that property.

As regards the appeal of the plaintiff, it has been contended on behalf of the respondents that the Subordinate Judge should have held, on the authority of the decision in *Chidambaram Chettiar* v. *Sami Iyer* (1)

(1) (1907) 30 Mad. 6.

confirmed on appeal to the Judicial Committee in *Chidambaram Chettiar* v. *Srinivasa Sastrial* (2), that the mortgage transaction which was voidable under S. 53 of the Transfer of Property Act must be avoided in its entirety and cannot be made the basis of a decree even for such portion of the consideration as is proved to have been passed from the mortgagee to the mortgagor. The case mentioned is clearly distinguishable. The Subordinate Judge has found that the mortgage-bond was executed for an antecedent loan of Rs. 57 and an alleged cash payment of Rs. 93 and that the payment of the cash consideration was doubtful or had not been proved. He has further found that the plaintiff was not, at the date of the mortgage transaction, aware of the decree obtained by the second defendant nor of its impending execution against the first defendant. There is also no evidence to show that there were other creditors of the mortgagor at the time of the mortgage transaction who were intended to be defrauded or defeated. But the Subordinate Judge seems to have held that the intention of the mortgagor was to put a fictitious statement of consideration in the mortgage-bond so that it might be of use to him as against possible creditors at some future time; there is, however, no direct evidence to show that the mortgagee was aware of this fraudulent intention. The facts found by the Subordinate Judge are, consequently, not sufficient to bring the case within the scope of S. 53, as explained by this Court in the cases of *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (3) and *Hakim Lal* v. *Mooshahar Sahu* (4).

But we need not rest our decision on this basis alone. We shall assume, for our present purposes, that the mortgage is within the mischief of S. 53 and that the facts sufficient to justify this conclusion have been found by the Subordinate Judge, still the question arises, what is the relative situation of the parties to this litigation? S. 53 does not render the transaction void; it is only voidable at the option of any person defrauded, defeated or delayed thereby. Let us assume also, as was done in the case of *Eastern Mortgage and Agency Co., Ltd*, v. *Rebati Kumar Roy* (5), that the validity of the mortgage can be questioned by way of defence and that it is not obligatory upon the person prejudicially affected to institute an action to avoid the transaction. If these assumptions are made, the inference follows that the second defendant is entitled to question the mortgage, only in so far as it affects the property acquired by him, namely, the hut on the second parcel. But the Court, when it proceeds to grant relief by way of avoidance of the transaction, will do so only on equitable considerations and will apply the principles of justice, equity and good conscience. In the present case, it is plain from the orders in the execution proceedings wherein the second defendant became the purchaser, that he acquired the hut subject to the lien of the plaintiff; consequently, if at his instance the mortgage is avoided, he should be granted relief, only on condition that he satisfied that lien. It follows that the plaintiff is entitled to a decree for his dues as against the second property in the hands of the second defendant. This view is in accord with that taken in the cases of *Rajani Kumar Das* v. *Gaur Kishore Saha* (6) and *Jaladanki Chinna Pitchia, In re* (7), which recognise the principle that a mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

The result is that this appeal is allowed, the cross-objection dismissed and the decree of the Subordinate Judge discharged. There will be a mortgage-decree in favour of the plaintiff against both the properties included in the security. But the decree will direct that the plaintiff must, in the first instance, proceed to realise his dues by sale of the first property. If such sale is not found sufficient to satisfy his dues, he will be entitled to proceed against the second property to recover the balance. As the hut, after purchase by the second defendant, has been demolished and can no longer be brought to sale, the decree will specify the sum recoverable by the plaintiff from the defendant under our judgment. Each party will pay his own costs throughout the litigation.

V.B./R.K.

Appeal allowed.

(2) A. I. R. (1914) P. C. 137 = 36 Mad. 227 = 23 I. C. 714 (P. C.).
(3) (1897) 24 Cal. 825.
(4) (1907) 34 Cal. 999.
(5) (1899) 3 C. L. J. 260.
(6) (1908) 35 Cal. 1051.
(7) (1913) 36 Mad. 29 = 11 I. C. 868.

A. I. R. 1916 Calcutta 352

CHITTY AND WALMSLEY, JJ.

Emperor.

v.

Aushi Bibi—Accused.

Criminal Ref. No. 54 of 1915, decided on 10th February, 1916.

Evidence Act (1 of 1872), S. 24—President of *panchayat* is person in authority within purview of S. 24—Judge held to have misdirected Jury—Criminal Procedure Code (1898), S. 297.

Where it transpired that the accused, with a view to poison a certain person, had given a powder to a girl to be administered to that person and a *salish* (assembly) consisting of the president of a *panchayat* and others was summoned to consider the case which was being made against the accused, and on their telling her that if she confessed the matter would be compromised, she made a confession, and on her trial the Sessions Judge in his charge to the Judge said: "A confession made under these circumstances is not inadmissible because (1) the members of the *salish* were not persons in authority, (2) the accused was not then charged with any offence":

Held, that the Judge possibly misdirected the Jury, inasmuch as it was clearly erroneous on his part to tell the Jury that the president of a *panchayat* was not a person in authority within the purview of S. 24 of the Indian Evidence Act and that the accused was not then charged with any offence, for she was before the *salish* on a charge of having attempted to commit murder. 9 C. W. N. 474 and 11 C. W. N. 904, ref. to.

[P. 352, C. 2 & P. 353, C. 1.]

Held, also, that the confession certainly ought not to have been placed before the Jury without an explanation as to how they should value it, having regard to the circumstances in which it was made. [P. 353, C. 1.]

Orr—for the Crown.

Kali Prasanna Piplai for *Hemendra Chandra Mazumdar*—for Accused.

Judgment.—This is a reference under S. 307, Criminal Procedure Code, in the matter of Aushi Bibi who was charged before the Additional Sessions Judge of Dacca and a Jury with offences under Ss. 302/115 and 328/116, Indian Penal Code. The case against Aushi Bibi was that she suspected an intrigue between her husband and Adarjan. She accordingly gave a powder which was subsequently found to contain arsenic, to Chandra Ban a girl of 13 years of age, the wife of Jarip. This girl was a relation of the accused. Aushi Bibi told Chandra Ban to give the powder to Adarjan by mixing it with lime in a *pan* or by mixing it with rice. The powder which was wrapped up in a red paper was taken by Chandra Ban; and as her aunt Nekjan came to the *bari* shortly afterwards, she showed it to her aunt and told her what had happened. Nekjan told her not to give it to Adajan but to throw it away. Nekjan tested some of it by putting it in water, when it is said to have become dark. Chandra Ban also said that Nekjan further tested it by placing it on the rind of a *jambura* or lemon. This incident Nekjan does not mention. This was on Wednesday. On the Friday the matter got about in the village and a *salish* was summoned and Aushi Bibi and Chandra Ban were called before the assembly. Manu Mandal, the president, questioned them both; and, though Aushi Bibi at first denied having got the poison, she eventually went and produced it. Manu Mandal is dead; but the witnesses who speak to what took place in the *salish* prove that she at first denied the occurrence but, on being told that the *salish* would compromise the matter, she went and brought the powder of her own accord. It should be stated that Aushi Bibi had asked Chandra Ban to give her back the powder and that Chandra Ban had given her back a portion retaining a portion herself. This other portion Chandra Ban also produced before the *salish*. Both the portions were placed together and sent eventually to the chemical analyser, who reported that traces of white arsenic were found in the powder. That is the case against the accused; and, on the evidence, the Jury returned a unanimous verdict of "not guilty." The learned Additional Sessions Judge disagreeing with that has referred the case for our decision.

In the first place, we should mention that the learned Judge has possibly misdirected the Jury in the matter of the confession to the members of the *salish*. He says in his charge: "A confession made under these circumstances is not inadmissible because (1) the members of the *salish* were not persons in authority, (2) the accused was not then charged with any offence."

As to the *first* reason, there are decisions of this Court holding that the president of a *panchayat* in such circumstances is, or may be, a person in authority within the purview of S. 24 of the Indian Evidence Act. We may refer to the two cases of *Nazir Jharudar* v. *Emperor* (1) and *Emperor* v. *Jasha Bewa* (2). It would depend on the question of fact, whether the confession was caused by any inducement,

(1) (1905) 9 C. W. N. 474.
(2) (1907) 11 C. W. N. 904.

threat or promise, having reference to the charge against the accused person. It should, therefore, have been left to the Jury to say whether there was any such inducement, threat or promise in this case; but to tell them that the president of a *panchayat* was not a person in authority within the meaning of S. 24 of the Evidence Act was clearly erroneous.

The *second* reason given by the learned Judge is also incorrect, because the *salish* was undoubtedly summoned to consider the case which was being made against Aushi Bibi of having given poison to Chandra Ban to be administered to Adarjan. She was, therefore, before the *salish* on that charge.

In this case there appears to have been a direct inducement from the president and members of the *salish* that if she confessed they would compromise the matter. It is, therefore, extremely doubtful whether this confession should have been allowed to be placed before the Jury at all. It certainly ought not to have been placed before them without an explanation as to how they should value it, having regard to the circumstances in which it was made.

Excluding that confession from consideration, there remains only the evidence of Chandra Ban corroborated, so far as it is corroborated, by the evidence of Nekjan. We feel unable to say, in these circumstances, that the Jury were wrong in rejecting this evidence against the accused Aushi Bibi. They had these facts before them and they were entitled to reject that evidence for any reason that they thought proper.

There is the further fact that the chemical analysis does not disclose how much arsenic was found in this powder. There is, therefore, no evidence on the record against the accused as to the amount of poison which was proposed to be administered to Adarjan.

It would be difficult, therefore, to say whether the case would come under S. 302 or S. 328, Indian Penal Code, or whether there would be any offence proved against Aushi Bibi at all. We accordingly direct that the verdict of the Jury be upheld and that Aushi Bibi be acquitted.

V.B./R.K.

Accused acquitted.

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FLETCHER AND WALMSLEY, JJ.

Kiranbala Debi—Plaintiff—Appellant.

v.

Kali Charan Singha and *others*—Defendants—Respondents.

First Appeal No. 73 of 1913, decided on 13th July, 1915, against the Decree of Sub-Judge, Berhampore, dated 9th October, 1912.

Evidence Act (1 of 1872), S. 115—Adoption contested—Suit dismissed—Question left open till adoptive widow's death—Acceptance of lease from adopted son's son by plaintiff's husband estops her from challenging adoption.

The plaintiff's late husband brought a suit against one Chhaya Kumari and Nilkanta to set aside the adoption of Nilkanta, by the former. The suit was decreed by the primary Court but on appeal to the High Court the judgment was set aside, the question of the adoption being left open until the death of Chhaya Kumari. Afterwards an application was made to the District Judge under S. 31 of Act VIII of 1890 for leave to raise certain moneys to pay off debts due from the son of Nilkanta, then a minor, by granting a *putni* of a certain portion of the estate, and the plaintiff's husband appeared before the District Judge and expressed his desire to take the *putni* lease at a premium of Rs. 10,000.

Held, (1) that this was a clear case of waiver, by the plaintiff's husband who with full knowledge of his rights obtained the *putni* which recognised the validity of the adoption of Nilkanta; [P. 354, C. 1 & 2.]

(2) that the plaintiff was estopped from questioning the adoption of Nilkanta, as she was still in possession of the property comprised in the *putni*, and claimed through her late husband. [P. 354, C. 2.]

(3) That whether the adoption of Nilkanta be or be not valid the plaintiff cannot succeed in this suit. [P. 354, C. 2 & P. 355, C. 1.]

Brojo Lal Chakravarti, *Upendra Nath Bogchi* and *Nagendra Nath Sen*—for Appellant.

S. P. Sinha, *Mohinimohan Chatterji*, *Sarat Coomar Mitter* and *Kalikinkur Chakravarty*—for Respondents.

Judgment.—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Berhampore dismissing her suit. The plaintiff brought her suit to recover certain properties that represent one-half of the estate originally belonging to one Shibaram Singh. Shibaram died on the 9th of August, 1836 leaving a widow, Chhaya Kumari, aged about 14 years and a daughter, Foodan Kumari by a former wife. Foodan was many years older than the

widow. She was married to Chait Lal Singh and had two sons, Ram Lal and Behari Lal. On the death of Shibaram his widow succeeded to his properties. By a subsequent arrangement with Foodan Kumari and Chait Lal Singh, Chhaya Kumari was left in possession of 8 annas share of the property, except one *mehal* which was made over to Ram Lal. The other 8 annas share in the property was made over to Foodan Kumari and Chait Lal Singh.

The present suit relates to the 8 annas share of the property retained by Chhaya Kumari. The defendants Nos. 2 to 6 are in possession of the property No. 11 in schedule *ka* to the plaint under a purchase from Chhaya Kumari. The rest of the properties sued for are in the possession of the defendant No. 1. He claims them as heir of his father Nilkanta who, it is alleged, was adopted by Chhaya Kumari. Nilkanta was a son of Gopal Sundari, a daughter of Foodan Kumari. The plaintiff is the widow of Shayama Charan Singh who was the son of Annapurna, another daughter of Foodan. It is not denied that if no son had been adopted to Siva Ram, the present plaintiff in the events that have happened would be entitled to the estate of Shibaram.

The plaintiff questions the alleged adoption of Nilkanta on the following grounds, *first*, that there was no such adoption in fact, *secondly*, even if there were, Shibaram gave no authority to Chhaya Kumari to adopt and, *thirdly*, the adoption would be void even if authority had been given to Chhaya Kumari, as Nilkanta's natural mother could not have married Shibaram if she had been a maiden.

The learned Judge in a very comprehensive judgment has dealt with all the matters raised in the suit. He has held, *firstly*, that the adoption was valid and, *secondly*, that the plaintiff is estopped from questioning the adoption of Nilkanta. A large part of the argument has been addressed to us as to whether or not the adoption of Nilkanta was valid.

In the circumstances of the present case we need not enter into this question. For we are of opinion that the plaintiff is estopped from questioning the adoption of Nilkanta. The facts relating to such estoppel may be briefly stated :—In 1878 the plaintiff's late husband brought a suit against Chhaya Kumari and Nilkanta to set aside the adoption of Nilkanta. The suit was decreed in the primary Court, but on appeal to this Court the judgment was set aside, the question of the adoption being left open until the death of Chhaya Kumari. The plaintiff's husband was, therefore, fully aware of his rights. At the end of the year 1895 an application was made to the District Judge under S. 31 of Act VIII of 1890 for leave to raise certain moneys to pay off debts due from the defendant No. 1, then a minor. The first proposal was to raise the money by mortgage, but it was subsequently altered to a proposal to grant a *putni* of a certain portion of the estate. The proposal dragged on for a considerable time. On the application coming on the 2nd of March, 1898, the District Judge granted time to enable the husband of the plaintiff to come in as he might contest the validity of the adoption of the father of the defendant No. 1.

On the 10th of March, 1898 the plaintiff's husband appeared before the District Judge and expressed his desire to take the *putni* lease at a premium of Rs. 10,000. The learned Judge sanctioned the proposal, subject to a condition that the plaintiff's husband together with a surety should give security to pay the expenses of any suit (up to Rs. 2,000) which might be brought by any other reversioner to question the title of the defendant No. 1. In pursuance of this order the *putni* lease (Exhibit D) and the Security bond (Exhibit E) were executed. This seems to us to be a clear case of waiver by the husband of the plaintiff. With full knowledge of his rights he obtained the *putni* (Exhibit D) which recognises the validity of the adoption of Nilkanta and the plaintiff, his widow, is still in possession of the property comprised in the *putni*. That being so, it is now too late for the plaintiff, who claims through her husband, to question the adoption.

The doctrine of estoppel by conduct has been applied in many cases in India to invalid adoptions. The facts in this case raise a clear case of estoppel against the plaintiff. To hold otherwise would be lamentable. The defendant No. 1 has married the daughter of the plaintiff's late husband. If the plaintiff can question the adoption of Nilkanta, then the marriage of the defendant No. 1 will be invalid and the defendant No. 1 will be left as belonging to no family and with a wife to whom he is not legally married. We agree with the learned Judge in the Court below that the facts proved establish a clear case of estoppel against the plaintiff. Whether the

adoption of Nilkanta be or be not valid the plaintiff cannot succeed in this suit. The appeal, therefore, fails and must be dismissed with costs. There will be two sets of costs, one to the defendant No. 1 respondent and the other to the defendants Nos. 1 to 6 respondents.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 355

SHARFUDDIN AND CHAPMAN, JJ.

Abdul Sheik—Plaintiff—Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 367 of 1915, decided on 9th July, 1915.

(a) Criminal P. C. (5 of 1898), S. 297—Charge to Jury—Duty of Court—Jury's attention should be drawn to defence case and non-production by prosecution of witnesses present at the time of occurrence giving rise to presumption under S. 114 of Evidence Act (1872).

In his charge to the Jury a Judge should draw the attention of the Jury to the case set up by the defence and the non-production by the prosecution of witnesses who were present at the time of the alleged occurrence, pointing out to them that the non-production created a presumption under S. 114, Indian Evidence Act, which did not help the prosecution case.

[P. 355, C. 2.]

(b) Criminal P. C. (5 of 1893), S. 297—Charge to Jury—Riot case—Judge must point out what unlawful assembly is—Indian Penal Code (1860), Ss. 141 and 147.

In cases of riot it is essentially necessary for a Judge to mention, in his charge to the Jury, what an unlawful assembly is. [P. 355, C. 2.]

(c) Criminal P. C. (5 of 1898), S. 297—Charge to Jury—Rioting case—Ingredients of offence not stated—Charge held to be inadequate.

Where a Judge in his charge to the Jury said: "The offences of rioting, culpable homicide, voluntarily causing grievous hurt and the provisions of Ss. 34, 149, Indian Penal Code, are explained" and there was nothing to show that the Jury were told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in S. 141, Indian Penal Code.

[P. 355, C. 2.]

Held, that the charge was most inadequate.

(b) Criminal P. C. (5 of 1898), S. 297—Charge to Jury—Riot cases—Omission to mention common object does not vitiate trial.

Semble.—In cases of riot the omission to mention the common object in the charge-sheet does not necessarily vitiate the trial. 11 Cal. 106; 22 Cal. 276 and 33 Cal. 295, not foll.

[P. 355, C. 2.]

Manmatha Nath Mookerjee and *Birendra Kumar De*—for Appellant.

Orr—for the Crown.

Sharfuddin, J.—The case was tried by Jury.

We have heard the learned Vakil appearing for the appellant. He contends that there has been a misdirection in the charge, *first*, because in the charge-sheet the common object has not at all been mentioned and he relies on the cases of *Behari Mahton* v. *Queen-Empress* (1), *Sabir* v. *Queen-Empress* (2) and *Poresh Nath Sircar* v. *Emperor* (3). There are, however, other cases which go to show that the omission to mention the common object in the charge-sheet does not necessarily vitiate the trial. The *second* ground urged by the learned Vakil is that in the charge to the Jury, the learned Sessions Judge has not drawn their attention to the case set up by the defence and that some of the witnesses who were present at the time of the alleged occurrence were not examined in the trial.

The learned Deputy Legal Remembrancer admits that the charge is inadequate.

The learned Sessions Judge should have drawn the attention of the Jury to those facts, pointing out to them that non-production of those witnesses created a presumption under S. 114 of the Evidence Act which did not help the case for the prosecution.

Apart from these objections, I am of opinion that the charge to the Jury is most inadequate. In his charge the learned Judge says: "The offences of rioting, culpable homicide, voluntarily causing grievous hurt and the provisions of Ss. 34 and 149, Indian Penal Code, are explained." There is nothing to show that the Jury were told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in S. 141, Indian Penal Code. I am of opinion that in cases of riot it is essentially necessary to mention what an unlawful assembly is. The Jury are not experts in law. They might not be able to distinguish between a collection of five or more men without a common object and a collection of the same number of men with a common object.

In these circumstances, I think, the case should go back for re-trial. The conviction

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(1) (1885) 11 Cal. 106.
(2) (1895) 22 Cal. 276.
(3) (1906) 33 Cal. 295.

and sentence are set aside and a fresh trial is ordered.

I would like to point out that in the fresh trial it is desirable that the common object of the assembly, the case set up by the accused, the evidence, if any, either in cross-examination of the witnesses for the prosecution or in the examination-in-chief of any defence witness, if examined and any statement corroborating the allegation of the accused, should be distinctly placed before the Jury.

The re-trial of the accused will be only under S. 147, Indian Penal Code, inasmuch as he has not been found guilty of any other offence.

Let the accused be admitted to bail to the satisfaction of the District Magistrate.

Chapman, J.—I agree.

V.B./R.K.

Re-trial ordered.

A. I. R. 1916 Calcutta 356

CHATTERJEA AND ROE, JJ.

Gopal Proshad Bhagat and *others*—Decree-holders—Petitioners.

v.

Rajendra Lal Panja and *others*—Judgment-debtors—Opposite Parties.

Civil Rule No. 198 of 1915, decided on 20th July, 1915, against the Judgment of Sub-Judge, Midnapur, dated 24th October, 1914

(a) Limitation Act (9 of 1908), Sch. I, Art. 182 (5)—Application by decree-holder certifying partial satisfaction of decree is step-in-aid of execution—Payment must be actually made—Civil P. C. (1908), O. 21, R. 2.

An application by a decree-holder certifying payment of a portion of the decretal amount out of Court, is a step-in-aid of execution within the meaning of Article 182 (5) of the Limitation Act, provided the payment was actually made and even though the decree-holder by his application also prayed that the execution case might be struck off. 12 Cal. 608; 12 All. 399; 20 Cal. 696 and 3 I. C. 391, foll. [P. 357, C. 1]

(b) Civil P. C. (5 of 1908), S. 148—Application for execution within time—Application returned for amendment of formal defects—Application re-filed after amendment, but beyond limitation—Held application was not time-barred.

Where an application for execution was made just within the limitation period but was returned by Court for amendment of certain formal defects within a certain time and the application after amendment was re-filed after that time and beyond the limitation period, with a prayer that the delay might be excused in view of the circumstances stated therein and the Court accepted and acted upon the application:

Held, that the Court had in effect enlarged the time in the exercise of its discretion under S. 148, Civil Procedure Code, and that, therefore, the application was not time-barred. 7 I. C. 578. dist. [P. 357, C. 1 & 2.]

Satcowri Pati Roy—for Petitioners.

Surendra Nath Ghoshal—for Opposite Parties.

Judgment.—This rule was granted upon an application under S. 25 of the Provincial Small Cause Courts Act.

The main question raised in the Rule is, whether an application by a decree-holder certifying partial satisfaction of a decree is a step-in-aid of execution of the decree within the meaning of Article 182 (5) of the Second (First?) Schedule of the Limitation Act.

The question has been considered in several cases and answered in the affirmative. In *Tarini Das Bandyopadhya* v. *Bishtoo Lal Mukhopadaya* (1) the learned Judges held that such an application is a step-in-aid of execution of the decree, and observed: "when a judgment-creditor comes into Court and certifies to the Court the payment of a sum, that proceeding takes place in consequence of an arrangement as to payment between him and the judgment-debtor, and because if he had not certified, the judgment-debtor could, under the law, compel him to do so. The effect of the certificate is to satisfy the decree so far as the sum certified is concerned." The same view was taken by a Full Bench of the Allahabad High Court in *Sujan Singh* v. *Hira Singh* (2). Mahmud, J., in that case observed that the rule laid down by this Court in the case of *Tarini Das Bandyopadhya* v. *Bishtoo Lal Mukhopadaya* (1) is "a sound rule of law," because "where a decree-holder has not only out of Court acquired a partial satisfaction of the decree, but where he also comes to certify such partial satisfaction under S. 258 of the Civil Procedure Code, he is taking a step by which he asserts enforcement of his decree in the exercise of those powers which are vested in him because he is a decree-holder."

A similar view has been taken in subsequent decisions of this Court. [See *Wasi*

(1) (1886) 12 Cal. 608.
(2) (1890) 12 All. 399.

Imam v. *Poonit Singh* (3) and *Chhoto Rakhal Das* v. *Jogendra Narain* (4).]

It is contended on behalf of the opposite parties, that in the present case the decree-holder by his application certifying payment also prayed that the execution case might be struck off, and this fact was relied upon strongly by the learned Subordinate Judge. No doubt an application to the Court to strike off an execution case cannot possibly be a step-in-aid of execution, but if an application certifying payment to the Court is a step-in-aid of execution, the mere fact that there is a prayer in the application that the execution case might be struck off after satisfaction, cannot take away the effect of certifying payment to the Court.

Having regard to the authorities cited above, we must hold that an application by the decree-holder certifying payment of a portion of the decretal amount out of Court is a step-in-aid of execution of the decree within the meaning of Article 182 (5) of the Limitation Act provided, of course, the payment asserted has actually been made. In the present case it is not disputed that the payment was actually made.

It is pointed out on behalf of the opposite parties that although the present application for execution was originally filed on the 22nd May, 1914 which was within three years from the date of the application certifying payment to the Court referred to above, it was returned on the 9th June for amendment (of certain formal defects) within five days from that date, and the application was not re-filed within the time allowed, but on the 27th June. It is contended that there is no express order under S. 148, Civil Procedure Code, enlarging the time for amendment, and the case of *Budhan Shah* v. *Sita Nath Shah* (5) is relied upon. But in the present case, the decree-holder filed a petition on the 27th June, stating the reason why the application had not been filed within the period allowed and praying that the delay might be excused. There was thus an application for enlargement of the period allowed and the order of the Court, taken along with the above petition, goes to show that the circumstances under which the application for execution was re-filed after the period originally allowed were considered and the Court in the exercise of its discretion enlarged the time.

We are of opinion that the application for execution of the decree was not barred by limitation. The Rule is accordingly made absolute, and the case sent back to the Court below for proceeding with the execution. Costs one gold *mohur*.

V.B./R.K.

Rule made absolute.

(3) (1893) 20 Cal. 696.
(4) (1909) 3 I. C. 391.
(5) (1910) 7 I. C. 578.

A. I. R. 1916 Calcutta 357

JENKINS, C.J. AND N. R. CHATTERJEA, J.

Hiranmoy Kumar Saha Plaintiff Appellant.

v.

Ramjan Ali Dewan Defendant Respondent.

Second Appeal No. 1563 of 1913, decided on 9th June, 1915, against the decree of Sub-Judge, 1st Court, Burdwan, dated 21st February, 1913.

(a) Civil P. C. (5 of 1908), S. 11—Rent-decree in prior suit is not merely piece of evidence but conclusive evidence of relationship of landlord and tenant.

In a suit for arrears of rent a decree for rent obtained by the landlord in a prior suit against the same defendants is not merely an item of evidence, but is conclusive as to the relationship between the parties at the time to which the previous suit referred. [P. 357, C. 2.]

(b) Evidence Act (1 of 1872), S. 114 (d)—Presumption of continuance of relationship of landlord and tenant from previous rent-decree is not obligatory but permissible.

S. 114, Illustration (*d*) of the Evidence Act does not compel, but certainly permits, the Court to make a presumption as to the continuance of the state of things. [P. 358, C. 1.]

Kherode Nath Bhuya for Appellant.

D. N. Bagchi for Respondent.

Judgment.—This is a suit for arrears of rent. It was necessary for the plaintiff to establish that he was the defendants' landlord. He proposed to do that by utilizing, among other things a decree for rent which he had obtained in a prior suit against these defendants. The lower Appellate Court has rejected the decree as an item of evidence, apparently on the ground that it was *ex parte*. This is manifestly erroneous. The decree is not merely an item of evidence, but is conclusive as to the relationship between the parties at the time to which the previous suit referred. That does not mean that in the circumstances of this case it is conclusive as to the

present relation between the parties. But it is good and valuable evidence in so far as it establishes the relationship at a time that has passed. Its value becomes more apparent when the terms of S. 114 of the Evidence Act and Illustration (*d*) are borne in mind, which do not compel, but certainly permits, the Court to make a presumption as to the continuance of the state of things. The decree has been excluded from consideration by the lower Appellate Court in error.

We must, therefore, reverse the decree of the lower Appellate Court and send back the case in order that it may be determined according to law. Costs hitherto incurred will abide the result.

V. B./R. K.

Decree reversed; Case remanded.

A. I. R. 1916 Calcutta 358

SANDERSON, C. J. AND MOOKERJEE, J.

Aklu—Defendant—Appellant.

v.

Emman—Plaintiff—Respondent.

Appeal No. 2537 of 1914, decided on 15th March, 1916, from the Appellate Decree of Sub-Judge, 2nd Court, Hooghly, dated 25th May, 1914.

Transfer of Property Act (4 of 1882), Ss. 106 and 107—Lease of immovable property not for agricultural or manufacturing purposes reserving annual rent when not registered is to be deemed lease from month to month.

A lease of immovable property (not for agricultural or manufacturing purposes) reserving an annual rent, though it might be held to create an annual tenancy according to the contract of the parties, is to be deemed a lease from month to month terminable by fifteen days' notice under S. 106 of the Transfer of Property Act, when that contract between the parties has not been put into writing and registered as required by S. 107 of the Act. 24 I. C. 183 ref to

[P. 359, C. 2.]

Monmotha Nath Roy—for Appellant.

Jyotis Chandra Hazra—for Respondent.

Sanderson, C. J.—In this case I think the appeal must be dismissed. The lease was given on the 18th of January, 1904 to the defendant's brother, one Sheikh Chandu, of a particular area of land which was 2 *cottahs*, and the rent was Rs. 12 a year. In 1909 Chandu died. From that time the defendant and the heirs of Chandu, and I think all his heirs, lived on the land in question; but apparently after the death of Chandu the land occupied by the defendant and the heirs, who according to the judgment of the lower Appellate Court were probably living with the defendant, was 2½ *cottahs* and the rent that was paid was not Rs. 12 a year but was Rs. 15 a year, and the first question raised is whether the tenancy was a heritable one.

The learned Subordinate Judge has held that the tenancy was not heritable one, and he bases his judgment upon the terms of the lease. That has been examined by my learned brother Mr. Justice Mookerjee and he agrees that there is nothing in the lease to show that the tenancy was a heritable one. Further than that, the fact that the area occupied after Chandu's death was different from that included in the lease and the fact that the rent was different from that which was specified in the lease, lead me to come to the conclusion that the judgment of the learned Subordinate Judge that the holding was not a heritable one was correct. Therefore, the position is this. The lease has come to an end; a new tenancy must have been created, and upon that two questions arise—with whom was the new tenancy created, and *secondly*, on what terms.

Now, upon the *first* point, the learned Vakil who has argued the case for the appellant urges that the tenants were not only the defendant but also the heirs who were co-sharer tenants, as he suggests, with the defendant. That point is really a question of fact and that has been decided by the learned Subordinate Judge against him, who has held that the defendant was the only tenant, and if it is necessary for me to express any opinion, I think that the learned Judge was perfectly right in coming to that conclusion, as far as I can judge from the materials before me: it is not necessary for me to go into detail; they are referred to in the two judgments that are before us. Therefore, the tenancy was between the plaintiff and the defendant.

Then the *second* point arises, what were the terms of that tenancy? There is no dispute as to that, because the Court of first instance has held that the rent was an annual rent of Rs. 15. The contest had been as to whether the rent was a monthly rent or a yearly rent: the amount was agreed between the parties and as to that there was no dispute. The question was whether it was an annual rent of Rs. 15 or a monthly rent of Rs. 1-4. The Court of first instance has

dealt with that specific question which is a question of fact, and has found that the rent was an annual rent of Rs. 15 a year. Then arises the next question, whether from that fact it can be presumed that the tenancy was an annual tenancy. I should be prepared to follow what was said by my learned brother Mr. Justice Mookerjee in the case of *Durgi Nekarrini* v. *Goberdhan Bose* (1), namely, "It may possibly be accepted as a proposition generally true that, as indicated in *Wilkinson* v. *Hall* (2), the mode in which rent is expressed to be reserved affords a presumption that the tenancy is of a character corresponding thereto. The rule, however, is not of universal application, and, it was pointed out by Mr. Justice Maule in *Atherstone* v. *Bostock* (3), that the presumption of yearly taking from the rent being paid yearly does not apply to the case of lodgings, and the same view is supported by the case of *Wilson* v. *Abbott* (4). Now in this case there is nothing to rebut the presumption which, I think, ought to be drawn from the fact that the rent was to be an annual rent. Therefore, the presumption ought to be drawn that the tenancy was to be an annual tenancy; and so far that conclusion at which I have arrived is in favour of the appellant. Therefore, within the words of S. 106 of the Transfer of Property Act, there would be a contract, namely, such as I have described, a contract of tenancy between the plaintiff on the one hand and the defendant on the other, and an annual tenancy for which an annual rent of Rs. 15 was to be paid; and, therefore, S. 106, if it stood by itself, would not apply, because there would be a contract to the contrary. But unfortunately for the appellant, there is S. 107 which says that such a contract as that, a contract such as I have described which reserves a yearly rent, can be made only by a registered instrument, and, inasmuch as there is no registered instrument in this case, that contract must be treated as an invalid contract and as not existing. Therefore, I am forced to the conclusion that this case does come within S. 106, because there is an absence of a contract to the contrary, inasmuch as the contract which was in fact made and was in fact held to exist by the Court of first instance was not put into writing and was not registered. Therefore, there being no contract to the contrary, and inasmuch as this was a lease of immovable property and not for agricultural or manufacturing purposes, but for some other purpose, it must be deemed to be a lease from month to month terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy, and, inasmuch as fifteen days' notice was admittedly given in this case, a sufficient notice under the Statute was given and the plaintiff consequently is entitled to obtain a decree for possession of the land, for arrears of rent and for damages for holding over after the notice to quit.

For these reasons the appeal must be dismissed with costs.

I should like to say, this is one of the first cases that I have heard argued by the learned Vakils of this Court that in my opinion it has been very well argued on both sides.

Mookerjee, J.—I agree.

V.B./R.K.

Appeal dismissed.

(1) A. I R. (1915) Cal. 64=24 I. C. 183.
(2) (1837) 3 Bing (N. C.). 508=132 E. R. 506.
(3) (1841) 133 E. R. 850=10 L. J. C. P. 113.
(4) (1824) 3 B. & C. 88=107 E. R. 667.

A. I. R. 1916 Calcutta 359

WOODROFFE AND NEWBOULD, JJ.

Indra Narain Sarkar and *others*—Plaintiffs—Appellants.

v.

Bedeswari Dassya—Defendant—Respondent.

Second Appeal No. 1013 of 1914, decided on 13th July, 1915, against the Decree of Dist. Judge, Dinajpur, dated 14th of February, 1914.

(a) Practice—Admission—Mortgage suit—Mortgagor's admission of balance due—Dismissal of entire claim for non-production of deed bearing endorsement is improper.

Where in a mortgage suit it is found by the first Court that the sum alleged to have been paid by the mortgagor has not been paid, it being admitted by the mortgagor that there is a balance due, and on appeal, the District Judge has dismissed the suit, on the ground that the plaintiff-mortgagee has not produced the original deed upon which it is alleged that an endorsement of payment was made:

Held, that in the face of the admission that there is some money still outstanding on the mortgage, the suit should not have been entirely dismissed. [P. 360, C. 1.]

(b) Evidence Act (1 of 1872), Ss. 102 and 103 —Onus of proof of repayment is on person alleging it.

That the onus of proving the payment alleged by the defendant is upon the latter.

[P. 360, C. 1.]

Kali Kinkar Chakravarti—for Appellants.

Brojo Lal Chakravarti—for Respondent.

Judgment.—This is a suit brought upon a mortgage. Amongst other defences, a plea was taken that a certain sum specified had been paid: it was admitted, however, that there was a balance due.

The first Court found that the sum alleged to have been paid had not been paid. On appeal, the District Judge, on the ground that the plaintiff had not produced the original deed upon which it was alleged that an endorsement of payment had been made, dismissed the suit.

It is conceded that this was an error, it being admitted that as there was some money still outstanding on the mortgage, the suit should not have been entirely dismissed. Had the matter rested there, it might have been possible for us to have dealt with the question ourselves. But on reading the judgment I think it would be advisable that we, while setting aside the judgment and decree of the lower Appellate Courts, should send the case back for re-decision. The onus of proving the payment alleged by the defendant was upon her. The first Court in the first instance found that the evidence of payment which she had produced was untrustworthy; and the lower Appellate Court does not appear to have dealt at all with this first part of the case, and it merely rested its decision upon the fact that the plaintiff had not produced his deed. Under these circumstances, we set aside the judgment and decree of the lower Appellate Court and remit the case to the District Judge for a fresh decision on the facts.

The appellant in this Court will be entitled to his costs of this appeal.

V. B./R. K.

Decree set aside; Case remanded.

A. I. R. 1916 Calcutta 360

SHARFUDDIN AND TEUNON, JJ.

Romesh Chandra Dutta Choudhury and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 610 of 1914, decided on 4th June, 1914, against the decision of Dist. Magte., Dacca.

Criminal P. C. (5 of 1898), Ss. 109, 118 and 122 —Bad livelihood case—Sureties—Residence of each in immediate neighbourhood of accused is not necessary.

In a bad livelihood case when several sureties are required it is not necessary that each one of them should live in the immediate neighbourhood of the accused. [P. 361, C. 1.]

J. N. Roy, B. C. Chatterjee and *Birendra Kumar De*—for Petitioners

Orr—for the Crown.

Judgment.—In this case the petitioners were required to execute bonds with three sureties each in the sum of Rs. 1,000 to be of good behaviour for one year. They offered certain sureties and under the provisions of S. 122, Criminal Procedure Code, these sureties were rejected as being unfit persons. Thereupon the petitioners obtained from this Court the present Rule calling upon the District Magistrate of Dacca to show cause why the sureties offered should not be accepted. The learned District Magistrate has submitted a very fair explanation and after reviewing the evidence expressed his opinion that in the case of the petitioner Suresh Chandra Banerjee three of the sureties offered, namely, Basanta Kumar Banerjee, Kali Kumar Banerjee and Rash Mohan Banerjee are fit persons to be accepted as sureties. In the case of Suresh Chandra Banerjee we direct that the three persons above named be accepted.

In case of Romesh Chandra Dutta Chaudhuri, of the five persons offered he finds that No. 3, Khitish Chandra Dutta Chowdhuri, has been rejected on insufficient grounds. With regard to the 1st and 2nd he says that the 1st is the elder brother and the second the younger brother of the petitioner and that they themselves are looked upon with some suspicion. With regard to the 4th and 5th he says that they are residents of Mymensingh town, a place at a considerable distance from Bajitpur

where the petitioner lives. Considering that three sureties are required we do not think it necessary that each one of the three should live in the immediate neighbourhood of the accused. With regard to Suresh Chandra Dutta Chowdhuri, the elder brother, it does not appear that the suspicions against him have been substantiated. We, therefore, direct that in the case of Romesh Chandra Dutta Chowdhuri the following three persons Suresh Chandra Dutta Chowdhuri, Khitish Chandra Dutta Chowdhuri and Hemendra Mohun Dass, be accepted as sureties.

The Rule is made absolute in these terms.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 361

SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Mathura Sundari Dassi —Plaintiff—Appellant.

v.

Haran Chandra Shaha and *others*—Defendants—Respondents.

Appeal No. 43 of 1915, decided on 21st December, 1915, from the Original Decree and Order of Imam, J., dated 5th February, 1915.

(a) Civil P. C. (5 of 1908), O. 9, R. 9—Order refusing to restore suit dismissed for default by Judge on Original Side is appealable, being judgment within the meaning of Clause 15 of Letters Patent.

An order of a Judge of the High Court in its original jurisdiction rejecting an application under O. 9, R. 9, Civil Procedure Code, for the restoration of a suit dismissed for default, is a judgment within the meaning of Clause 15 of the Letters Patent and is appealable. [P. 366, C. 1.]

(b) Civil P. C. (5 of 1908), O. 9, R. 9, and O. 43, R. 1—Order refusing to restore suit dismissed for default by Judge on Original Side is appealable under O. 43, R. 1.

Per *Sanderson, C. J.*, and *Mookerjee, J.*—An order of a Judge of the High Court, in its original jurisdiction rejecting an application for restoration of suit dismissed for default is appealable under O. 43, R. 1, Clause (c), of the Civil Procedure Code, as the Code and the rules made under it apply to an appeal from a decision of a Judge of the High Court on the original side. [P. 362, C. 2 & P. 365, C. 1.]

(c) Appeal — Right of—Burden of proof—Competency of appeal in question—Appellant must establish right of appeal.

Per *Mookerjee, J.*—Where the competency of an appeal is in question it is incumbent upon the appellant to establish that she has a right of appeal, for a right of appeal does not exist in the nature of things but must be given by express enactment. 40 Cal. 21 (P. C.), foll.; *Sandback Charity Trustees* v. *North Staffordshire Railway Company* (1877) 3 Q. B. D. 1; 47 L. J. Q. B. 10; 37 L. T. 391 and 26 W. R. 229, foll. [P. 364, C. 1 & 2.]

(d) Practice—Duty of Court—Suit dismissed for mistake of legal advisers—Court can in proper case restore suit on payment of costs.

Even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs. Case law discussed. [P. 367, C. 1.]

S. R. Das, B. C. Mitter and *N. Gossain* —for Appellant.

W. Jackson, N. Sarkar, N. Bhose, S. C. Bhur and *M. N. Bose*—for Respondents.

Sanderson, C. J.—With regard to the preliminary objection which was raised by Mr. Jackson, when that point was taken, the case was argued upon the assumption that the suit had been dismissed under O. 9, R. 8, which deals with default of appearance, and, therefore, I propose, whatever may have been the real position, to deal with the argument which was presented to us by the learned Counsel upon the basis that the order by Mr. Justice Imam dismissing the suit was made under O. 9, R. 8. That order was made on the 5th of February, 1915. Then an application was made on the 25th of March of this year to set aside that order of dismissal. That was heard by the learned Judge and was refused, and the plaintiff appealed from that order of refusal to restore the case and set aside the dismissal, and a preliminary point has been taken by the learned Counsel for the defendant that no appeal lies from such an order.

It was argued by the learned Counsel for the defendant, Mr. Jackson, *first*, that the order in question was not a 'judgment' within the meaning of Clause 15 of the Letters Patent; and, *secondly*, that if it is not within Clause 15 of the Letters Patent, the Civil Procedure Code has no application to an appeal from a Judge of the High Court to other Judges of that Court.

As to the *first* point, namely, whether the order in question was a 'judgment' within the meaning of Clause 15, personally I should not have had much doubt

or hesitation in holding that the order was a 'judgment' within the meaning of that clause, if it had not been for some cases which were cited to us. It is quite true that the learned Judge had no discretion upon the question of the dismissal of the suit under O. 9, R. 8. In fact, the rule expressly says, "where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court *shall* make an order that the suit be dismissed." The learned Judge has no option and under such circumstances he must dismiss the suit. But when the application to set aside that dismissal is made, in my opinion, the Judge has discretion, and he must exercise his judgment on the materials before him. The question on which he has then to exercise his judgment and his judicial discretion may, as in this case, be a matter of great importance: It is no less than whether the plaintiff under the circumstances of the case shall be allowed to prosecute his suit or for all time be debarred from trying to enforce his claim. Clause 15 obviously refers to 'judgments' which in common parlance may be called *orders*. In my opinion, the decision so arrived at on such a question as above stated would be a 'judgment' within the meaning of the word 'judgment' in the Letters Patent. The judgments, however, in some of the cases which Mr. Jackson has cited to us throw some doubt upon the correctness of the above view. I do not refer to them all, though I have considered them: the most important are *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1) and *Gobinda Lal Das* v. *Shiba Das Chatterjee* (2). I only pause to remark that the exact point which arises in this case has not been decided, as far as I know, in any reported case, and I am informed that many such appeals, as this, have been heard in the Court of Appeal here, but it is said that in one unreported case the decision of this Court was that an appeal would not lie. The decision in the present case on the application of the plaintiff does, in my opinion, decide a question which affects the rights of the plaintiff. He alleges that he should be allowed to prosecute his claim. A refusal of the application debars him for all time. If he had put in a plaint which was ill-framed and that had been struck out by the learned Judge, according to the decision in one of the cases, he would have a right of the appeal within the very terms of the judgment in that case—that was an illustration in the case in *Hurrish Chunder Chowdhry* v. *Kali Sundari Debi* (1)—yet when an order is made which debars his suit for all time, according to the argument of Mr. Jackson, he is not to have a right of appeal.

I should be very loth to hold that this order is not a 'judgment' within the meaning of Clause 15 of the Letters Patent, but it is not necessary in my judgment to give a definite opinion upon it because I think, on the *second* point, the Code does give a right of appeal. By Clause 44 of the Letters Patent it is provided as follows: "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations." By the terms of S. 117, the Code is made applicable to the High Court, and O. 43, R. 1, gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that O. 9, R 8, applies. That order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to O. 9, R. 8, and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which—when his application for re-instatement has been refused—gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal.

(1) (1883) 9 Cal. 482 = 10 I. A. 4 (P. C.).
(2) (1906) 33 Cal. 1323.

This case has given me a considerable amount of anxiety, and I think the safest thing for me to do in giving judgment, having regard to the course which we intend to adopt, is to say as little as possible about the case itself, on the merits or demerits of the case, because if I do say anything, it may be taken to prejudice either the one side or the other. I have come to the conclusion that the safest course for this Court will be to order this suit to be re-entered—I am not grounding my judgment upon what happened before January or February this year, but I take a few facts, namely. that this case was fixed to be tried by Mr. Justice Imam on the 4th of February; that, apparently, according to the evidence which was before the Court on the 3rd, the plaintiff, the lady, who had been suffering to some extent from colic for sometime was taken worse; that on the 4th that matter was mentioned to the learned Judge, and that an application would be made for adjournment. When the case was called on the 5th what happened is shown by the entry in the learned Judge's note and is as follows: "Mr. Das withdraws from the case, that he has only instructions to apply for adjournment and he does not appear any more in the case." I do not know exactly what the position was as regards Mr. Das—unfortunately, he is not here to-day; he is out of Calcutta as I understand—but having regard to the admission which has been made by the learned Counsel for the appellant, Mr. S. R. Das, to the effect that the learned Counsel who appeared in the Court below took a wrong course, it seems to me that we must conclude that he ought to have gone on with the case, when the learned Judge gave him an opportunity of calling his other witnesses, and if necessary asking for an adjournment in order that the plaintiff might be examined at a subsequent time. It is, therefore, admitted that the learned Counsel made a mistake, in the course which he and his junior adopted. The only question is whether the plaintiff in consequence of that mistake is to be debarred for all time from prosecuting her suit. It is a suit for a large sum of money: there are serious issues in it, and I think that if I had been in the position of Mr. Justice Imam, I would have allowed the case to be re-entered upon terms: and, inasmuch as there is an appeal (we have decided already that there is an appeal in a matter of this kind), I have to apply my mind and try to ascertain what I should have done had I been in the position of Mr. Justice Imam. In my judgment, this case should be re-entered and the conditions of reinstatement are these: The plaintiff must pay the taxed costs of the defendants. *viz.*, such costs as were thrown away by the case not proceeding on the day when it should have, and she must also pay the taxed costs of the defendants upon the application before Mr. Justice Imam for restoration, and also the taxed costs of the respondents in this appeal, except for the first day which I think was occupied by the argument on the preliminary objection that there was no appeal, upon which question we have decided against the respondent. The plaintiff must pay such costs as I have intimated as a condition precedent to the case being re-entered: And, upon the point mentioned by Mr. Das, although at one stage of the proceedings there were only two sets of costs, still it seems to me that the defendants were entitled to appear here by separate Counsel and as regards this appeal there will be separate sets of costs as regards each defendant, who appeared.

Futher, inasmuch as the taxation of costs may take sometime, we think that the plaintiff ought to bring into Court within three weeks from this date the sum of rupees two thousand, and it is to be clearly understood that the case will not be re-entered until the costs have been taxed and paid: they must be paid within one month from the certificate of costs. The appellant will have the costs of the first day of the appeal which was taken up in the preliminary point, and these costs will be set off, on taxation, against the costs which she will have to pay.

We direct that the taxation be expedited.

If the sum of Rs. 2,000 be not paid into Court and if the taxed costs payable by the appellant as aforesaid, after the taxation and the set-off, be not paid by her within the time fixed, the case will not be restored, and in that event the appellant will be liable to pay the taxed costs of this appeal after the set-off which has been allowed.

Woodroffe, J.—I need not in this case consider the question whether S. 104 of the Civil Procedure Code touches the right of appeal given by the Letters Patent, for, if the order appealed from is a judgment within the meaning of the Letters Patent, the question does not arise. It has doubtless been held that an order dismissing an appeal for default is not a judgment [see *Mansab Ali* v. *Nihal Chand* (3)]. But we are not concerned here with an order under O. IX, R. 8, only but with an application for restoration under O. 9, R. 9. Whether or not as a question of jurisdiction an appeal lies under Clause 15 of the Letters Patent in a case in which an appeal is allowed under the Code, I think it may be said that there are *prima facie* grounds for holding that an appeal should be held to lie under the Letters Patent where it is allowed under the Code; for the fact that the Legislature has in the Code allowed an appeal in a particular case, affords to my mind *prima facie* ground for supposing that that case is of a class which this Court considers appealable under its Letters Patent. This Court has further held that we should not adopt a narrow construction [See *Mussammat Brij Coomaree* v. *Ramrick Dass* (4)]. Looking at the nature of the order appealed from, I think I should hold that it is appealable as a 'judgment' under the Letters Patent. I do not consider that the case reported as *Gobinda Lal Das* v. *Shib Das Chatterjee* (2), which was on another section, is any bar to my so holding.

On the facts of this appeal I have myself doubts whether we should allow it. But as my learned colleagues are prepared to give an indulgence to the plaintiff and that indulgence is to be on the term that all costs should be paid as a condition precedent, I do not dissent from the order proposed.

Mookerjee, J.—This appeal is directed against an order under R. 9 of O. 9 of the Civil Procedure Code, where by Mr. Justice Imam has refused to set aside an order of dismissal of a suit made by him under R. 8.

As a preliminary objection has been taken to the competency of the appeal, it is incumbent upon the appellant to establish that she has a right of appeal [*Minakshi Naidu* v. *Subramanya Sastri* (5)], for as Lord Bramwell said in *Sandback Charity Trustees* v. *North Staffordshire Railway Company* (6), "an appeal does not exist in the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment"—words quoted with approval by Lord Macnaghten in *Rangoon Botatoung Company Ltd.* v. *Collector of Rangoon* (7). She relies upon O. 43, R. 1, Clause (*c*), Civil Procedure Code, as also upon Clause 15 of the Letters Patent. O. 43, R. 1, Clause (*c*), provides that "an appeal shall lie from an order under O. 9, R. 9, rejecting an application (in a case open to appeal, for an order to set aside the dismissal of a suit)." The question, consequently, arises, whether O. 43, R. 1, Clause (*c*), is applicable to an order under O. IX, R. 9, made by a Judge on the Original Side of this Court.

On behalf of the appellant, reliance has been placed upon S. 117 of the Code, which lays down that "Save as provided in this part or in part X or in rules, the provisions of this Code shall apply to High Courts established under the Indian High Courts Act, 1861." The only provision in part IX, which may have any possible bearing, is that contained in S. 120, which obviously does not touch the present question. The provision in part X, which deals with this matter, is contained in S. 129; this also does not militate against the contention of the appellant. The term "Rule," which finds a place in S. 117, is defined in Clause 18 of S. 2 of the Code to mean "a rule contained in the First Schedule or made under S. 122 or S. 125." Our attention has not been drawn to any such rule which makes O. 43, R. 1, Clause (*c*), inapplicable. On the other hand, O. 49, R. 3, which excludes the operation of other rules, lends support to the contention of the appellant that O. 43, R. 1, Clause (*c*), is applicable to the present appeal.

But it has been argued on behalf of the respondents, on the authority of the decision of the Judicial Committee in *Hurrish Chunder Chowdhry* v.

(3) (1893) 15 All. 359.
(4) (1901) 5 C. W. N. 781.
(5) (1888) 11 Mad. 26=11 Ind. Jur. 393=14 I. A. 160 (P. C.).
(6) (1877) 3 Q. B. D. 1=47 L. J. Q. B. 10.
(7) (1913) 40 Cal. 21=16 I. C. 188=39 I. A. 197 (P. C.).

Kali Sunderi Debi (1), that the Civil Procedure Code, in so far as it provides for appeals, does not apply to an appeal preferred from a decision of one Judge of a High Court to the Full Court. The true effect of the decision of the Judicial Committee was considered by this Court in *Toolsee Money Dassee* v. *Sudevi Dassee* (8), but it is not necessary for my present purpose to determine its bearing in all its implications, because, in my opinion, the law has been substantially altered since that decision was pronounced. S. 104 of the Code of 1908 is materially different from S. 588 of the Code of 1882. It provides that "an appeal shall lie from the orders mentioned in the first clause of that section and, *save as otherwise expressly provided in the body of the Code or by any law for the time being in force*, from no other orders." The effect of S. 104 is thus, not to take away a right of appeal given by Clause 15 of the Letters Patent, but to create a right of appeal in cases even where Clause 15 of the Letters Patent is not applicable. I may here observe parenthetically that in the case of *Toolsee Money Dassee* v. *Sudevi Dassee* (8), Prinsep, J., felt pressed by the argument that if an appeal was deemed to have been allowed by the Code of Civil Procedure, there was no provision for the constitution of a Court to which such an appeal might be preferred. S. 106 of the Code, however, lays down that "where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made." Consequently, where a right of appeal has been so given, it would be the duty of this Court to constitute a Court of appeal under S. 13 of the Indian High Courts Act. I hold accordingly that this appeal is competent under Clause (*c*), R. 1, O. 43 of the Civil Procedure Code.

I am further of opinion that the appeal is competent also under Clause 15 of the Letters Patent. That clause allows an appeal from a "judgment," and, the controversy has consequently centred round this expression. Reference has been made to the now classical definition [*Musammat Brij Coomaree* v. *Ramrick Dass* (4)] first formulated by Couch, C.J., in the case of *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (9); "judgment" in Clause 15 means a decision "which affects the merits of the question between the parties by determining some right or liability; it may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." Substantially the same view was adopted by Sargent, C. J., in *Sonbai* v. *Ahmedbhai Habibhai* (10) and was later on applied by Couch, C.J., himself in *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed* (11) where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under Clause 12 of the Letters Patent. Reference may also be made to the decision of this Court in *Kully Soondery Dabia* v. *Hurrish Chunder Chowdhury* (12) subsequently affirmed by the Judicial Committee *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1), where an appeal was entertained against an order refusing to transmit for execution an order of His Majesty in Council. It must be remembered in connection with these decisions that they do not profess to give an exhaustive definition of the term "judgment," and other definitions of a very comprehensive scope have, from time to time, been attempted, for instance by Scott, C. J., in *Ahmed* v. *Ayeshabai* (13), by Bittleston, J., in *De Souza* v. *Coles* (14). and by White, C. J., *Tuljaram Row* v. *Alagappa Chettiar* (15). In the opinion of Bittleston, J., the term 'judgment' includes "any decision or determination affecting the rights or the interest of any suitor or applicant," and that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." In the opinion of White, C. J., this is too wide, and the test is "not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is

(8) (1899) 26 Cal. 361.

(9) (1906) 8 B. L. R. 433.
(10) (1872) 9 Bom. H. C. R, 398.
(11) (1874) 13 B. L. R. 91=21 W. R. 303.
(12) (1881) 6 Cal. 594.
(13) (1909) 2 I. C. 167.
(14) (1866-67) 3 M. H. C. R 384.
(15) (1912) 35 Mad. 1=8 I. C. 340.

made. If its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court, before which the suit or proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment." But, whether we adopt the wider or the narrower view of the scope of the term "judgment"—although I may add that I am not disposed, as Maclean, C. J., was not disposed [*Musammat Brij Coomaree* v. *Ramrick Duss* (4)] to favour an attempt to place a narrow construction on the term "judgment,"—it is plain that the order in this case is a "judgment" within the definition formulated by Couch, C. J., in *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (9). The order under appeal does affect the merits of the question in controversy between the parties by the determination of a right or liability. No doubt, it has been argued that the right or liability of the parties was determined by the dismissal of the suit and the position was not affected by the subsequent dismissal of the application to revive the suit. But this clearly overlooks the fundamental point that the primary order of dismissal of the suit was liable to be revoked, as it was subject to a possible order of restoration under R. 9. The effect of the subsequent order is accordingly to give a character of finality to the primary order of dismissal, by a determination that the applicant had failed to establish grounds in support of his alleged right to an order under R. 9 of O. 9. Such determination is, in my opinion, a "judgment" within the meaning of Clause 15 of the Letters Patent.

I am not unmindful that the contrary view may receive an apparent support from some dicta in reported decisions, for instance, *Rughoo Bibee* v. *Noor Jehan Begum* (16) and *Gobinda Lal Das* v. *Shiba Das Chatterjee* (2). As regards the former case, which ruled that an order dismissing an application for review is not a "judgment," it is sufficient for our present purpose to observe that judicial opinion on this matter has not been uniform [*Ramhari Sahu* v. *Madan Mohan Mitter* (17), *Aubhoy Churn Mohunt* v. *Shamont Lochan Mohunt* (18) and *Mulji Virji* v. *Bangabashi Saha* (19)]. As regards the latter case, stress is laid upon the following passage in the judgment of Ghose, C. J., "an order, which terminates a proceeding, is a judgment within the meaning of Clause 15, but it must be a proceeding,.....in the course of a suit or in relation thereto, and in which some question or other as to the right or liability of any party is raised, and not a proceeding in respect of a matter, which had already come to termination by operation of law or otherwise." I feel bound to record my respectful dissent from this exposition of the law, for the qualification formulated plainly carries us beyond the definition of the term "judgment" as given by Couch, C. J., and if the question arises in another case precisely on all fours with the decision mentioned, and if it comes before me, I shall not hesitate to refer the matter for consideration to a Full Bench. It is not necessary, however, to adopt that course on the present occasion, as admittedly there is no decision which precisely covers the case before us; and the class of cases which rule that an order refusing [*Tara Chand Biswas* v. *Radha Jeebun Musotfee* (20), *Manly* v. *Patterson* (21), *Lutf Ali Khan* v. *Asgur Reza* (22) and *Kishen Pershad Pandey* v. *Tiluckdhari Lall* (23)] or granting [*Musammat Amirrunnessa* v. *Baboo Behary Lall* (24) and *Mowla Buksh* v. *Kishen Pertab Sahi* (25)] an application for leave to appeal to His Majesty in Council, or for stay of execution [*Mohabir Prosad Singh* v. *Adhikari Kunwar* (26) and *Chitto Sheik* v. *Muzzur Hossain* (27)] is not a "judgment," plainly stands on a different footing.

As regards the merits, I am clearly of opinion that the application under R. 9 of O. 9 should have been granted. We have not had the advantage of hearing from Mr. C. R. Das his version of what took place in Court when the suit was dismissed

(16) (1869) 12 W. R. 459.
(17) (1896) 23 Cal. 339.
(18) (1889) 16 Cal. 788.
(19) (1905) 9 C. W. N. 502.
(20) (1875) 24 W. R. 148.
(21) (1881) 7 Cal. 339.
(22) (1890) 17 Cal. 455.
(23) (1891) 18 Cal. 182.
(24) (1876) 25 W. R. 529.
(25) (1875-76) 1 Cal. 102=24 W. R. 150.
(26) (1894) 21 Cal. 473.
(27) 2 Hyde. 212.

for default. But, on the materials before me, I see no escape from the conclusion that there was a grave error of judgment on his part and that he should have proceeded with the suit. The question then reduces to this: should his client be penalized for his error of judgment, if so, to what extent. The client will be penalized by the order which the Court of Appeal is about to make in so far as the payment of costs is concerned; but I am not prepared to hold that the client should be penalized to the extent of dismissal of her claim without investigation. Judicial decisions of high authority favour the view, that even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs [*Southampton Steamboat Co.* v. *Rawlins* (28), *Michell* v. *Wilson* (29), *Birch* v. *Williams* (30), *Hale* v. *Lewis* (31) and *Muruga Chetty* v. *Rajasami* (32)], but reference need be made specially to one case in this country, *Oriental Finance Corporation Ltd.* v. *Mercantile Credit and Finance Corporation Ltd.* (33), and to another in England, *Burgoine* v. *Taylor* (34). In my opinion, this appeal should be allowed and the suit restored on the conditions mentioned in the judgment of the Chief Justice.

V.B./R.K.

Appeal allowed; Suit restored.

(28) (1865) 34 L. J. Ch. 287=11 Jur. (N. S.) 230=13 W.R. 512.
(29) (1877) 25 W.R. 380.
(30) (1876) 24 W.R. 700.
(31) (1838) 2 Keen 318=48 E.R. 651.
(32) (1912) 14 I.C. 823.
(33) (1864-66) 2 Bom. H.C.R. 267.
(34) (1878) 9 Ch. D. 1=47 L. J. Ch. 542.

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JENKINS, C. J. AND N. R. CHATTERJEA, J.

Durga Charan Chandra—Plaintiff—Appellant.

v.

The Khorda Company Ltd.—Defendants—Respondents.

Letters Patent Appeal No. 67 of 1914, decided on 28th May, 1915, against the decree of Coxe, J., dated 28th May, 1914.

(a) Evidence Act (1 of 1872), S. 102—Consideration — Alleged *benamidar* proves sale-deed reciting payment of consideration—Onus of non-payment is on vendor.

In a suit for possession on the basis of a sale-deed the plaintiff (vendee) has to prove his title where the defendant in possession pleads that he is only a *benamidar* but he shows a *prima facie* title by producing and proviug his conveyance which contains a recital ot receipt of the consideration. [P. 368, C. 1 & 2.]

In such a case the onus is upon the defendant to show the non-payment of consideration. [P. 368, C. 2.]

(b) Civil P. C. (5 of 1908), O. 18, R. 17—When can evidence after close of case be allowed, is stated.

Where after the close of evidence on both sides, the plaintiff applied to the Court to be allowed to adduce further evidence but the application having been disallowed, he applied to withdraw from the suit with liberty to bring a fresh suit but the order granting this latter application was set aside on revision, and the plaintiff then applied for summons on certain person to prove a certain part of his case, but the defendants objecting, the Court did not allow these persons to be produced, though present:

Held, that under the circumstances the plaintiff ought to have been allowed to tender further evidence. [P. 369, C. 1.]

Rash Behari Ghose, D. N. Chakravarti and *Kali Kinkar Chakravarti*—for Appellant.

S. R. Das and *Ambika Pada Choudhury*—for Respondents.

Judgment.—The plaintiff-appellant sued the defendant company for damages for having demolished a building, a 21/80th share of which is alleged by the plaintiff to have been purchased by him from one Ram Chandra Banerjee in the name of one Bepin Behari Haldar on the 10th December, 1907. The defendants also purchased the same share from the heirs of Ram Chandra on the 22nd September, 1908. They also purchased the remaining shares from the other co-sharers and dismantled the whole building in October 1908.

The defence was that the alleged purchase by the plaintiff from Ram Chandra was a colourable and *benami* transaction and the plaintiff had not acquired any title under it.

The Court of first instance placed the burden of proving the *benami* upon the defendants, and decreed the suit, but that decree was reversed by the District Judge on appeal, and the decree of the District Judge was affirmed on second appeal by Mr. Justice Coxe. The plaintiff has preferred this appeal under the Letters Patent.

The learned District Judge was of opinion that the Munsif had wrongly placed the onus of proving *benami* upon the defendants. He held that "the burden was clearly upon the plaintiff to prove the reality of the sale to him and the fact that consideration had passed from him to Ram Chandra," that he had failed to prove the same, and came to the conclusion that the sale to the plaintiff was a colourable and *benami* transaction.

Now, the plaintiff claimed the property under a registered conveyance from Ram Chandra, through whom the defendants also claimed it. The execution of the *kobala* by Ram Chandra has been proved and the *kobala* has been produced by the plaintiff. Apparently a valid transfer was effected by the *kobala*, and the onus, therefore, lay upon the defendants to show that it was not a real transfer.

It is contended on behalf of the defendants that the principle is inapplicable to a case where the defendant in possession sets up the plea of *benami*. No doubt the fact that the defendants are in possession is in their favour, and is an important element to be taken into consideration in determining whether the transaction is *benami*. But there is no presumption in favour of *benami* even where the defendant is in possession. In *Uman Parshad* v. *Gandharp Singh* (1), where the plaintiff sought to recover possession on the strength of certain deeds against the defendants in possession who pleaded that the deeds were *benami*, the Judicial Committee observed: "It is familiar to us all that the system of putting property *benami* is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a *sham* transaction will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a *benami* or *sham* transaction."

No doubt a plaintiff has to prove his title where the defendant in possession pleads that he is only a *benamidar*, but he shows a *prima facie* title by producing and proving his conveyance, which usually contains a recital of the receipt of consideration. In the present case also, the *kobala* contains an admission by the vendor (Ram Chandra) of the receipt of consideration. That admission is evidence, though not conclusive, against the defendants [*Foolee Bibee* v. *Bessirudi Mirdha* (2)]. The learned District Judge however, is of opinion that this "case should be distinguished from those cases in which one of the parties to a deed denies the truth of a statement made as to the passing of the consideration;" and that the "issue of *benami* or not *benami* turns principally on the question whether the plaintiff has shown that he paid the stated consideration to Ram Chandra." But the defendants stand in the same position as Ram Chandra himself through whom they claim, and the non-payment of consideration is a matter to be taken into account in determining whether the *kobala* was *benami*. The onus, therefore, is upon the defendants to show the non-payment of consideration.

It is contended on behalf of the defendants that the learned District Judge has considered the question of possession, and upon a consideration of the whole evidence has come to the conclusion that the *kobala* was a *benami* one, and the same view has been taken by Coxe, J. But it seems to us that the conclusion arrived at has been influenced by the view taken by the District Judge as to the incidence of the burden of proof. The question of possession, no doubt, is to be taken into consideration as well as other circumstances and probabilities in deciding whether a *kobala* is a real and *bona fide* or merely a *benami* transaction, but the learned District Judge appears to have arrived at the conclusion that the *kobala* was *benami* by placing the onus upon the plaintiff of proving the reality of the transaction and the passing of the consideration.

The judgment of Coxe, J., and the decree of the District Judge are accordingly set aside, and the case sent back to the lower Appellate Court for a re-hearing of the appeal according to law. Costs to abide the result.

(1) (1888) 15 Cal. 20=14 I. A. 127 (P. C.).

(2) (1869) 12 W. R. 25 (F. B.).

The plaintiff complains before us, that some important evidence which he wanted to adduce for proving payment of consideration to his vendor had been excluded by the Courts below.

It is stated in the *kobala* of the plaintiff that the consideration was paid by a currency note for rupees one thousand, the number of which was mentioned in it. The plaintiff stated in his deposition that he drew the note from the Commercial Bank and paid it over to his vendor, Ram Chandra. After the close of evidence on both sides he applied to the Court to be allowed to adduce further evidence, but the application having been disallowed, the plaintiff applied to withdraw from the suit with liberty to bring a fresh suit. The application was granted by the Court, but the order was set aside on revision by the Court, and the Munsif was directed to take up the case at the stage at which the order for withdrawal was made. The plaintiff then applied for summons upon the Liquidator of the Commercial Bank and the Comptroller of Paper Currency to produce certain books of their offices and it appears that certain clerks of the said office were present in Court with the books required. The defendants objected to the reception of further evidence, and the Munsif, was of opinion that having regard to the order of the High Court the plaintiff could not be allowed to adduce further evidence. We think that under the circumstances the plaintiff ought to have been allowed to tender the books in evidence and we direct the lower Appellate Court to do so. The defendants also will be entitled to adduce evidence relevant to the question.

V.B./R.K.

Decree set aside ; Case remanded.

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CHATTERJEE AND CHAPMAN, JJ.

In re Nikhrannessa Bibi—Petitioner.

Appeal No. 90 of 1915, and Rule No. 179 of 1915, decided on 30th March, 1915, from the Order of Dist. Judge, 24 Parganas, dated 23rd February, 1915.

Guardians and Wards Act (5 of 1890), S. 45 (b)—Sale of minor's estate—Major portion allowed to be retained by purchaser for satisfaction of debt of guardian—Order directing guardian to pay unrealized amount into Court or in default to pay fine—Order held to be *ultra vires*—S. 45 (b) held inapplicable—Removal of guardian held not necessary.

A certificated guardian, who was the mother of two minors, obtained permission of the District Judge to sell certain property of the minors on the allegation that the purchase-money would be received in cash and utilised in the repairs of the minors' house. After the sale she drew up and filed an account showing that out of the purchase-money, a major portion was retained by the purchaser in satisfaction of a debt due from her; whereupon the District Judge ordered the guardian to pay the balance of the purchase-money into Court within a certain time and upon her failing to do so, directed her to pay a daily fine until the amount was paid into Court and ordered her dismissal from the guardianship:

Held, that the order for daily fine was *ultra vires*, as S. 45, Clause (*b*) of the Guardians and Wards Act, which only might authorise the action of the District Judge, had not any application to the facts of the case.

[P. 369, C. 2 & P. 370, C. 1 & 2.]

Held, also, that the said conduct of the mother did not disqualify her from continuing as the guardian of her sons.

(b) Guardians and Wards Act (1890), S. 45 (b)—Appointment of mother as guardian—Simple illiteracy is no disqualification.

Simple illiteracy is no ground for disqualification for the appointment of a mother as guardian of her sons. [P. 370, C. 2.]

Zahed and *Satis Chandra Mukerjee*—for Petitioner.

Judgment.—This appeal arises out of a suit under the Guardians and Wards Act. The appellant who is the mother of two minor sons was appointed a guardian under this Act. When the eldest son became 16 years of age, she made an application to the District Judge at Alipore that she was going to get her two sons married at an expense of Rs. 4,000 and she wanted her application to be filed as of record, and this was done. She did not in this application say that Rs. 4,000 would be spent out of the minors' estate and that being so, it is not open to her now to say that she spent Rs. 4,000 out of the minors' estate. Thereafter she made an application to the learned Judge that a sum of about Rs. 3,000 was required for the repairs of the minors' house and something for paying their debts. She then applied for permission to sell certain property of the minors in the District of Patna yielding an annual income of Rs. 150 at a price of Rs. 4,000. Sanction was given and then she sold the shares of the minors as well as her own $\frac{1}{8}$th share in the property to one *Musammat* Idun for a consideration of Rs. 5,000.

Out of this consideration money, however, *Musammat* Idun, from whom she had borrowed Rs. 4,000 for the purpose of marrying her sons under a hand-note, deducted the amount due to her for principal and interest thereon and paid only the balance. She then drew up and filed an account with regard to the purchase-money showing how the share of the minors in this Rs. 5,000 was disposed of. Upon this the learned Judge after examining the accounts suspected that there was foul play on the part of the guardian, the Court having been deceived into granting the permission to sell on the representation that the money would be spent for the repairs of the minors' house. She was called upon to explain her conduct and she explained by saying that at first it had been arranged with the purchaser that the money would be paid, but that the purchaser ultimately refused to pay the full amount and deducted the amount due to her out of the purchase-money. She did not conceal this fact to the Court because she filed a *kobala* which mentioned the way in which the consideration was paid. The learned Judge, however, directed her to pay the balance of the money into Court within a certain time and upon her failing to pay the amount within the specified time he passed an order that until she did pay that amount she was to pay a fine of Rs. 5 per diem. Now this order could have been passed only under S. 45 of the Guardians and Wards Act and the only clause of that section which might authorise an action of this kind would be Clause (*b*). This clause, however, does not seem to have any application to the facts that have transpired in this case. Clause (*b*) says: "If a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under Clause (*b*) of S. 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under clause (*c*) of that section or to pay into the Court the balance due from him on those accounts in compliance with a requisition under Clause (*d*) of that section," then only the Court can impose a fine upon the guardian. Now the amount of the consideration money was not paid to her and, therefore, she could not be called upon to pay any amount of balance due from her, nor could this balance be said to be a balance due on accounts filed in compliance with a requisition under Clause (*d*) of S. 34. The order for fine, therefore, was clearly *ultra vires* and should be set aside.

There is then an order dismissing her from the guardianship of her minor sons. We must consider on the whole facts whether such an order is for the benefit of the minors. Simple illiteracy is no ground for disqualification for the appointment of a mother as a guardian of her sons. The estate in this case is not a very large one and if a stranger be appointed a guardian of the estate, he would have to be paid a certain amount which would be an incumbrance on the estate of the minors. There is no charge of any other mismanagement than this, that the consideration money which should have been paid in cash was deducted by the purchaser in payment of debts due to her from the guardian. We do not think that this conduct of the guardian, so far as it is disclosed in the record in this case, shows such a disqualification for her being a guardian of the property of her minor sons as to disentitle her to remain their guardian any longer. In this view of the case we think that the order dismissing her from the guardianship of her minor sons should also be set aside.

There is, however, this to be said in favour of the order of the District Judge that the permission to make the sale in this case was obtained on the allegation that the amount of the purchase money would be received in cash and utilised in the repair of the minors' house and that the conduct of the purchaser in refusing to pay in cash was not in accordance with what had been represented by the guardian to the Judge.

Under these circumstances the best order to pass is to order that the sale of the minors' property will not be confirmed unless the balance of the purchase money is put in into Court within two months from this date. The fine, if paid, will be refunded.

The Rule will stand discharged without costs.

V.B./R.K.

Rule discharged.

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MOOKERJEE AND NEWBOULD, JJ.

Madhu Sudan Patitunda—Petitioner.

v.

Rash Mohan Sen Poddar and *others*—Opposite Parties.

Civil Rule No. 36 of 1915, decided on 7th April, 1915, against the decision of Munsif, Barisal, dated 18th November, 1914.

(a) Civil P. C. (5 of 1908), Ss. 73 and 151—Mere order of attachment before judgment, before decree is passed is insufficient for claim under S. 73—There must be execution application—S. 151 does not help against express law—Attachment before judgment does not create any interest in property—Attachment before judgment cannot affect attachment after decree obtained by another.

An order for rateable distribution cannot be made, under sub-S. (1) of S. 73 of the Code of Civil Procedure, in favour of a person who has not obtained his decree but only an order for attachment before judgment and who is thus incompetent to apply for execution at the time when the assets are realised. [P. 371, C. 2 & P. 372, C. 1.]

It is only where an application for execution has been made before the realization of assets that S. 73 of the Code of Civil Procedure applies. 3 I. C. 836, dist. [P. 371, C. 2.]

The doctrine of inherent powers of a Court, recognised by S. 151 of the Civil Procedure Code, has no application where there is an express provision of law which covers a case. [P. 372, C. 1.]

Attachment before judgment does not, by itself, create any interest in the property attached. 15 I. C. 668, ref. to. [P. 372, C. 1.]

There is a difference between an attachment effected in execution of a decree and an attachment before judgment, and a person obtaining an attachment before judgment, cannot restrict the rights of an attaching creditor who has previously obtained his decree. 38 Cal. 448, foll. [P. 372, C. 2.]

(b) Civil P. C. (5 of 1908), S. 115—Failure to exercise jurisdiction is ground for revision.

A High Court is competent to interfere with an erroneous order of a Subordinate Court when as a result of that order, though erroneous in law, that Court has assumed a jurisdiction which it did not possess or has declined a jurisdiction which was vested in it by law. 16 Bom. 708 and 22 Cal. 767, ref. to. [P. 372, C. 2.]

Jatindra Nath Bose for *Sarat Chandra Dutta*—for Petitioner.

Brojendra Nath Chatterjee—for Opposite Parties.

Judgment.—We are invited in this Rule to set aside an order for rateable distribution of assets held by the Court below. The circumstances under which the order has been made are not in controversy and may be briefly stated.

The petitioner, Madhu Sudan Patitunda, on the 13th July, 1914, instituted a suit against his debtor, Pranballabh Poddar, for recovery of money due. The suit was decreed on the 10th August 1914. Two days later the decree- holder applied for attachment of movable properties belonging to his judgment-debtor. On the 17th August the attachment was effected and the movables were brought into Court. On the 4th September, 1914, the Sens, who are the opposite parties to this Rule and were also creditors of Pranballabh Poddar, instituted a suit for recovery of money due from him. The Sens obtained an order for attachment before judgment in their suit and the attachment was effected on the 8th September, 1914. The two suits were instituted before the same judicial officer, with this difference that in one case he exercised the powers of a Small Cause Court Judge and in the other that of a Munsif. On the 9th September, 1914, the movables were sold at the instance of Patitunda. The Sens obtained a decree in their suit on the 24th October following, and on the 10th November, they applied for execution of the decree they had obtained, by rateable distribution of the assets realised by the sale held at the instance of Patitunda. The question in controversy is, whether an order for rateable distribution can rightly be made. The Court below has held, on the authority of the decision in *Butloo Khan* v. *Gomani Singh* (1), that it is competent to the Court to allow rateable distribution in the events mentioned, and has ordered accordingly. That order is now challenged before us on the ground that it was made without jurisdiction.

It is plain that an order for rateable distribution cannot possibly be made in this case under sub-S. (1) of S. 73 of the Code of Civil Procedure. That section applies only where an application for execution has been made before the assets have been realised. In the case before us, the assets were realised on the 9th September, 1914. The application for execution by the Sens was not made till the 10th November, 1914. In fact it was not competent to them to apply for execution on the 9th September, 1914, when the assets were realised, as

(1) (1909) 3 I. C. 836.

they did not obtain their decree till the 24th October, 1914. It is thus indisputable that an order for rateable distribution could not be made in their favour under S. 73. The Court below, however, has held that S. 73 is not exhaustive and that it has inherent power to make an order of this description. In our opinion, there is no room here for the application of the doctrine of inherent powers of a Court which is recognised by S. 151 of the Code. We have here, not only an express provision of the law which admittedly does not cover the case of the Sens, we have also an express provision which negatives their claim. Rr. 5 to 12 of O. 38 of the Code deal with the subject of attachment before judgment. R. 10 is in these terms: "Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." It is well settled, as was ruled by this Court in the cases of *Sewdut Roy* v. *Sree Canto Maity* (2), *Basiram Malo* v. *Katyani Debi* (3) and *Jogendra Nath Chatterjee* v. *Manmata Nath Ghose* (4), that attachment before judgment does not, by itself, create any interest in the property attached. In the case before us, in view of the provisions of R. 10 of O. 38 of the Code, it was manifestly open to the petitioner to apply for sale of the properties attached by him in execution of his decree and his right in this respect was in no way restricted by the attachment before judgment effected at the instance of the Sens. In our opinion, it is perfectly plain that the Court below was not competent to make an order for rateable distribution. The decision in *Butloo Khan* v. *Gomani Singh* (1) is clearly distinguishable. In that case, the attachment before judgment had been effected at the instance of four plaintiffs. Three of them obtained an order for rateable distribution under S. 73 of the Code; the fourth challenged the propriety of that order. It was ruled by this Court that S. 73 did not apply to the case and that the Court below was not competent to make an order for rateable distribution of the sale-proceeds amongst the decree-holders in three of the suits in disregard of the order of attachment in the other suit. In that case, the four rival decree-holders were precisely in the same position, and yet it was held, at the instance of one of them, that the other three could not claim the benefit of S. 73. In the case before us, there is a competition between an attachment effected in execution of a decree and an attachment before judgment. The distinction between these two classes of attachments was explained by this Court in *Basiram Malo* v. *Katyani Debi* (3), which is an authority for the proposition that a person who has obtained an attachment before judgment cannot restrict the rights of an attaching creditor who has previously obtained his decree. The case of *Jogendra Nath Chatterjee* v. *Manmatha Nath Ghose* (4) further shows that a person who has effected an attachment before judgment is not competent to apply for reversal of an execution sale under R. 90 of O. 21 of the Code; and the express provision of that rule shows that, in this respect, a person who is entitled to obtain an order for rateable distribution is in the same category as a person whose interest has been affected by the sale. The conclusion appears to us irresistible that the order of the Court below cannot possibly be supported.

This, indeed, has been fully realised on behalf of the opposite party, and the only argument seriously addressed to us has been that the order of the Court below involves an error of law and cannot consequently be revised under S. 115 of the Code of Civil Procedure. There is obviously no force in this contention. The order of the Court below is, no doubt, erroneous in law; but the error of law has induced that Court to assume a jurisdiction which it did not possess. It is unquestionably competent to this Court to interfere with an erroneous order of a Subordinate Court, when as a result of that order, though erroneous in law, that Court has assumed a jurisdiction which it did not possess or declined a jurisdiction which was vested in it by law. *Manisha* v. *Siyali Koya* (5);

(2) (1906) 33 Cal. 639.
(3) (1911) 38 Cal. 448 = 10 I. C. 305.
(4) (1912) 15 I. C. 668.

(5) (1888) 11 Mad. 220.

Vishvambar v. *Vasudev* (6) and *Jogodanund* v. *Amrita Lal* (7).

The result is that this Rule is made absolute and the order for rateable distribution made by the Court below discharged. The petitioner is entitled to his costs both here and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*.

V.B./R.K.

Rule made absolute.

(6) (1892) 16 Bom. 708.
(7) (1895) 22 Cal. 767.

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SHARFUDDIN AND CHAPMAN, JJ.

Peary Mander — Defendant — Appellant.

v.

Anand Ram—Plaintiff—Respondent.

Appeal No. 1763 of 1914, decided on 16th December, 1915, from the Appellate Decree of Sub-Judge, 1st Court, Bhagalpur, dated 3rd December, 1913.

Bengal Tenancy Act (8 of 1885), S. 153—Decision of conflicting claims to landlord's right—Second appeal is competent.

In a suit for rent, the plaintiff who had acquired the landlord's right by purchase at a sale in execution of a mortgage-decree, added as parties defendants, the successors of the previous landlord, who contested the suit on the ground that the plaintiff had not obtained possession of the landlord's right:

Held, that a second appeal lay to the High Court inasmuch as the plaintiff's title was assailed by the successors of the previous landlord and there were conflicting claims to landlord's right which were decided by the Court below. [P. 373, C. 1 & 2.]

Guru Das Sinha—for Appellant.

Naresh Chandra Sinha—for Respondent.

Judgment.—This appeal arises out of a suit for rent. The plaintiff had acquired the landlord's right by purchase at a sale in execution of a mortgage-decree. He made the successors of the previous holder of the landlord's right, parties to the suit. The main question which was determined by the lower Courts was the question whether the plaintiff had obtained possession of the landlord's right or not. The suit was contested upon this ground both by the tenant and by the successors of the previous holder of the landlord's right. The first Court held that the plaintiff had failed to prove that he obtained possession. The Court of first appeal set aside this decision, held that the plaintiff had obtained possession and decreed the suit. The successors of the previous owner of the landlord's right and the tenant both appeal to this Court.

An objection has been made by the respondent that no appeal lies.

The plaintiff's title was, however, assailed by the successors of the previous owner and there were conflicting claims which were decided by the Court below. An appeal, therefore, lies.

The first ground taken in appeal is that it is not open to the Civil Court to go into the question of the plaintiff's title inasmuch as that has been determined under S. 40 of the Bengal Tenancy Act.

It appears that the tenant had applied under that section for the commutation of his rent. A copy of the decision has been filed in this case and from that decision it appears that both the plaintiff and the defendants 2nd party; the successors of the previous owner, were parties to that decision. But it does not appear that any question between the plaintiff and the previous owner was decided. The case of *Lala Saligram Singh* v. *Mohunt Ramgir* (1) has been relied on. But in that case the decision under S. 40 was directly attacked and it was held that it is not open to the Civil Court to enter into a question which involves the validity of a decision under S. 40 of the Bengal Tenancy Act.

In the present case there was no decision of the question in the case under S. 40, nor is the validity of the proceeding under S. 40 involved in the present case. We are of opinion that the judgment in the case under S. 40 does not operate as a bar to the present suit.

It was then contended that the plaintiff is not entitled to succeed inasmuch as his name had not been recorded in the land register. There is nothing, however, to show that the name was not so recorded and no objection on behalf of the tenant was made that the plaintiff was not recorded in the land register.

(1) (1899) 3 C. W. N. 311.

Then it is contended that the Court of appeal below was not justified in coming to the finding that it did in the absence of evidence, but we find that there was evidence to support the finding, namely to the effect that possession had been delivered to the plaintiff by the Court after his purchase at the execution sale, and that in the case under S. 40, the tenant had made the plaintiff a party.

It is further contended that inasmuch as the tenant had sold his *jote* to one Tapashia Tewari, a third party, he had thereby got rid of the liability to pay rent. The defendant, however, did not allege that there was any custom entitling him to transfer his tenancy nor was there any evidence that he had put an end to his liability to pay rent to the landlord.

It has finally been somewhat faintly contended that in a rent suit, the Court should not have gone into the question of title. But in order to determine the claim for rent, it was necessary to go into the question in this case. Moreover, after all it was a question of possession and not title.

The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

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MOOKERJEE AND BEACHCROFT, JJ.

Brahmadat Tewari — Caveator — Appellant.

v.

Chaudan Bibi—Petitioner — Respondent.

Appeal No. 429 of 1912, decided on 17th June, 1914, from the Original Decree of Dist-Judge, Saran, dated 1st October, 1912.

(a) Probate and Administration Act (1881), Ss. 51 and 56—Probate—Grant of—Testimony of attesting witness not establishing full compliance with law—Evidence on record ample to prove due execution and attestation—Probate should not be refused.

Where there is ample reliable evidence on the record to show that a will was duly executed and attested, Probate should not be refused on the ground that the testimony of the attesting witnesses who have been examined does not establish full compliance with the statutory requirements. 22 W. R. 189; (1846) 4 Moore P. C. 419, foll. [P. 375, C. 1.]

(b) Probate and Administration Act (1881), Ss. 51 and 56—Probate—Grant of—Evidence of attesting witness vague—Court may yet pronounce in favour of will.

When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court of Probate may, on consideration of the circumstances of the case or of other evidence, pronounce in favour of the will. [P. 375, C. 2.]

(c) Will—Proof—Due execution and attestation—Affirmative evidence that testator or attesting witness did, as matter of fact see each other signing document is not necessary—It is enough to show that relative position of both was such that they might have seen execution and attestation respectively.

For proving due execution and attestation of a will, it is enough to establish from the circumstances that the relative position of the testator and the attesting witnesses was such that they might have seen the execution and the attestation respectively, and it is not necessary that affirmative evidence should be forthcoming that the testator did, as a matter of fact, see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. *In re Trimnall*, (1865) 11 Jur. (N. S.) 248 and *Newton* v. *Clarke*, (1839) 2 Curt. 320, foll. [P. 376, C. 1.]

(d) Will—Proof of—Will regular on face of it—Presumption is in favour of due execution and attestation.

Every presumption will be made in favour of due execution and attestation, when a will is regular on the face of it and is apparently duly executed. 4 C. W. N. 204; (1884) 9 P. D. 149; 14 E. R. 871; (1890) 15 P. D. 170 and (1902) P. D. 205, foll. [P. 376, C. 1.]

Harihar Prasad Singh—for Appellant.

Nores Chandra Singh—for Respondent.

Judgment.—This appeal is directed against the grant of Probate of a will alleged to have been executed by one Ram Charan Tewari on the 19th March, 1893. The will was registered six days later. The testator died on the 10th August, 1911. On the 3rd May, 1912 the application for Probate was made by his granddaughter, the sole surviving beneficiary under the will. The caveator is a brother of the testator. There is no room for doubt on the evidence that the will was executed by Ram Charan Tewari. The only substantial question in controversy is, whether it was duly attested. The document on the face of it purports to have been attested by thirteen witnesses inclusive of the scribe, of whom five signed their names as witnesses, and eight affixed to their signatures the words "on the admission of the executant." Six of the thirteen witnesses are proved to be dead; two have

been examined and have proved hostile to the petitioner; three others have not been examined on the allegation that they too were hostile; the whereabouts of the remaining two witnesses have not been traced. The two attesting witnesses who have been examined are constrained to admit that they signed the will as witnesses. One of them, however, could not recollect whether he had seen the testator sign. The other stated that he had signed as an attesting witness at the request of a third person, who assured him that the testator had left the will in his custody and desired the witness to attest. This statement is remarkable, as the witness did not affix to his signature, as seven other witnesses did, a note that he had signed on receiving an acknowledgment of execution by the testator.

In this state of the evidence, it has been argued by the caveator that as the testimony of the attesting witnesses who have been examined, does not establish full compliance with the statutory requirements, Probate should not be granted. In our opinion, this contention cannot prevail, as there is ample reliable evidence on the record to show that the will was duly executed and attested. Brij Behary Tewari who was present at the time of the execution of the will, though he did not sign as an attesting witness, states in his examination-in-chief that when the will was signed by the testator, Mahabir Tewari, Balmukund Tewari, Sheo Shankar Upadhya and Ramlal Upadhya were present there, that the witnesses and the testator signed, that the witnesses signed in the presence of the testator and in the presence of each other, and that the testator's signature was made in his presence. Two of these attesting witnesses, namely, Balmukund Tewari and Ramlal Upadhya are proved to be dead; the other two, namely. Mahabir Tewari and Sheo Shankar Upadhya have been examined, and, as already stated, have deposed practically in favour of the objector. This, however, does not compel the Court to pronounce against the will. It was ruled by this Court in the case of *Nubo Kishore Doss* v. *Joy Doorga Dossee* (1) that the mere fact that attesting witnesses to a will have repudiated their signatures does not invalidate the will, if it can be proved by evidence of a reliable character that they have given false testimony. To the same effect is the decision of the Judicial Committee in *Cooper* v. *Bockett* (2). The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will. [*Young* v. *Richard* (3) and *Burgoyne* v. *Showler* (4).] In the case before us, there is no reason why the testimony of Brij Behary Tewari should not be accepted in its entirety. That evidence shows that Balmukund and Ram Lal were present when the will was signed by the testator and that they signed in his presence and in the presence of each other. This is confirmed by the fact that against the signatures of Balmukund and Ramlal, there is no note that they had signed on receiving an acknowledgment of execution from the testator; and the same remark applies to Mahabir and Sheo Shankar, both of whom are stated by Brij Behary to have been present when the will was executed, which is consistent with the fact that their signatures appear as those of attesting witnesses, without any note or qualification as in the case of some of the other witnesses. This is sufficient to show that the requirements of S. 50 of the Indian Succession Act, which has been made applicable to the wills of Hindus by S. 2 of the Hindu Wills Act, were substantially complied with. Under that section—we refer to so much of it only as is necessary for our present purpose—the *first* requirement is that the testator shall sign the document; the *second* is that his signature shall be so placed that it shall appear that it was intended thereby to give effect to the

(1) (1874) 22 W. R. 189.

(2) (1846) 4 Moore P.C. 419=10 Jur. 931.
(3) (1839) 2 Curt. 371.
(4) (1844) 1 Rob. 5.

writing as a will; the *third* is that the will shall be attested by two or more persons, each of whom must have seen the testator sign, and each of the witnesses shall sign the will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time. In the present case, there is no question as to the first two requirements: the signature of the testator, which has been proved by Brij Behary, appears eight times on the document which is composed of sheets posted in succession and made into a roll. But as regards the third requirements, it is urged that Brij Behary does not say that the witnesses saw the testator sign and that the testator saw the witnesses sign. It is not necessary, however, that affirmative evidence should be forthcoming that the testator did, as a matter of fact, see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively, or as Walde, J., said *In re Trimnell* (5), the true test is whether the testator might have seen, not whether he did see, the witnesses sign their names [*Newton* v. *Clarke* (6).] In cases of this description, as was pointed out by this Court in *Sibo Sundari Debi* v. *Hemangini Debi* (7) on the authority of *Wright* v. *Sanderson, Sanderson, In re* (8), every presumption will be made in favour of due execution and attestation in the case of a will regular on the face of it and apparently duly executed [*Lloyd* v. *Roberts* (9). *Harris* v. *Knight* (10) and *In the goods of Peverett* (11).] As Foy, L. J., observed in *Wright* v. *Sanderson, In re Sanderson* (8), the Court of Probate has long been accustomed, rightly and wisely, to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced, where no suspicion of fraud has occurred.

In our opinion, the evidence in this case establishes beyond reasonable doubt that the will was duly attested, and as we have already said, we feel no doubt whatsoever that it is a genuine instrument.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. We assess the hearing-fee at five gold *mohurs*.

V.B./R.K.

Appeal dismissed.

(5) (1865) 11 Jur. (N. S.). 248.
(6) (1839) 2 Curt. 320.
(7) (1900) 4 C. W. N. 204.
(8) (1884) 9 P. D. 149=53 L. J. P. 49.
(9) (1858) 12 Moore. P. C. 158=14 E. R. 871.
(10) (1890) 15 P. D. 170=62 L. T. 507.
(11) (1902) P. D. 205=71 L. J. P. 114.

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MOOKERJEE AND ROE, JJ.

Akbar Fakir—Plaintiff-Appellant.

v.

Intail Sayal and *another*—Defendants—Respondents.

Second Appeal No. 25 of 1914, decided on 27th May, 1915, against the Decree of Sub-Judge, Faridpore, dated 26th September, 1913.

(a) Contract Act (9 of 1872), S. 54—Defendant in possession of property in pursuance of contract for sale or lease—Position not affected by absence of deed provided suit for specific performance lies in that Court.

Where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been executed, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. *Walsh* v. *Lonsdale*, 52 L. J. Ch. 2, foll.; 2 C. L. J. 343; 9 I. C. 374; 8 I. C. 44; 17 I. C. 180 and 18 I. C. 844, ref. to. 29 Mad. 336 (F. B.), diss. from.

[P. 377, C. 1 & 2.]

(b) Ejectment—Suit—Relief—Ejectment suit defeated by claim under contract of sale—Plaintiff not entitled to decree for balance of consideration in same suit.

Where, therefore, the plaintiff in a suit for ejectment was the admitted proprietor of the land in dispute and the defendants resisted his claim for ejectment on the ground that they had come into occupation by his leave and license under an agreement for sale on the payment of part of the consideration money:

Held, that the plaintiff was not entitled to eject the defendants nor was he entitled to a decree for the balance of the consideration in the suit, because he had not sued to recover the money.

[P. 377, C. 1 & 2.]

Monmohan Bose—for Appellant.

Jyotish Chandra Hazra—for Respondents.

Judgment.—This is an appeal by the plaintiff in an action in ejectment commenced on the 10th April, 1912. The

plaintiff is the admitted proprietor of the land in dispute. The defendants resist his claim on the ground that they came into occupation by his leave and license under an agreement for sale executed on the 12th February, 1912, whereby it was stipulated that a conveyance would be executed by the plaintiff in their favour on or before the 13th April 1912. Rupees 80 was fixed as the consideration and the plaintiff was actually paid Rs. 50 on the date of the agreement. The defendants alleged that they subsequently offered the balance but the plaintiff refused to accept the sum and execute a conveyance. The question thus arises, whether this constitutes a sufficient answer to the claim for ejectment.

On behalf of the plaintiff, reliance has been placed upon the decision of a Full Bench of the Madras High Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (1). That case is an authority for the proposition, that a contract of sale followed by delivery of possession does not, when there is no registered sale-deed, create any interest in the property agreed to be sold and, cannot, even if enforcible at the date of suit or decree, be pleaded in defence to an action for ejectment by one who has a legal title to recover. With all respect, we are unable to accept this principle of law as consonant with the rules of justice, equity and good conscience. A contrary view has been adopted in a long series of decisions of this Court, amongst which may be mentioned *Bibi Jawahir Kumari* v. *Chatterput Singh* (2), *Singheeram Poddar* v. *Bhagbat Chander Nundi* (3), *Bepin Behari Mitter* v. *Tinkowri Pathak* (4), *Champaklatika Mitra* v. *Nafar Candra* (5), *Sarat Chandra Ghose* v. *Sham Chand Singh* (6), *Secretary of State for India* v. *Forbes* (7) and *Mati Lal* v. *Darjeeling Municipality* (8). These casese were based on the well-recognised doctrine of equity explained by Sir George Jessel, M. R., in *Walsh* v. *Lonsdale* (9), where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been executed, the position is the same as if the documents had been executed provided specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. If we were to accept the contention of the appellant, the result would be this: as soon as the suit for ejectment is instituted, the defendant must institute in that very Court a counter-suit for specific performance of his contract and obtain a stay of proceedings in the suit for ejectment. When the defendant is successful in the suit for specific performance, he will have the conveyance executed in his favour by the plaintiff or by the Court on his behalf. This will perfect his title and clothe him with authority to continue in possession, with the inevitable result that the suit for ejectment will stand dismissed. Clearly, the Court should not encourage mischievous multiplicity of litigation in this manner. We hold that the plaintiff is not entitled to eject the defendant, nor is he entitled to a decree for the balance of the consideration in this suit because he has not sued to recover the money.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1906) 29 Mad. 336 (F.B.).
(2) (1905) 2 C. L. J. 343.
(3) (1910) 6 I. C. 632.
(4) (1911) 9 I. C. 374.
(5) (1910) 8 I. C. 44.
(6) (1912) 39 Cal. 663=14 I. C. 701.
(7) (1912) 17 I. C. 180.
(8) (1913) 18 I. C. 844.
(9) (1882) 21 Ch. D. 9=52 L. J. Ch. 2=46 L. T. 858.

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Full Bench

SANDERSON, C. J. WOODROFFE AND MOOKERJEE, JJ.

Lakurka Coal Company Ltd.—Defendants—Appellants.

v.

Jumnadass Bhagwandass—Plaintiff—Respondent.

Civil Appeal No. 49 of 1915, decided on 11th February, 1916, against the Judgment of Chaudhuri, J., in O. C. S. No. 127 of 1915.

(a) Contract — Construction — Contract for supply of coal—Contract imperfectly expressed and silent as to mode of delivery—Implied

covenant might be inferred having regard to custom of trade.

The defendant, a Colliery Company, contracted to supply a specified quantity of coal to the plaintiff firm within a period of six months at rates agreed upon by the parties. The agreement was partly parol but was based chiefly on correspondence. The defendant, after despatching a small quantity, stopped further supply owing to the shortage of wagons supplied by the Railway Company to load and remove the coal. It was conceded by the parties that, in the course of business, the defendant used to indent on the Railway Company for wagons for the carriage of coal, not specifically for individual buyers, but in accordance with despatching instructions received from various customers. In a suit for damages for breach of contract to supply the agreed quantity, the defendant company pleaded that partly owing to the holding of the Imperial Durbar and partly owing to trade conditions, the Railway Company did not send them sufficient wagons to meet their customers' requirements and that, therefore, they were not liable to pay any damages :

Held, (1) that, as the contract was imperfectly expressed, and silent as to the mode of delivery, an implied covenant might be inferred having regard to the custom of trade or the course of business usual in the class of transactions to which the contract related ;

[P. 388, C. 1 & 2.]

(2) that, though it was the defendant company's duty to indent for wagons to load the coal, they did not impliedly undertake an absolute obligation to supply the wagons, and were not liable for loss resulting to plaintiff by shortage of wagons, the implied term of the contract being that, in the event of a shortage of wagons, the company would only allocate for the use of the plaintiff a fair or proportionate share of the wagons available. [P. 390, C. 2.]

(b) Contract—Construction—Written contract—Inference as to implied stipulation—Principle—Duty of Court.

Per *Sanderson, C. J.*—The principle on which a stipulation or undertaking is to be implied in a written contract is to give such business efficacy to the transaction as both parties must have intended, at all events, it should have, not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances. A Court has no right to imply in a written contract any stipulation between the parties, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. 37 W. R. 439 and *Hamlyn* v. *Wood*, (1891) 2 Q. B. 488, rel. on.

[P. 380, C. 2 & P. 381, C. 1.]

(c) Contract—Breach—Suit for damages—Burden of proof.

Per *Woodroffe, J.*—In a suit for damages for breach of contract, it is for the plaintiff to establish both the contract and its breach.

[P. 384, C. 2.]

(d) Contract—Construction—Usage of trade must be looked into to ascertain real thought of contract.

Per *Mookerjee, J.*—The law recognises the fact that men assume that the words of their contract will be understood in their trade meanings and that the terms of their agreements will be governed by the well-recognised usages of the callings to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts, but rely upon the knowledge and good faith of one another as to matters so well-known that special reference to them would be burdensome and unnecessary, and they accordingly agree upon many of the terms of their contracts by mere silence; what these terms are, must be shown by parol evidence. [P. 389, C. 1.]

(e) Contract—Construction—Usage—Implied incorporation—Usage must be shown to have been certain and reasonable.

The usage deemed incorporated by implication into a contract must be shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it, or might know it if he took the pains to enquire. Case-law discussed. [P. 388, C. 2.]

S. R. Das and *Langford James*—for Appellants.

B. C. Mitter, A. N. Choudhuri and *A. Sinha*—for Respondents.

Sanderson, C. J.—This is an appeal by the Colliery Company from a judgment of Chaudhuri, J., delivered on 14th April, 1915 by which he gave judgment for the plaintiff for Rs. 29,224-3-3 with interest. The claim was based on a contract whereby the plaintiff agreed to purchase from the Colliery Company 6,000 tons of Rubble at Rs. 1-6 and 4,000 tons of Dust at Rs. 1-4 per ton to be delivered from November 1911 to April 1912.

It is agreed that the contract quantity has not been delivered and the defendant's contention was that the non-delivery was due to the failure of the supply of Railway wagons for the conveyance of the coal, for which the defendants allege they were not responsible.

It appeared that the only method of removing the coal from the colliery was by Railway wagons from the colliery siding, that the colliery had no wagons of their own available for the delivery of coal to their customers but it was the practice for the Colliery Company, in accordance with instructions from their customers, to indent upon the Railway Company for the wagons. Such indents were made for all their buyers according to despatching instructions and not separately for each buyer. The plaintiffs,

in addition to other business carried on by them, were dealers in coal and had been in that trade for some seven or eight years at the date of the contract.

On the 6th September, 1911, the plaintiffs wrote to H. V. Low & Co., who are the Managing Agents in Calcutta for the Colliery Company, asking them to quote the actual selling rate for B. B. Rubble from the Lakurka Company and stating that if the rate proved agreeable, they intended accepting the entire stock of B. B. Rubble from the Lakurka Colliery. Apparently a rate was quoted, for on the 12th September, 1911 the plaintiffs again wrote a letter to Low & Co., see letter (page 11) :—

"We are prepared to accept your rate for Lakurka B. B. Rubble at Rs. 1-6 per ton as referred to in your letter of 11th September, 1911, and beg to state that if you feel agreed to enter into a contract as to supplying us all the B. B. Rubble that is lying in your stock and will be raised till March 1912 and that no other men will be given supply of B. B. Rubble from your Lakurka Colliery except ourselves and that regular supplies will be arranged against our indents for wagons, we are quite prepared to deposit amount to your satisfaction either at yours or at your office as you please. We beg to add that we shall commence taking delivery from October and with slow progress till December but the last three months from January to March 1912, ours will be plenty of orders to hand and those you are to please arrange to give prompt effect to.

"Also please let us know as to what will be the probable quantity including the B. B. Rubble lying in stock and that will be raised till March 1912. Please oblige us by your kindly quoting the actual rate for Dust from your Lakurka Colliery by return. A favourable reply will highly oblige.

"P.S. The deposit money must be the one as current in all other offices."

No answer was sent to this and accordingly the plaintiff wrote again on the 16th September, 1911 (page 12) :—

"We beg to invite your kind attention to our letter No. 412 of 12th September, 1911 and shall feel glad to have an early reply thereto."

Then an interview took place on 15th October, 1911 at the Colliery at which Mr. Castles, the Colliery Manager, Mr. Pattinson, a partner in Low & Co., Mr. Moore and two of the partners in the plaintiffs' firm were present, and an agreement was evidently arrived at between the parties for on the same day a letter was sent from the Lakurka Colliery signed Low & Co., to the following effect :—

"With reference to our conversation you may take delivery of 6,000 tons of Rubble at Rs. 1-6-0 (Rupee one and annas six) and 4,000 tons of Dust at Rs. 1-4-0 (Rupee one and annas four) per ton from November to April, cash with order and subject to a deposit of Rs. 1,000 (Rupees one thousand) Government paper as security of due fulfilment of this contract."

On the 19th October the plaintiffs replied (page 13) :—

"With reference to your letter No. 948 of 15th October, 1911 in connection with the purchase of B. B. Rubble and Dust from Lakurka, and that of 15th instant regarding the purchase of B. B. Rubble from your Auckland Colliery, we beg to state that we agree to accept the quantities as offered by you in your above and that the money towards the security deposit shall be sent you after the Kali Puja Festival that takes place on the 21st next, as our Head Office at Ranigunge is also closed for the said period."

This was directed to Low & Co., at Calcutta. Low & Co., writing from Calcutta, replied on the 20th (page 14) :—

"With reference to your letter dated 19th instant, we have no knowledge of a letter No. 948 dated 15th October, 1911, nor of a letter regarding the sale of Auckland B. B. Rubble.

"We must see these letters and ascertain what quantities and rates were offered you before going further into the matter."

Obviously they had not been advised of the contract made at the Colliery and evidenced by the letters of the 15th and 19th October, 1911. Consequently the plaintiffs wrote on 26th (page 14) :—

"With reference to your favour dated 20th instant, we beg to send you herewith copies of your letters No. 948 of 15th October, 1911 regarding sale of 6,000 tons of B. B. Rubble and 4,000 tons of Dust from Lakurka Colliery at Rs. 1-6-0 and Rs. 1-4-0 per ton respectively and that dated 15th instant regarding disposal of 4,000 tons of B. B. Rubble from your Auckland

Colliery at Re. 1 per ton for ready references. To make it more plain we beg to remind you that the former letter was written out at 10 in the morning in the Lakurka Colliery Office while the latter at the Lakurka Colliery Manager's Bungalow at 4 P. M. in the evening. Further we beg to add that you did offer us above-mentioned rates and we agreed to accept them.

"Herewith we beg to send you a *hundi* valued Rs. 1,000 (Rupees one thousand only) on production of which at our Calcutta Office Lalchand Nopechand, 180 Harrison Road, the total value will be paid in, in exchange, which please keep with you in deposit as security towards the proposed contract on the disposal of the B. B. Rubble and Dust. Please be good enough to acknowledge a formal receipt for the *hundi* or the money you get in exchange with it at an early date and issue necessary instructions to your respective Collieries to effect prompt deliveries of stuff against our requisitions. Thanking you in anticipation."

Low & Co replied on the 27th (page 15):—

"We are in receipt of your letter No.883 dated 26th instant enclosing copies of our letters No. 948 and No. nil dated 15th instant regarding the sale of 6,000 tons of Lakurka B. B. Rubble Coal, 4,000 tons of Lakurka Dust Coal and 4,000 tons of Auckland B. B. Rubble Coal to you at Rs. 1-6-0, Rs. 1-4-0 and Re. 1 per ton respectively, which are in order.

"On your *hundi* amounting to Rs. 1,000 security for the due fulfilment of the contract being cashed our formal receipt will be handed to your Calcutta friends and we will hold ourselves in readiness to deal with your despatching instructions."

In my judgment, even if it had not been already made at the interview, the contract was concluded on the 19th by the letter which the plaintiffs sent accepting the terms offered by the defendants in their letter of the 15th, and this is the contract which the Court has to construe in this case.

It is alleged by the defendants that after the contract had been made and during the latter part of the month of November, a shortage of Railway wagons began to be felt, partly owing to the Durbar and partly owing to trade conditions, and that Railway Companies did not supply sufficient wagons to the Colliery to enable the Company to meet the requisitions of the Company's customers and that consequently the deliveries of the quantities asked for by the plaintiffs could not be delivered. Assuming that there was such a shortage of wagons and that it was the cause of the non-delivery, the *first* question to be considered is whether the defendants can be held liable for such shortage of wagons. The learned Judge has held that it was part of the contract that the defendants should provide the wagons necessary for the delivery of the coal to the plaintiff, and consequently that the defendants are liable for the failure to deliver. The contract as contained in the letters above-mentioned has no reference to the supply of wagons, and it is not suggested that the arrangement made at the interview of the 15th October, 1911 carried the matter any further.

If, therefore, there was an undertaking by the defendants to provide the wagons, it must be an implied undertaking.

The principle, on which a stipulation or undertaking is to be implied in a written contract, was laid down by Bowen, L. J., in *The Moorcock* (1) where he says:—

"An implied warranty, or, as it is called, a covenant-in-law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants-in-law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must

(1) (1889) 14 P. D. 64=58 L. J. P. 73=60 L. T. 654=37 W. R. 439.

have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." And this principle was followed down by Lord Esher in *Hamlyn* v. *Wood* (2), and the passage to which I am about to refer is at page 491, where he says: "A large number of cases have been cited, in some of which the Court implied a stipulation, and in others refused to do so. In my opinion, it is useless to cite such cases, so far as they merely show that in the particular case an implication was or was not made. The only use of citing such cases is where they lay down the rule as to such implications, upon which the Court will act in dealing with the particular case before it. I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." Then he refers to the passage of Lord Justice Bowen which I have already quoted.

The question, therefore, is, can the Court in considering this contract in a reasonable and business manner come to the conclusion that an implication necessarily arises that it was the intention of the parties that the defendants should undertake the absolute obligation to provide the wagons and be responsible for any failure of supply, even though they had taken all reasonable steps to procure them and the Railway Companies had failed to supply them?

It is admitted by the defendants that an undertaking to indent for the wagons and to load the coal into the wagons when supplied by the Railway Companies, must be implied. It was the regular practice and course of business for the customers to send their requisitions to the Colliery and for the Colliery Company to indent for wagons in accordance therewith. It was indeed stated that as a matter of practice and course of business the Railway Companies only received indents from the Colliery Companies. Further, the rate mentioned in the contract included charges for moving the Rubble and Dust from the Colliery to the siding and loading it into the wagons. Therefore, it must necessarily be implied that there was a duty on the defendants to indent for wagons in accordance with the plaintiffs' requisitions and load them when supplied.

But I am unable to say that the further obligation mentioned above, *viz.*, that the defendants would procure the wagons and would be responsible for any failure to supply, must necessarily be implied. In the *first* place, the form of the contract is "you may take delivery of 6,000 tons," etc., which would point to a taking of delivery in the ordinary way, *viz.*, by delivering the coal into wagons at the Colliery siding. So far as it goes, it would indicate a limitation of the defendants' liability to loading the coal into wagons when supplied. In the *second* place, the Indian Mining Association form of contract, which I understand was the ordinary form of broker's contract in the coal trade, was put in evidence and this shews that such contracts are made "subject to supply of wagons" for which the sellers "shall indent on the Railway Company upon receipt of buyer's despatching instructions."

There was no evidence or suggestion that the rate mentioned in the contract was more than the market rate and it seems to me strange that the defendants should without extra remuneration have taken upon themselves an obligation, not usually undertaken in such contracts, *viz.*, an absolute liability to provide the wagons, over the supply of which they had no control except by way of indenting upon the Railway Companies.

To make such an implication would, in my judgment, be in the words of Bowen, L. J., "to impose on one side all the perils of the transaction," or "to emancipate one side from all the chances of failure," and I cannot come to the conclusion that such a promise must have been in the contemplation of the parties.

This view of the case is borne out by the subsequent correspondence, which was voluminous. It is clear that the plaintiffs were complaining of the non-delivery of the coal requisitioned by them, but an examination of the correspondence shews that they did not assert the absolute obligation of the defendants now relied upon until the attorney's letter of 8th May, 1912, but that when writing themselves what they were insisting upon was that they were not receiving a proper proportion of the wagons which were in fact supplied by the Railway Companies.

(2) (1891) 2 Q. B. 488=60 L. J. Q. B. 734=40 W. R. 24.

On the other hand, when the complaint as to non-delivery was first made, *viz.*, by the plaintiffs' letter of 22nd November, 1911, the defendants replied on the 23rd alleging the shortage of wagons as an excuse. If there had been the absolute obligation on the defendants now contended for, one might have expected the plaintiffs to have stated at once that the shortage was no excuse for non-delivery and that they should hold the defendants to their contract. On the contrary, by their letter of the 29th November, 1911, they seem to accept the position that the defendants were excused from delivering as regards one Railway where there was a shortage, but alleged that on another Railway, *viz.*, the B. N. Railway, there was not the same excuse.

On the 30th November the defendants wrote :—

"DEAR SIRS,

"We are in receipt of your letter dated 29th instant and regret the delay in executing your orders, but all buyers of coal are experiencing the same trouble and we are doing our best at the Collieries to despatch what wagons are given us proportionately to our buyers.

"We have written to the Colliery Managers both at Lakurka and Auckland, asking them to give special attention to your orders."

To this proposition of proportional distribution there was no reply, and the plaintiffs did not rely upon the absolute right to have the wagons procured by the defendants for the delivery of their coal.

Again on the 15th and 16th January, 1912 (page 28) the defendants wrote :—

15th January, 1912.

"DEAR SIRS,

In reply to your letter dated 12th instant we regret the delay in dealing with your orders, which is, as you know, due to small supplies of wagons. Mr. Burt is giving special attention to your orders and will reserve as many wagons for your requirements as he reasonably can."

"16th January, 1912.

"DEAR SIRS,

"We are in receipt of your letter of the 15th instant and have written strongly to the Colliery Manager regarding your requirements and trust you will have no further cause to complain of short supplies."

There was a reply to that letter on the 18th January by the plaintiffs (page 29), who wrote :—

18th January, 1912.

"DEAR SIRS,

"We are glad to note the contents of your favour dated 16th instant and trust that henceforth we may have our order to a certain extent complied with by Lakurka Colliery Manager but we would at the same time suggest of your kindly transferring same 4,000 or 5,000 tons B. B. Rubble or Dust from Lakurka Colliery to your Govindpore Colliery where we learn slack coal is lying in abundance, or from any other Collieries where you may feel convenient. In the event of your complying with the request, we are confident that we may have supplies of fair proportion of wagons. Awaiting a reply by return."

Then again on 30th January, the defendants wrote (page 32) :—

"DEAR SIRS,

"In reply to your letter dated 29th instant we have to say that you are receiving a proportionate number of the few wagons supplied to Colliery. Colliery Manager has been instructed to give your orders as much attention as possible. We have already replied to your letter dated 23rd instant. All cash and orders must be submitted to this office whence the orders will be passed on to Colliery for execution. Colliery has no authority to deal with orders."

Then on the 13th of February they wrote (page 40):—

"DEAR SIRS,

"With reference to your letter No. 1881 dated 12th instant we beg to say that wagon supplies are now worse than ever they have been before. Akra and South Gobindpur have been unable to supply any Rubble or Dust to you, as practically no wagons for public orders have been supplied to them. Auckland is in a similar position. We are doing all we can under the circumstances and are doing our best to carry out your contract as far as circumstances permit, and your almost daily letters asking for supplies of wagons, which it ought to be clear to you we are unable to obtain, are quite unnecessary."

Then on the 21st of March they wrote (page 46) :—

"DEAR SIRS,

"We are in receipt of your letter No. 2297 dated 20th March, 1912 and are asking our Colliery Manager to increase deliveries to you.

"With regard to your claim we do not admit liability. The shortness of wagons

has interfered not only with the supply of coal but with the whole work at the Colliery. You have been at the Colliery frequently of late and must have seen for yourself that there is no room to stock and no room to conduct screwing operations. We are giving you a share of our wagons so far as the deplorable conditions at the Colliery will allow, and we must, therefore, ask you to give us time to complete the contract."

Then on the 3rd of April they wrote (page 48) :—

"DEAR SIRS,

"We are in receipt of your letter dated 2nd instant and in reply have to say that you are receiving a fair proportion of the wagons not required for Government orders. There are other buyers with running contracts with Colliery as well as yourself and you cannot expect to receive supplies to the complete exclusion of other customers."

There was no reply to this. The plaintiffs wrote on the 23rd April, 1912 (page 50) :—

"DEAR SIRS,

"We beg to state that we are now quite tired of and disgusted with writing to you about increasing supplies, but without any effect whatever. This month we have received supplies both from Auckland and Lakurka Collieries which are equally poor. This sort of supplies as has been continued for months together will not complete the contracted quantity. We shall, however, in reference to your letter dated 21st ultimo, be glad to extend the period up to 15th May, 1912, should you feel glad to arrange to complete our contract during the said period. But as we anticipate that you will still fail to act up to your promise as you have already done, we shall have to adopt measures for the same."

To which the letter of the defendants on the 1st of May was an answer in these terms (page 51) : —

DEAR SIRS,

"6,000 tons Lakurka B.B. Rubble.

"4,000 tons Dust.

"4,000 tons Auckland B. B. Rubble.

"With reference to your above contracts we are prepared to continue delivery until their completion under the following conditions.

"We will deliver during the remainder of this season such quantities of Dust and B. B. Rubble as there are wagons available for. Any quantities remaining not despatched to be carried forward for delivery next season subject to wagon supplies.

"Kindly let us know if you agree to the above otherwise the contract is finished."

I have not referred to all the letters which were read many times in the course of the argument. To my mind the correspondence is inconsistent with the absolute obligation now contended for by the plaintiffs, *viz.*, that the defendants were under a liability to procure the necessary wagons, though it is quite consistent with the case that the plaintiffs were entitled to a certain proportion of the wagons supplied by the Railway Companies, and shews that they were complaining that they were not receiving a proper proportion.

In my judgment, therefore, there was no absolute obligation upon the defendants to procure the wagons necessary for the delivery of the coal and dust to the plaintiffs, but that in this respect the defendants' liability was limited to indenting for the wagons and loading the coal when they were supplied by the Railway Company.

The question, *then*, arises whether there was such shortage of wagons as justified the defendants in delivering to the plaintiffs about 1,372 tons of B. B. Rubble and about 770 tons of Dust Coal during the specified time instead of 6,000 tons and 4,000 respectively.

I do not think there is any question that if the defendants had allocated all the wagons, which they received from the Railway Companies, to the plaintiffs, there would have been more than sufficient wagons for delivery of the whole contract quantity, but on the other hand it is equally clear that if the Company's indents for the whole of their customers are taken into consideration, such indents were not fully complied with, and only a small proportion of wagons indented for was in fact sent, and the defendants contend that inasmuch as the known practice was for the Colliery to indent for all its customers and not for any particular customer, the only obligation upon the defendants on the happening of the shortage was to distribute the wagons actually received among the buyers for whom the defendants had indented, and that in making such distribution not only must the orders of all the buyers be considered, but also the maintenance of the working of

the Colliery ; that there was no obligation to distribute the wagons on any standard of fairness unless such standard means taking into consideration not only the number of wagons ordered by the various buyers and the number supplied, but also the necessities of the Colliery and the course of business as regards the preferment of certain classes of orders.

It was further contended that the above-mentioned obligation did not arise out of the original contract of purchase and sale, but upon a contingency not contemplated by the parties and out of a contract of agency implied from the course of business and from their indenting for wagons.

I think, therefore, the case stands thus:—There was an obligation on the defendants to indent for wagons in accordance with the plaintiffs' requirements ; though the plaintiffs gave up making regular and specific requisitions for wagons in accordance with the request of the defendants, they clearly intimated that they wanted sufficient consignments to complete the delivery within the contract time ; the defendants did indent for sufficient wagons to complete the delivery, they did in fact get sufficient wagons, but such wagons were supplied in respect of indents sent by the defendants on behalf of other customers as well as the plaintiffs.

Under these circumstances, the plaintiffs allege that they are entitled to judgment. On the other hand, the defendants say that by reason of an implied agreement arising out of the course of business the defendants were only bound to give the plaintiffs a proportion of the wagons actually received, and that they gave them such proportion.

This view of the case has not really been considered in the Court of first instance, for inasmuch as the learned Judge held that the defendants were under the absolute liability to provide the wagons, the last mentioned questions did not arise.

It is true that the learned Judge has held that the defendants had "successfully shewn that there was not any inequitable distribution of the wagons received" but this was, in view of his previous decision, "*obiter dictum*," and his finding on this point has been challenged by the learned Counsel for the plaintiffs.

I think, therefore, this appeal should be allowed and the case remitted to the original side for the above-mentioned matters to be tried. I am not certain whether any amendment of the pleadings will be necessary : but in my judgment, if any amendment is necessary leave should be given to allow the parties to raise the issues which arise in view of the construction which I have placed upon the contract.

I have purposely abstained from expressing any opinion as to the merits of any of the matters which will have to be investigated before the learned Judge of the original side, so as to avoid any charge of prejudice to the one side or the other ; but I wish to make it clear, as far as my own judgment is concerned, that the only matter I have decided is the construction of the contract, and that all other matters, as for instance, the allegation that the real cause of the delay was not shortage of wagons but shortage of Coal and Dust, are open to the plaintiffs, and that if the question of proportional distribution becomes material, the plaintiffs should not be precluded by the above-mentioned finding of the learned Judge in that respect, and that this matter also must be regarded as fully open to the plaintiffs. I think the appeal should be allowed with costs, and the costs of the first trial should be left to the discretion of the Judge who tries the case.

Woodroffe, J.—This appeal raises several questions of difficulty owing to the absence of a formal contract and the paucity of evidence regarding its making, the happening of a contingency for which no express provision was made, which provision must be made out from the course of business. It raises also a number of questions which it is not possible to here deal with as they have not been the subject of pleading, sufficiently specific issues and evidence and which have not been dealt with in the judgment, which proceeds upon the single point of the construction of the contract. The suit is one for damages for breach of contract. It is for the plaintiff to establish both the contract and its breach. Negotiations opened with an enquiry made in a letter of 6th September, 1911. A reply was given by the Colliery Agents on the 11th September, 1911, which is not produced, and replied to by the letter of the plaintiffs of 12th September, 1911 and 16th September, 1911. Then on the 15th October, according to the evidence of the plaintiff Purusuttamdas, a contract was entered into at the Colliery with Mr. Pattinson, a member of the firm of Messrs. Low & Co., the Colliery Agents. His evidence is that it was arranged that 6,000 tons of Rubble

and 4,000 tons of Dust from the Lakurka Colliery would be supplied at Rs. 1-6-0 and Rs. 1-4-0 between November 1911 and April 1912. I quote the words of the witness. This oral conversation is said to have been confirmed by a letter written at Colliery, dated 15th October, 1911, which states "You may take delivery of 6,000 tons, etc." This letter was accepted by another of 19th October, 1911 written to the Calcutta firm, who replied on the 20th October, 1911 that they had no knowledge of the matter. On the 26th October, 1911 it was explained to the latter that the contract was entered into at the Colliery, to which Messrs. Low & Co., replied accepting the position and declaring that they held themselves in readiness to deal with despatching instructions. If the contract is to be found only in the oral evidence above referred to and the letters dated 15th October, 1911 and 19th October, 1911, then according to the contract it would appear that delivery was to be at the defendants' Colliery from which it was to be removed apparently by the plaintiff, since nothing is said about the despatch of coal by the Colliery. Such removal depended on the question whether railway wagons were available for the purpose. Nothing is said as to who was to get the wagons necessary or upon whom the loss would fall in the event of the Railway Company being unable to supply wagons. It is, however, common ground that the contract included terms to be gathered from the course of business. It is admitted that according to such course of business the Company was under an obligation to indent for the wagons and if the wagons asked for were fully supplied, to assign them to the purchasers on whose behalf the indent was made, and then to load the wagons without further charge. The defence is that though not bound so to do by the express terms of the contract, yet by the course of business the Colliery on behalf of the buyers indented for wagons and did not get the sufficient quantity, with the result that the coal was not delivered. Two questions arise on this, *viz.*, was there in fact a shortage of wagons, and if so, was the defendant Company liable therefor? That is, did such shortage to the extent it existed exonerate them? The case for the plaintiff on the second point has been (and this has been accepted by the learned Judge) that the Colliery Company absolutely undertook to get the wagons and made themselves liable for the risk that wagons might not be available. In this view of the case it was not necessary for him to decide any other of the matter argued before us in appeal. I am unable to accept this view of the case for the following reasons. The express contract is silent on the point and no usage or course of business is established which fixes such a liability on the defendant. The argument in effect is an inference of such liability from other facts. The learned Judge finds that it was a well-understood term of the contract. though not expressed. There is no oral evidence that it was so agreed and the contract as set out in the plaint is as stated in the letters there cited. The learned Judge, however, relies on the correspondence. The question of the absolute liability of the defendant Company to supply wagons was not there dealt with, but there is an admission there that the defendant Company was obliged to give the plaintiff a fair share of the wagons actually supplied and an apparent admission that the plaintiffs had not had such a share. Reliance has been placed on the fact that the defendant Company did not say that they had no liability whatever in respect of the wagons. But this question of the absolute liability of the defendant Company to supply the wagons does not seem to have been present to the mind of the writers, and did not come up until they were written to by the attorney for the plaintiff. For, on the other hand, it may be asked why did not the plaintiffs in their earlier letters write and say that they were not concerned with the defendant Company's difficulties about the wagons, for the latter were under an absolute obligation to supply wagons and were liable, whether the Railway Company were able to supply the wagons are not. Nor does it seem likely that without extra remuneration the Company would undertake to supply wagons. It is said that they made enquiries of the Railway and were satisfied that there was no risk, the shortage being temporary only. A letter of the 17th October, 1911 is relied upon on this point as also the defendants' oral evidence. It would appear from the letter of the 20th October, 1911 that the writer of the former letter was unaware of this contract. The fact, however, that the supply of wagons may be taken into account in making contracts, does not establish an understanding by the Company that they are liable for the wagon supply. Such enquiries are

necessary for the carrying on of the business. Thus the Company could not fairly at one and the same time assert its non-liability for wagon supply and allow others to contract with it, without knowing whether such supply was sufficient to enable such others to get the benefit of such contracts. Further, we have it that at the time of this contract there was in existence a form of mining contract which was subject to the supply of wagons. It is said that the fact that it was not adopted in this case indicates an intention to contract without reference to any condition as to the existence of railway wagons. But this circumstance is explained by the fact that the contract was orally entered into at the Colliery. Had it been entered into in Calcutta it is probable that the general mining contract would have been adopted. It is argued that because it is established that according to practice the Colliery alone can indent for wagons, this shews that the obligation for supply is on the latter. This does not follow. What does follow in such case is that there is an obligation on the Colliery to indent. This, however, is admitted. But because the Colliery is under the circumstances bound to indent, it does not follow, in the absence of an express provision or proved course of business to that effect, that the Colliery is to be held liable if on indenting it is unable to get wagons. The statement in the judgment that Mr. Burt fixed these contracts on the understanding that he was to get the wagons, is obviously ambiguous.

My conclusion then on this part of the case is that assuming (without deciding) that there was in fact a deficiency in the wagon supply, the defendant Company is not liable on their contract in respect of such assumed deficiency. Thus if we had to deal only with a contract for delivery of 10,000 tons of coal by the defendant to the plaintiff and there were no other contracts entered into by the defendant Company and wagons were supplied by the Railway Company sufficient to carry 5,000 tons only, the defendant Company would not, in my view of the case, be responsible for damages for non-delivery of these 5,000 tons because a third party, the Railway Company, had not supplied the wagons necessary for the purpose. In short, the contract was subject to wagon supply. The Company have no wagons of their own.

But this finding does not dispose of the suit, which is for damages for breach of contract and which the defendant Company contests on the ground that they could not carry it out in its totality on account of deficiency in the number of wagons supplied by the Railway. Its only effect is to negative the plaintiffs' contention that deficiency in wagon supply was no defence.

The question still remains for determination whether there was in fact a deficiency in supply of wagons which exonerates the defendant Company from paying damages for goods admittedly not delivered, and if so, to what extent. It is admitted that between the 1st November and 30th April, 1912, the number of wagons supplied to the Company was 2,300. The plaintiffs say it was more. It is not contested that about 600 wagons only were necessary for the carriage of the plaintiffs' coal. The plaintiffs on this contend that there was no shortage of wagons as alleged. If they are right in this, they are entitled to succeed notwithstanding that the first point here dealt with, *viz.*, the construction of the contract is decided against them. It being admitted that according to the course of business the Company undertook and was bound to indent for and did indent for wagons and got wagons in excess of the requirements of the plaintiff, it is upon the defendant Company to shew what they allege that there was nevertheless a shortage of wagons which exonerated them from the carrying out of their contract with the plaintiffs further than they have done. It is true that Chaudhuri, J., has held that there was a shortage and that the plaintiff received a fair proportion of the wagons available. But having regard to his finding as to the construction of the contract this decision was not necessary, and doubtless for this cause was given without any statement of reasons and without consideration of points which have been argued before us in appeal, but do not seem to have been present to the mind of the learned Judge. Nor are the facts upon this issue as to the shortage of wagons sufficient for a decision, nor are such findings as are to be found in the judgment sufficient. What the standard of equitable distribution is, the learned Judge does not state. The case must, therefore, be remanded to the learned Judge for the determination of the issue whether there was in fact a shortage in the wagon supply. If there was not, the plaintiff succeeds, if there was such a shortage it must be determined what the shortage was, and the extent to which it exonerated the

defendant Company from carrying out its contract. The first question to be considered on this issue is whether in ascertaining such shortage, it is open to the Company to consider other contracts of other purchasers which have to be fulfilled, and if so, what contracts may be so taken into account. According to the respondents they are not concerned at all with the fact that the Company entered into other contracts. This the appellants deny, saying that as the indents for wagons were on behalf of all purchasers they had to be distributed amongst the latter. The question further remains to be determined what contracts (if any) must be so considered, and in what way: and in particular whether contracts made subsequently to that of the plaintiff should not be excluded. For it may be argued that in entering into such subsequent contracts the defendant Company to that extent precluded themselves from carrying out their contracts with the plaintiffs. Whether this be a good contention has to be decided. Further, on this point it must be considered whether the defendant Company are entitled to give preferential treatment to loco coal, steam coal and slack. For they claim to be entitled to load the wagons first with steam coal and slack and to give to the plaintiff a share only of the wagons left over. Lastly, after considering these and any other points which may arise on this issue, it will be necessary to determine whether the plaintiffs were entitled to a fair proportion of the wagon supplied, and if so, what was the fair proportion of wagons to which the plaintiffs were so entitled, and whether they did, in effect, get them, and if not, to what damages they are entitled in respect of coal which was not, but which should have been, delivered had the plaintiffs received the fair proportion of wagons to which they were entitled.

There is, in my opinion, no force in the contention that the defendant Company are not liable because they in fact supplied the wagons for which they received despatching orders. For it is shown that the plaintiffs were told it was no use giving further orders and that delivery would be given as and when wagons were available. There is, however, a further issue which has still to be tried, *viz.*, whether the contract quantity of B. B. Rubble was ready for delivery, and if not whether and to what extent the shortage of Railway wagons exonerates the defendant Company.

It being decided by us that the defendant Company is not liable for shortage of wagon supply, the suit must be remanded to the learned Judge to enquire and determine (1) whether there was in fact a shortage of wagons, and, if so, to what extent such shortage existed and operated to exonerate the defendant Company. (2) Whether the contract quantity of B. B. Rubble was ready for delivery.

In determining these issues it will be necessary to determine the respective contentions of the parties above noted, as also on the *second* issue the question whether the shortage of wagon supply, if any, affects the question of the *prima facie* liability of the defendant Company in respect of non-readiness to deliver if this is established. That Rubble was not ready for delivery seems hardly to have been disputed, but the bearing of this fact on the case and its relation to the question of wagon supply has not been considered.

As the hearing of the appeal has to a large extent been concerned with the question of the construction of the contract on which the respondent fails, the appellant is entitled to the costs of the appeal. The case must be remanded for determination of the other issues which arise in the suit. The costs of the suit will be dealt with by the learned Judge after the determination of the remaining issues on remand.

Mookerjee, J.—This is an appeal by the defendant Company against the plaintiff firm in a suit for damages for breach of contract. The case for the respondents was that the appellants agreed to supply 6,000 tons of B. B. Rubble Coal and 4,000 tons of Dust Coal during the months of November 1911 to April 1912; that the Company actually supplied only 1,372 tons 13 cwt. of the former kind and 771 tons 5 cwt. of the latter kind; and that the plaintiffs are consequently entitled to recover Rs. 33,727-4-9 as damages for breach of contract. The defendant Company, in their written statement, submitted that though at the request of the plaintiffs' firm, wagons were indented for from the Railway Company, the latter could not supply a sufficient number of wagons, and, consequently, the coal could not be delivered in terms of the agreement. The written statement, in fact, suggested that it was the duty of the plaintiff firm to take

delivery of the Rubble and Dust at the Colliery and to remove the same from there, and that owing to insufficient supply of wagons and not to any default of the Company, the plaintiff firm failed to take delivery of the rest of the Rubble and Dust Coal. On these pleadings, the question obviously arose, whose duty it was to get the wagons. Mr. Justice Chaudhuri has come to the conclusion that the Colliery Company had undertaken to provide wagons, and that the failure of the Company to supply the contract quantity was a breach of the contract; in this view, the plaintiff firm have been awarded a decree for Rs. 29,224-3-3. The defendant Company have appealed to this Court and the cases of the respective litigants have been elaborately presented from every conceivable point of view, by Mr. Das for the appellants and Mr. Mitter for the respondents. The fundamental question for determination, as it has emerged out of this discussion, is, was there any, and, if any, what, agreement between the parties as to the supply of wagons in which the coal was to be loaded for transmission.

The contract between the parties is embodied in two letters dated the 15th and 19th October, 1911. The first of these letters had been preceded by oral negotiations which, admittedly, do not affect the question now in controversy. The letter itself is addressed to the plaintiff firm and states you may take delivery of the stated quantity of coal, at certain rates per ton from November to April. The second letter, which is addressed by the plaintiff firm to the Calcutta agents of the defendant Company, contains the acceptance of the terms offered in the earlier letter. It is thus plain that these letters are entirely silent as to the wagon supply they do not explicitly state whose duty it was to get the wagons: this is subject to the observation that the language used in the first letter, if literally interpreted, may apparently support the theory that, as the purchasers were to take delivery, they were to provide the wagons in which the coal was to be loaded. In a case of this description, one of two hypothesis is possible, either that this particular point had entirely escaped the attention of the parties, or that the contract, though contained in several writings, is imperfectly expressed, and was made subject to a usage or custom of the trade or to the course of business usual in the class of transactions to which the contract relates. The voluminous evidence on the record shows that, in the case before us, the contract in truth is partly expressed and in writing partly implied or understood and unwritten. The test to be applied to discover the entire contract in these circumstances is that formulated by Sir John Coleridge, in *Juggomohun Ghose* v. *Manickchund* (3), namely is the usage so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. To the same effect is the language used by Willes, J., in *Plaice* v. *Allcock* (4), "it must be shown as a matter of law, *first*, that it was a certain usage; and *secondly*, that it was a reasonable usage, not inconsistent with law, and as a matter of evidence that it was so universally acquiesced in that everybody in the trade knew it; or could have ascertained it if he had taken the pains to enquire." Lord Alverstone, C. J., in *Devonald* v. *Rosser* (5), refers with approval to the similar words used by Lord Denman, C. J., in *R.* v. *Stoke-upon-Trent* (6), "it is so universal that no workman could be supposed to have entered into the service without looking to it as part of the contract." As was said by Bowen, L. J., in *The Moorcock* (1) and by Lord Esher, M. R. in *Hamlyn* v. *Wood* (2), the Court has a right to imply a stipulation in a written contract, only if, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. The same view was in substance adopted by Ayyar, J. in *Volkart Brothers* v. *Vettuvelu Nadan* (7) when he said that the usage deemed incorporated by implication into a contract must be shewn to be certain and reasonable and so universally acquiesced in that every body in the particular trade knows it or might know it, if he took the pains to enquire. Reference may also be made

(3) (1857-59) 7 M. I. A. 263=4 W. R. 8 (P. C.).

(4) 4 F. & F. 1074.

(5) (1906) 2 K. B. 728=75 L. J. K. B. 688.

(6) (1843-44) 5 Q. B. 303=13 L. J. M. C. 41=8 Jur. 34.

(7) (1888) 11 Mad. 459.

in this connection to *Prodyote Kumar Tagore* v. *Rakhal Chandra Sarkar* (8) (where reliance is placed upon the observations of Baron Parke in *Hutton* v. *Warren* (9) and *Gibson* v. *Small* (10) and to the notes to *Wigglesworth* v. *Dallison* (11). The truth is that the law recognises the fact that men assume that the words of the contract will be understood in their trade meanings, and that the terms of their agreements will be governed by the well-recognised usages of the callings to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts, but rely upon the knowledge and good faith of one another as to matters so well-known that special reference to them would be burdensome and unnecessary, and that they accordingly agree upon many of the terms of their contracts by mere silence: what these terms are, must be shown by parol evidence. See *Brown* v. *Byrne* (12), *Humfrey* v. *Dale* (13). We must, consequently, determine, upon the evidence, what term was by implication included in the contract between the parties to this litigation; in this connection it is important to observe that the parties are now agreed that there was an implied term as to the supply of wagons.

In the Court below, as already indicated, the defendant Company alleged that the plaintiff firm were under an obligation to take delivery of the Rubble and Dust at the Colliery and to remove the same from there; in other words, it was the duty of the plaintiff firm to secure a sufficient number of wagons, though the defendant Company, at the request of the plaintiff firm, endeavoured, from time to time, to procure the wagons. The plaintiff firm on the other hand maintained that the defendant Company were under an absolute obligation to provide the necessary wagons and that the alleged shortage of wagons afforded no valid defence to the claim. In my opinion, neither of these extreme positions is tenable. It is not disputed that the only method of removal of the coal was by means of Railway wagons from the Colliery siding. Neither the Colliery nor the purchasers had wagons, and, *prima facie*, it does not look probable that either party should have undertaken an absolute obligation to provide the wagons; there is, further, the important circumstance that even if either party had undertaken to supply the wagons, the Railway Company could not be forced to accept them for carriage of coal. Consequently, if either party had undertaken to provide the wagons, one would have expected to find evidence of negotiations with the Railway authorities for the acceptance of the wagons so supplied; apparently no such negotiation took place: on the other hand, the defendant Company enquired of the Railway authorities whether wagons would be available. This serves to indicate that the parties looked forward to the Railway Company as the source of supply of the requisite wagons. This is fully borne out by such evidence, as we have on the record, of the usual course of business in transactions of this character. The evidence shews that the Railway Companies do not, as a rule, entertain applications from individual buyers for the supply of wagons for the carriage of coal, and that the indents for wagons are sent by the Colliery Companies. The evidence further shews that such indents are sent by the Colliery Companies, not specifically for individual buyers, but in accordance with despatching instructions received from various customers. In the case before us, the defendant Company did, from time to time, indent for wagons, but never received the full supply, as the Railway Companies were unable to respond to the demand made on their resources by the Imperial Durbar and the trade conditions consequent thereon. The defendant Company maintain that when they indented for wagons, they did what they had undertaken to do in conformity with the usual course of business, and that there was no absolute obligation on their part actually to supply wagons. This contention has been negatived by Mr. Justice Chaudhuri; after careful consideration of the evidence, I regret I am unable to accept as sound his conclusion that the Colliery Company undertook an absolute obligation to supply the wagons

(8) 37 Cal. 322=5 I. C. 243.
(9) (1842) 1 M. & W. 466=2 Gale 71.
(10) (1852-54) 4 H. L. Cas. 353=1 C. L. R. 363.
(11) 1 Sm. L. C. 613=99 E. R. 132.
(12) (1854) 3 El. & Bl. 703=2 C. L. R. 1599.
(13) (1857) 7 El. & Bl. 266=119 E. R. 1246.

into which the coal was to be loaded. This view I take is confirmed by various circumstances. The price agreed upon was the ordinary market rate, and no extra allowance was made by the Company, as would undoubtedly have been made if the risk had been undertaken by them. It is also clear from the Mining Association Form that ordinarily the supply of coal from a colliery is made contingent upon the Railway authorities supplying wagons indented for by colliery upon receipt of despatching instructions from buyers. There would have been no controversy between the parties if the standard form of agreement had been used in this case: that they did not use it, does not imply that they intended to depart from the usual terms: if such had been their intention, one would have expected an express statement to that effect. On the other hand, the fact that the agreement was made at the Colliery, far away from Calcutta, furnishes an obvious reason why the form was not used. We have also the very significant circumstance that in the course of the protracted correspondence between the parties themselves, no suggestion was ever made by the buyers that the sellers were under an absolute obligation to supply the wagons. Thus to take the group of three letters dated 22nd, 23rd and 29th November, 1911. We find that the buyers complain of insufficient supply of coal, the sellers attribute the fact to heavy shortage of wagons, and the buyers in reply do not repudiate the excuse offered as irrelevant. In fact, the correspondence shews that the buyers throughout accepted the position that, if there was in reality a shortage of wagons, the Colliery Company was under an obligation only to allocate a fair share or proportionate share of available wagons for their use; and the grievance they made was that they were not given such proportionate share. It was not till the matter had been placed by the buyers in the hands of their Solicitors that, on the 8th May, 1912, the position was taken up that shortness of wagon supply was no excuse. Clearly in a matter of this description, the conduct of the parties themselves affords valuable evidence of what they really intended by the agreement they had made. I hold, accordingly, that the view which commended itself to Mr. Justice Chaudhuri cannot be supported, and that the Colliery Company did not impliedly undertake an absolute obligation to supply the wagons. The implied term of the agreement, on the other hand, was that the Colliery Company would load the contract quantity of coal into wagons if the requisite number was supplied by the Railway authorities on indents made by them, and that, in the event of short supply of wagons, the Colliery Company would allocate for the use of the plaintiffs a fair or proportionate share of the wagons available. The position, then, is that the fundamental ground which forms the basis of the decision of Mr. Justice Chaudhuri, fails; the result follows that the appeal must be allowed and the case remitted for re-trial.

I do not think it desirable to enumerate exhaustively the points which may require investigation at the re-trial: but, some aspects of the case, which were sought to be developed in more or less detail in the course of the argument addressed to us, though possibly imperfectly appreciated in the Trial Court, may be here indicated. One of the points for enquiry will obviously be, whether there was, as a matter of fact, a shortage of wagons and, if so, its extent; the question, thus stated, has a deceptive appearance of simplicity, though it is really of a complex character. The buyers allege that while about 600 wagons would have been sufficient for the purposes of their contract, the Colliery Company had at their disposal 2,300 wagons. This, *prima facie*, throws upon the Company the burden of proof that they were not under an obligation to use, for the benefit of the plaintiffs, all the wagons available, and that they were entitled to take into account the claims of other customers, and not only to give equal treatment to some, but preferential treatment to others. This aspect of the matter plainly requires careful scrutiny. The buyers also assert that apart from the question of short delivery of wagons, the Colliery Company had not ready the necessary stock of coal, and that, as a matter of fact, they had no room either to conduct screwing operations or to stock the coal. If this question is answered in favour of the Company, and if they also prove that there was a shortage of wagons due to circumstances beyond their control, the

question will arise, whether the Company did, in fact, allocate for the use of the plaintiffs a fair or proportionate supply of the available wagons; the proof of the affirmative of the allegation that they did so, clearly rests upon them. These and other questions, which it is neither possible nor desirable to specify precisely and exhaustively at this stage, will form the subject of investigation on the retrial. I am also of opinion that liberty should be reserved to the parties to amend the pleadings and to re-adjust the issues.

On these grounds, I agree that the appeal must succeed and the case be remitted for re-trial. The appellants are entitled to their costs here; the costs of the first trial will be in the discretion of the Trial Judge.

V.B./R.K.

Appeal allowed; Case remitted.

A. I. R. 1916 Calcutta 391 (1)

MOOKERJEE AND NEWBOULD, JJ.

Kumud Kumar Bose and *others*—Petitioners.

v.

Hari Mohan Samadar — Opposite Party.

Civil Rule No. 258 of 1915, decided on 30th March, 1915, against the Order of Dist. Judge, Barisal, dated 8th December, 1914.

Civil P. C. (5 of 1908), O. 43, R. 1—Dismissal for default of an application for setting aside *ex parte* decree is appealable.

Under Clause (*d*) of R. 1 of O. 43 of the Code of Civil Procedure an appeal is competent against an order of summary dismissal for default of an application to set aside an *ex parte* decree. [P. 391, C. 1 & 2.]

Soresh Chandra Bose—for Petitioners.

Judgment—In this case, the District Judge has refused to entertain an appeal against an order by which the Court of first instance dismissed for default an application to set aside an *ex parte* decree in a mortgage suit. The petitioner, who was the defendant in that suit, applied to have the *ex parte* decree set aside. The application was fixed for disposal on the 7th November, 1914. On that date an application was made on his behalf for adjournment. The Court held that the application was frivolous and refused to grant time: thereupon, the Pleader intimated to the Court that he had no further instructions. The application was accordingly dismissed for default. The petitioner then appealed to the District Judge; the result was that the following order was recorded: "No appeal lies; summarily dismissed." It is clear that under Clause (*d*) of R. 1 of O. 43 of the Code, the appeal was competent. The order assailed by way of appeal was an order under R. 13 of O. 9; it was immaterial that the application to set aside the *ex parte* decree had been dismissed, not on the merits, but for default. The District Judge has clearly declined to exercise a jurisdiction vested in him by law.

The result is that this Rule is made absolute and the order of the District Judge set aside. The records will be returned to him in order that the appeal may be heard on the merits.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 391 (2)

HOLMWOOD AND IMAM, JJ.

Jamir Fakir — Judgment-debtor — Appellant.

v.

Ram Lal Ghose Chowdhury—Decree-holder—Respondent.

Appeal No. 593 of 1914, decided on 31st January, 1916, from the Appellate Order of Sub Judge, Khulna, dated 20th November, 1914.

(a) Decree—Execution—Compromise decree—Executing Court—Power of.

An executing Court can go behind the terms of a compromise decree. [P. 392, C. 1.]

(b) Contract Act (9 of 1872), S. 74—Compromise decree—Stipulation to pay whole amount on default of payment of any instalment with interest at 36 per cent per annum—Provision for payment of interest held to be in nature of penalty.

A compromise decree provided that the defendant do pay a less amount than originally claimed according to certain instalments stated therein and that in default of payment of any instalment the whole amount do become payable at once together with interest at the rate of 36 per cent. per annum:

Held, that the liability to pay the whole amount in default of payment of any instalment was not a penalty but that the provision for the payment of interest at the rate of 36 per cent. per annum upon the whole amount was in the

nature of penalty within the purview of S. 74 of the Contract Act. [P. 392, C. 1.]

Tarak Chandra Chakrabarty—for Appellant.

Judgment.—The question which arises in this appeal is whether the compromise decree contained a contract involving a penalty within the meaning of S. 74 of the Contract Act. The learned Judge in the Court below held that he was unable to go behind the terms of the decree in which he appears to be in error. He also held that there was nothing unlawful or in the nature of penalty in the stipulations of the contract which was embodied in the decree.

The terms of the decree, as stated in the judgment, which are admitted to be correct by the appellant, are as follows: —"It is ordered that out of the amount claimed and costs, a decree be passed for Rs. 400 after deducting Rs. 508, remitted by the plaintiff, and that the defendant do pay the said sum according to the instalments stated below. In default of payment of any instalment, the whole amount shall become payable at once together with the sum remitted." So far, in our opinion, there is no penalty whatever. The case is precisely an ordinary one of discount for prompt payment, the debt due being Rs. 908 and Rs. 508 being remitted with a stipulation that Rs. 400 should be paid in eight instalments of Rs. 50 each without any interest, thus relieving the debtor of the exorbitant interest of 36 per cent. per annum, which was stipulated for in the original loan. But we find that in addition to this stipulation, which is one merely restoring the original principal if the conditions of remittance are not fulfilled, there is a further provision that interest shall be paid on the whole amount at the rate of half anna per rupee per mensem, that is, 36 per cent. per annum. Now this strictly speaking does come within the purview of S. 74 of the Indian Contract Act, and we may say that having regard to the unconscionable nature of the original bargain we do not think it necessary to assess any compensation *in lieu* of this interest which will be entirely expunged from the decree. But notwithstanding the view we take of the unconscionable nature of the original bargain we must hold that it is not within our competence to treat the restoration of the admitted debt to its original amount upon default under very easy terms of payment, which were given to the judgment-debtor in consideration of this large discount, as a penalty. To do so would be to work injustice in many other cases.

The appeal having been partially successful the appellant is entitled to his costs from the other side, who has not appeared, in proportion to the amount which will have to be deducted from the decree. We assess the hearing fee at three gold *mohurs*.

V.B./R.K.

Appeal partly allowed.

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ASUTOSH MOOKERJEE AND CHATTERJEE, JJ.

Dina Nath Das—Plaintiff—Appellant.

v.

Rama Nath Das and *others*—Defendants—Respondents.

Appeal No. 2098 of 1912, decided on 25th August, 1915, from the Appellate Decree of Sub Judge, Cuttack, dated 19th April, 1912.

(a) Limitation Act (9 of 1908), Sch. I, Art. 120—Applicability of—Art. 120 does not apply where consequential relief is asked for.

Article 120 of the Limitation Act is applicable to suits for declaratory reliefs but not to suits for declaration of title in which consequential reliefs are also prayed for.

(b) Specific Relief Act (1 of 1877)—Suit for declaration of title to land—Prayer for injunction upon defendant is prayer for consequential relief.

In a suit for declaration of title to land a prayer for injunction upon the defendant is a prayer for consequential relief quite as much as a prayer for confirmation of possession.

(c) Limitation Act (9 of 1908), Sch. I, Art. 120—Suit for declaration of title—Adverse entry in Record of Rights—Time does not run unless actual claim is made by defendant on strength of entry.

In regard to a suit for declaration of title to land in the possession of the plaintiff against whom an adverse entry has been made in the Record of Rights, time does not begin to run against him under Article 120 of the Limitation Act unless an actual claim is made by the defendant upon the strength of the entry.

Mohini Mohan Chatterjee—for Appellant.

Satis Chandra Mukerjee and *Suresh Chunder Chackerbutty*—for Respondents.

Mookerjee, J.—This is an appeal by the plaintiff in a suit for declaration of title to land, for confirmation of possession, and for the issue of a permanent injunction upon the defendants to restrain them from acts of interference with the plaintiff in the enjoyment of the disputed property. The case for the plaintiff is that he purchased the land on the 6th May, 1882, from the widow of one Golak Prosad, and that notwithstanding his possession on the basis of this purchase, his name was not registered by the Settlement Authorities at the time of the periodical Settlements. The order in the first of these Settlements was made adversely to the plaintiff in 1898, and this was repeated in 1908. The plaintiff states that the defendants, encouraged by these entries, have raised obstacles to his peaceful possession of the disputed property since the 28th November, 1907; he was consequently driven to institute this suit on the 4th April, 1910. The defendants pleaded, *first*, that the vendor of the plaintiff had no interest in the property, as her husband had predeceased her father-in-law, and, *secondly*, that the claim was barred by limitation. The Courts below have concurrently found in favour of the plaintiff upon the question of title. But whereas the Trial Court held that the claim was not barred by limitation, the Subordinate Judge has held that the suit is barred under Article 120 of the Schedule to the Indian Limitation Act, as explained in *Francis Legge* v. *Kambaran Singh* (1) and *Akbar Khan* v. *Turaban* (2). On the present appeal, the plaintiff has contended that the view taken by the Subordinate Judge upon the question of limitation is obviously erroneous. The argument in substance is that the suit is in no sense a suit for a pure declaratory decree, as he seeks a two-fold consequential relief, *first*, by way of confirmation of possession and, *secondly*, by way of a permanent injunction to restrain the defendants from unlawfully interfering with his possession. In our opinion, the decree of the Subordinate Judge cannot possibly be supported.

It need not be disputed, as ruled in the two cases mentioned by the Subordinate Judge and also in the decisions of this Court in the cases of *Mohabharat Shaha* v. *Abdul Hamid Khan* (3) and *Shyamanand Das* v. *Raj Narain Das* (4), that Article 120 of the Schedule to the Indian Limitation Act is applicable to suits for declaratory reliefs. But the present suit is not of that character, as a prayer for injunction is a prayer for consequential relief quite as much as a prayer for confirmation of possession: *Umatul Batul* v. *Nauji Kuar* (5) and *Jhuman Karti* v. *Debu Lal Singh* (6). Assume, however, that this is a suit for declaratory relief. The entries in the Record of Rights did not affect the possession of the plaintiff, though they might have been used in evidence against him in a possible suit for declaration of title. But the plaintiff was entitled to wait till the defendants had, on the strength of the entry in the Record of Rights, attempted to disturb his possession. This is clear from the decision in the case of *Sheopher Singh* v. *Deo Narain Singh* (7), where it was pointed out that unless an actual claim was made upon the strength of the entry in the Record of Rights, time did not begin to run against the plaintiff: *Rahmatullah* v. *Shamsuddin* (8). In our opinion, even if Article 120 be made applicable to this case, the suit has been instituted within six years after the cause of action arose. In this view the decree of the Subordinate Judge cannot be supported. It is needless to remand the case for a finding upon the question of possession, as the Trial Court expressly held that the plaintiff was not out of possession and this finding does not appear to have been assailed before the Subordinate Judge.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

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Appeal allowed.

(1) (1898) 20 All. 35.
(2) (1909) 31 All. 9=1 I. C. 557.
(3) (1905) 1 C. L. J. 73.
(4) (1906) 4 C. L. J. 568.
(5) (1907) 6 C. L. J. 427.
(6) (1912) 16 I. C. 898.
(7) (1912) 17 I. C. 675.
(8) (1913) 21 I. C. 609.

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WOODROFFE AND RICHARDSON, JJ.

Asad Ali—Plaintiff—Appellant.

v.

Bujrus Meher Bibi and *another*—Defendants—Respondents.

Appeal No. 2374 of 1913, decided on 31st May, 1915, from the Appellate Decree of Dist.-Judge, Chittagong, dated 2nd May, 1913.

(a) Civil P. C. (5 of 1908), S. 66—S. 66 is not retrospective and does not affect vested rights.

In a suit for redemption where it is found that an execution sale and a *benami* purchase took place in 1895, long before the passing of the present Code in 1908, and that at that time and afterwards and until the passing of the present Code the plaintiff has a vested right of redemption :

Held, that it ought not to be assumed, in the absence of any express words to that effect, that that right was taken away from him by the provisions of S. 66 of the Code of Civil Procedure. [P. 394, C. 1 & 2.]

(b) Civil P. C. (5 of 1908), S. 66—Scope of—It applies to all persons standing in shoes of purchaser—Effect of amendment stated.

Under the old law, S. 66 was only applicable to the certified purchaser, but as it is now amended it applies also to persons standing in the shoes of the purchaser. [P. 394, C. 1 & 2.]

Brojlal Chakravarti and *Jatindra Nath Lahiri*—for Appellant.

Kshitish Chandra Sen—for Respondents.

Woodroffe, J.—This was a suit for redemption which was decreed by the first Court. The lower Appellate Court has, I think, intended to affirm the findings of the first Court, but has held that the suit was barred by the provisions of S. 66 of the Code of Civil Procedure, and has, therefore, dismissed the suit. Now, as regards the applicability of S. 66, it is to be noted that the sale and purchase to which the defendant sought to make it applicable took place in 1895, when the old Code was in force. There is no doubt, upon the findings of fact arrived at by both the Courts, that, at that time and afterwards and until the passing of the present Code, the plaintiff had a vested right of redemption. Now, there is also no question as to that if the present Code governs the case then S. 66 is applicable. However, as the law then stood the section was only applicable to the certified purchaser; as it is now amended it applies also to persons standing in shoes of the purchaser. Formerly, according to the decisions of this Court and of the Madras High Court, it was held that S. 317 applied only to suits against the certified purchaser and not to suits against persons who derived title from him, such as his assignee or heir. According to the law in this Court under the preceding Code, the appellant is entitled to succeed, but if the case comes under the present Code then he fails. As this is a suit for redemption, the plaintiff had before the passing of the present Code a vested right to redeem. We ought not to assume, in the absence of any express words to that effect, that that right was taken away from him by the provisions of S. 66 of the Code of Civil Procedure. In my opinion, therefore, S. 66 does not apply to this suit. Then, however, it has been said that the findings of fact are not sufficient, and it has been argued that, if, as has been found, Guran Ali was a *benamidar* for the mortgagor, the latter allowed Guran Ali for a period of 16 years to hold possession of this property or allowed it to be believed that Guran Ali was the real purchaser under the sale of 1895, and that being so, and Lal Mea being, as it is contended, a *bona fide* purchaser for value, his rights exist. The first Court has come to distinct findings upon this argument and has held that Lal Mea was a creature of the mortgagee and that the conveyance of 1911 was brought about by the contrivance of this man to prevent Guran Ali from setting up a title to the land in suit which has all along been in his possession as mortgagee. And though there is not so explicit a finding by the District Judge in his judgment, there is a finding which seems equally sufficient, namely this, that the property has never been in possession of Guran Ali or Lal Mea and it remained throughout in possession of the mortgagee. If the property had all along been in possession of the mortgagee it is not possible to hold, under the circumstances, that Lal Mea could have supposed that Guran Ali had any title to it, seeing that his certificate of purchase was in 1895, 11 years after the sale to Lal Mea, and thereafter the property was held by the mortgagee.

Under these circumstances, I would decree this appeal, reverse the judgment

and decree of the lower Appellate Court and restore those of the Court of first instance, with costs of this Court and of the lower Appellate Court.

Richardson, J.—I agree.

V.B./R.K.

Appeal accepted.

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SHARFUDDIN AND NEWBOULD, JJ.

Taher Mondal—Plaintiff—Appellant.

v.

Tarafdi Gharami and *another*—Defendants—Respondents.

Appeal No. 2646 of 1913, decided on 31st March, 1915 from the Appellate Decree of Addl. Dist. Judge, 24 Parganas, dated 12th May, 1913.

Bengal Tenancy Act (8 of 1885), S. 155—Misuse of land by tenant—Suit for possession under S. 155—Suit is governed by Art. 32 of Sch 1 of Limitation Act (1908).

A suit for possession of land brought under S. 155 of the Bengal Tenancy Act on the ground of the tenant's misuse of the land or user in contravention of the terms of the *kabuliyat* is governed by Article 32 and not by Article 143 of Schedule 1 of the Limitation Act. 26 Cal. 564, foll. [P. 395, C. 1 & 2 & P. 396, C. 1.]

Dwijendra Nath Mukherjee—for Appellant.

A. K. Fazl-ul-Haq—for Respondents.

Sharfuddin, J.—This is an appeal from the judgment and decree of the Additional District Judge of 24 Parganas, dated the 12th May, 1913, setting aside the judgment and decree of the Munsif of Basirhat, dated the 30th April, 1912.

The plaintiff's suit against the respondents is for recovery of *khas* possession of certain lands by ejectment, on the ground that his tenant, defendant No. 2, in collusion with the defendant No. 1, allowed the latter to encroach upon the lands of the tenancy at the time of the re-excavation of a tank and further on the ground that he made an exchange of some lands of the tenancy with the defendant No. 1 in contravention of the terms of the *kabuliyat*. The present suit, it is alleged, was instituted on the refusal by the defendant No. 2 to pay compensation.

The defence of the defendant No. 2 is a denial of the allegations in the plaint and also that the suit is barred by limitation.

The Munsif gave a decree to the plaintiff holding that the suit was not barred by limitation. The defendant thereupon appealed to the District Judge, before whom it was contended on behalf of the plaintiff that the Schedule 3, part 1, Clause 1 of the Bengal Tenancy Act has no application to his suit, inasmuch as the defendant No. 2 was an under-tenant while the Schedule applied only to tenure-holders and *raiyats*.

The lower Appellate Court held that the position of an under-tenant was in no way different from that of the tenant for the purposes of the limitation as provided by the above Schedule of Bengal Tenancy Act. That Court further held that conceding the contention of the plaintiff to be correct the suit was barred by Article 32, Schedule II of the Limitation Act. That Court, on the above finding, allowed the appeal and dismissed the suit.

The plaintiff has now appealed to this Court. The only question that requires our decision is whether the plaintiff's suit is barred by limitation or not.

The present suit was instituted purely under S. 155 of the Bengal Tenancy Act. This section provides that the suits for ejectment on the ground (*a*) that the tenant has used the land in a manner which renders it unfit for the purposes of the tenancy, or (*b*) that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to be ejected, is entertainable only on a notice on the tenant. It appears from the plaint itself that the plaintiff treated his suit as coming under S. 155 of the Act (see paragraph 6 of the plaint).

The difference between the two sub-Ss. (*a*) and (*b*) is this. Under Clause (*a*) what is necessary is that the land should have been used in a manner which renders it unfit for the purposes of the tenancy, whether there is or is not any contract as to the manner of the use of the land. Clause (*b*) refers to a breach of a condition mentioned in the contract. In either of these two cases the tenant is liable to be ejected. The defendant No. 2 has done both.

What the plaintiff's case is, is indicated in paragraph 4 of the plaint in which he

says, after stating the misuse of the land of the tenancy by the defendant No. 2, that "This has caused great loss and mischief to the plaintiff. The defendant No. 2 took settlement of the land for his own agricultural purposes : but he has made it quite unfit for the purpose for which he took the *jote* settlement."

The finding of the lower Appellate Court is that the land of the tenancy was misused by the defendant No. 2 and in coming to that finding, the lower Appellate Court observed that it had no doubt the plaintiff knew of the misuse for more than two years before the time when he instituted the suit and his suit was, therefore, barred by limitation by Article 32, Schedule II of the Limitation Act.

On behalf of the plaintiff-appellant, it was urged that Article 143 was applicable. This Article provides that a suit for possession of immovable property should be instituted within 12 years from the time when the forfeiture is incurred or condition broken, when the plaintiff has become entitled by reason of any forfeiture or breach of condition. I am of opinion that this Article has no application to the present suit, which is not for possession of immovable property but which is against the defendant No. 2 for ejectment, who having a right to use the property for specific purposes perverted it to other purposes. For the latter class of cases the limitation is provided by Article 32 of the Schedule. And the limitation so provided is two years from the time when the perversion first becomes known to the person injured thereby.

In the Full Bench case of *Sharoop Dass Mondal* v. *Joggessur Roy Chowdhury* (1) it was held that in a suit brought by a landlord against a tenant where the primary relief sought was a mandatory injunction directing the defendant to fill up a tank excavated by him in contravention of the terms of the tenancy and to pay damages to the plaintiff for his wrongful act, and where the secondary relief sought was ejectment, and where the defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the excavation of the tank, that Article 32, Schedule II of the Limitation Act (XV of 1877), applied to the case and the suit was barred by limitation.

(1) (1899) 26 Cal. 564.

The above is a clear authority on the subject. I am, therefore, of opinion that the plaintiff's suit is barred by limitation and that the lower Appellate Court rightly dismissed it. The appeal is, therefore, dismissed with costs.

Newbould, J.—I agree.

V.B./R.K.

Appeal dismissed.

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MOOKERJEE AND NEWBOULD, JJ.

Salimulla Bahadur and *others* --Plaintiffs—Appellants.

v.

Rahenuddi and *others* –Defendants—Respondents.

Second Appeals Nos. 2539 and 2698 to 2707 of 1912, decided on 31st March, 1915, against the Decree of Sub-Judge, Backergunj, dated 20th July, 1912.

(a) Bengal Tenancy Act (8 of 1885), Ss. 163, 164 and 165—Scope of—Decree-holder can proceed under S. 165 if sale price at auction is not sufficient to satisfy decree.

The intention of the Legislature, as can be gathered from Ss. 163, 164 and 165 of the Bengal Tenancy Act, is to entitle a decree-holder, if he so desires, to proceed under S. 165 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs. [P. 398, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 165 and 167—Remedy under S. 165 is not optional—Decree-holder can remain content with sale under S. 164—In that case purchaser gets title free of encumbrance if procedure under S. 167 is followed—Consequence of sale under S. 164 does not depend upon amount of bid.

It is not obligatory upon him, however, in this contingency, to avail himself of the provisions of S. 165; he may nevertheless be content with the sale under S. 164 and if the sale is held under that section, the result described therein follows, *viz.*, the purchaser becomes entitled to annul all encumbrances, other than registered and notified encumbrances, provided he follows the procedure prescribed in S. 167.

[P. 398, C. 1.]

The consequence of the sale does not depend upon the amount of the bid offered by the succesful purchaser, it is independent of the value of the bid. [P. 398, C. 1.]

(c) Bengal Tenancy Act (8 of 1885), S. 165—Scope and object of S. 165 stated.

S. 165 was enacted solely for the benefit of the decree holder ; if the bid is not sufficient to satisfy his decree aud costs, it entitles him to have the property sold, with power to annul all encumbrances, but it is not obligatory on him to adopt this extreme measure and he is not in peril if he decides not to pursue this special remedy. 38 Cal. 923, dist. and diss. from.)

[P. 398, C. 1.]

Surendra Nath Guha—for Appellants.

Gunada Churn Sen—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for declaration of title to land and for recovery of possession thereof. The plaintiffs are the superior landlords of a *nim osut taluk*. The *talukdars* defaulted to pay rent, with the result that they were sued and a rent-decree was obtained against them on the 7th April, 1909. On the 5th August, 1909, the plaintiffs applied to execute the decree in accordance with the provisions of the Bengal Tenancy Act; five days later, an order was made for the simultaneous issue of the writ of attachment and the sale proclamation under sub-S. (1) of S. 163. The sale was held under sub-S. (1) of S. 164 on the 23rd September, when the decree-holders themselves purchased the defaulting tenure. The sale was confirmed in due course and symbolical delivery was made to the purchasers. They could not, however, obtain actual possession of the land, as they were resisted by the defendants who set up under-tenures in the property sold. The plaintiffs thereupon took proceedings under S. 167 of the Bengal Tenancy Act and the requisite notices for the annulment of the alleged encumbrances were duly served. On the 18th April, 1911, the plaintiffs commenced this action to eject the defendants. The Court of first instance found that the decree was for arrears of rent, that it had been executed in accordance with the provisions of the Bengal Tenancy Act, that at the sale held under sub-S. (1) of S. 164 the purchasers had acquired the tenure with power to annul the encumbrances thereon other than registered and notified encumbrances. and that steps had been taken in conformity with S. 167 to annul the encumbrances set up by the defendants. In this view the Court decreed the suit. Upon appeal the Subordinate Judge has reversed that decision on the ground that the sale, though held under the Bengal Tenancy Act, operated only as a sale under the provisions of the Code of Civil Procedure, and that the decree-holders auction-purchasers, had acquired nothing beyond the right, title and interest of their judgment-debtors. This decision is based on the ground that as the sum, realised at the sale, was not sufficient to liquidate the amount of the decree and costs, the sale must be deemed to have been held, not under sub-S. (1) of S. 164, but under the provisions of the Code of Civil Procedure. The Subordinate Judge, in this view, has dismissed the suit. On the present appeal, it has been argued on behalf of the plaintiffs that the view taken by the Subordinate Judge as to the effect of the sale held on the 23rd September, 1909 is erroneous and that the purchaser at that sale acquired the defaulting tenure with power to annul all encumbrances other than registered and notified encumbrances. This view has been controverted by the respondents, on the authority of the decision in *Banbihari Kapur* v. *Khetra Pal Singh Roy* (1). It has been, indeed, broadly argued on their behalf that a sale in execution of a decree for arrears of rent operates as a sale under sub-S. (1) of S. 164, only if the sum realised at the sale is sufficient to liquidate the amount of the decree and costs. We feel no doubt that this contention is erroneous and is not supported by the provisions of the Bengal Tenancy Act.

S. 159 formulates the fundamental principle that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as protected interests, but with power to annul the interests defined as encumbrances. S. 163 provides that when the decree-holder makes the application for execution mentioned in S. 162, the Court, if it admits the application and orders execution of the decree as applied for, shall issue simultaneously the order of attachment and the proclamation required by Rr. 66 and 70 of O. 21 of the Civil Procedure Code. Sub-S. (2) of S. 163 lays down that the proclamation shall announce that the tenure or holding will first be put up to auction, subject to the registered and notified encumbrances, and will be sold subject to those encumbrances, if the sum bid is sufficient to liquidate the amount of the decree and costs, and, that, otherwise, it will, *if the decree-holder so desires*, be sold on a subsequent date of which due notice will be given, with power to annul all encumbrances. Sub-S. (1) of S. 164 provides that when a tenure

(1) (1911) 38 Cal. 923=13 I. C. 785.

has been advertised for sale under S. 163, it shall be put up to auction, subject to registered and notified encumbrances; and if the bidding reaches a sum sufficient to liquidate the amount of the decree and costs including the costs of sale, the tenure shall be sold subject to such encumbrances. The respondents argue that if the bid does not reach a sum sufficient to liquidate the amount of the decree and costs, the sale, if concluded, operates only as a sale under the provisions of the Code of Civil Procedure, with the consequence that the purchaser acquires merely the right, title and interest of the judgment-debtor. We are clearly of opinion that this contention is not well-founded. If we were to accept the contention of the respondents, we would have to read into sub-S. (1) words which are not to be found there. The intention of the Legislature as can be gathered from Ss. 163, 164 and 165, is to entitle the decree-holder, *if he so desires*, to proceed under S. 165 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs. It is not obligatory upon him, however, in this contingency, to avail himself of the provisions of S. 165; he may nevertheless be content with the sale under S. 164: and if the sale is held under that section, the result described therein follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances, provided he follows the procedure prescribed in S. 167. The consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser; it is independent of the value of the bid. It is obvious that S. 165 was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold, with power to annul *all* encumbrances; but it is not obligatory on him to adopt this extreme measure, and he is not in peril if he decides not to pursue this special remedy. We have been pressed, however, to adopt the contrary view on the strength of some observations in the case of *Banbihari Kapur* v. *Khetra Pal Singh Roy* (1), which support the contention of the respondent. With all respect for the learned Judges who decided that case, we are unable to accept their view as a correct exposition of the law on the subject. But we do not think it necessary to refer the matter for decision to a Full Bench, because the observations mentioned were not necessary for the purpose of the decision of that case. It further appears that in that case the sale certificate stated that the purchaser had acquired merely the right, title and interest of the judgment-debtor, while in case before us the sale certificate shows, on the face of it, that the purchaser acquired the defaulting tenure itself which had been brought to sale. In our opinion, the view taken by the Subordinate Judge cannot possibly be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

It is conceded that this judgment will govern the other appeals, *viz.*, Nos. 2698 to 2707 of 1912 and similar decrees will be drawn up in each case.

Let the records be sent down as soon as possible.

V.B./R.K.

Appeals allowed.

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CHAPMAN AND MULLICK, JJ.

Krishna Prosad Singh—Judgment debtor—Appellant.

v.

Mati Chand—Decree-holder—Respondent.

Appeal No. 115 of 1914, decided on 5th January, 1916, from the Order of Dy. Commissioner and Sub-Judge, Hazaribaugh, dated 28th February, 1914.

(a) Decree—Execution—Limitation.

The execution of a decree cannot be barred by limitation in part. [P. 399, C. 2.]

(b) Decree—Execution—Money decree—Sale of judgment-debtor's property—Only portion of decretal amount realised—Sale set aside—Application for re-sale—Held decree-holder could realise by re-sale balance of decree also although application to execute decree for balance was barred.

In execution of a decree for money, only a portion of the decretal amount was realised by the sale of the judgment-debtor's property. Bu on the sale having been subsequently set

aside, the decree-holder applied for the re-sale of the property :

Held, that he could by the re-sale realise not only the sum which was the price obtained at the sale which was set aside, but also the balance of his decree, though an application to execute it for the balance would have been barred by limitation. 17 Cal. 268, dist.

[P. 399, C. 1 & 2.]

Provash Chandra Mitter and *Anilendra Nath Roy Chowdhury*—for Appellant.

Dwarka Nath Chakraburtty, Bepin Bihary Ghose, Karunamoy Bose and *Panchanon Ghose*—for Respondent.

Judgment.—This appeal is against an order, overruling an objection on the ground of limitation, made by a judgment-debtor to the execution of a portion of a decree. The decree was obtained in the Court of the Subordinate Judge of Benares on the 27th November, 1900 for Rs. 6,599-9-6. The decree was transmitted for execution to the Court of the Subordinate Judge of Hazaribagh. An application was made to the latter Court for the attachment and sale of a certain property, named Gadi Gandey, in execution of the decree. This application was made on the 19th of May, 1903. The property was accordingly attached and brought to sale on the 2nd of January, 1904. It was purchased by the decree-holder for Rs. 2,020. The judgment-debtor then applied to have the sale set aside and, upon his application, the sale was set aside on the 16th February, 1906. The decree-holder appealed to this Court. The order setting aside the sale was reversed and the sale confirmed on the 18th May, 1908. The judgment-debtor thereupon appealed to the Privy Council and, on the 6th March, 1913, their Lordships of the Privy Council reversed the judgment of this Court and set aside the sale. Upon the sale being set aside, the decree-holder had the right to apply to the Subordinate Judge of Hazaribagh for a re-sale of the property. He accordingly applied on the 1st December 1913 that the property namely, the estate Gadi Gandey, which had been already attached and sold in the execution proceedings commenced by the decree-holder in May 1903, should be re-sold. To this application the judgment-debtor objected that the decree-holder was not entitled to realise more than the sum of Rs. 2,020, which was the price obtained at the sale which was set aside by the Privy Council. The contention was that having realised that sum by the sale in January 1904 there had been nothing to prevent the decree-holder from proceeding to realize the balance of his decree, and that the subsequent proceedings leading to the setting aside of the sale did not in any way prevent the decree-holder from realising the said balance, and that more than three years having expired his right to realise the balance was barred by limitation. We note that the judgment-debtor conceded that the property might be re-sold if, on taking an account upon the basis that only Rs. 2,020 was due to the decree-holder, and after giving credit to the judgment-debtor for any sum due to him, it was found that any balance was due to the decree-holder.

The judgment-debtor, therefore, admitted that the application of the decree-holder, that the property might be re-sold, was an application for the revival of the previous proceeding. We have, therefore, not to consider that point. What we have to consider is whether, having regard to the fact that it was open to the decree-holder to proceed to execute his decree for the balance of the money due to him after realising Rs. 2,020 by the sale of the 2nd January, 1904, he is now, the period of limitation having expired, debarred from realising the whole of the decretal amount including the balance. The learned Subordinate Judge overruled the objection of the judgment-debtor holding that assuming, as was probable, that the decree-holder was satisfied with the property that he had purchased at the sale in execution, there was no reason in equity why the decree-holder should not now, that the sale had been set aside, realize the whole of the amount of his decree. The judgment-debtor appeals to this Court.

We can find no authority for saying that the execution of the decree can be barred by limitation in part. The learned Vakil for the appellant has relied upon the case of *Raghunandan Pershad* v. *Bhugoo Lal* (1) in support of his contention ; but in that case, it was not held that the execution of a portion only of the decree was barred. What was held was this that, upon the facts of that case, the application for execution, under consideration was a fresh application and not a

(1) (1890) 17 Cal. 268.

continuation of the previous application for execution, and was entirely barred for that reason. In the present case, it was conceded by the form of the objection made by the judgment-debtor that the application was, in fact, a continuation of the previous application. In the case referred to an entire property had been attached and subsequently, as the result of a separate suit, $\frac{2}{3}$rd of the property was released from attachment. The decree-holder thereupon applied for the attachment of the remaining $\frac{1}{3}$rd and it was held that the application for the attachment of the remaining $\frac{1}{3}$rd was not a continuation of the previous application for the attachment of the entire property. In the present case there can be no doubt that the application that the property might be re-sold was not a fresh application. It was an application in continuation or for the revival of the previous application for the sale of the identical property. We are satisfied that the objection of the judgment-debtor has been properly overruled. The appeal is accordingly dismissed with costs. We assess the hearing fee at three gold *mohurs*.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 400

SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Johur Lall Dey—Plaintiff—Appellant.

v.

Dhirendra Nath Dey—Defendant—Respondent.

Second Appeal No. 20 of 1915, decided on 24th November 1915, against the Judgment of Chaudhuri, J., dated 4th December, 1914.

(a) Succession Act (10 of 1865), S. 57—Partial tearing of will, held, under circumstances effectual for purpose of revocation.

A testator sent for his will from his solicitor and wrote the word "cancelled" on it and signed his name and dated it and thereafter, according to the instructions of the solicitor, intentionally tore the will only partially, without ever intending to tear it up altogether:

Held (per Curiam), that the tearing, under the circumstances was effectual under S. 57 of the Indian Succession Act for the purpose of revocation. [P. 402, C. 2 & P. 403, C. 1.]

(b) Succession Act (10 of 1865), S. 57—Writing word "Cancelled" and signing name, followed by partial hearing of will constitutes effectual revocation of will.

Per *Sanderson, C. J.*—A tearing (though partial) of a will, which is such a tearing as to evidence the testator's intention to revoke the will and is all the tearing that he intends to do, added to the fact that he writes the word "cancelled" on the will and signs his name, constitutes in law an effective revocation of the will. [P. 403, C. 2.]

(c) Practice—Appellate Court—Interference—Questions of facts—Opinion of Trial Court ought not to be differed from except on clear grounds.

The opinion of a Trial Judge on questions of fact formed after seeing the witnesses and hearing their evidence, ought not to be differed from by a Court of Appeal, except upon very clear grounds. [P. 401, C. 2.]

(d) Succession Act (10 of 1865), S. 57—Will—Revocation—Elements—Revocation consists of two elements intention of testator and some outward symbol of destruction—Both elements are necessary.

Per *Mookerjee, J.*—S. 57 of the Indian Succession Act lays down that revocation consists of two elements: intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling, or obliterating are sufficient to constitute a total or partial revocation of a will must depend to a considerable extent upon the circumstances of each case. [P. 404, C. 1.]

(e) Succession Act (10 of 1865), S. 57—Will—Revocation—Partial tearing—Effect of.

The slightest act of tearing with intent to revoke the whole will thereby is sufficient to constitute valid revocation. [P. 404, C. 1.]

S. P. Ghosh and *C. C. Ghosh*—for Appellant.

Jackson, Langford James and *P. N. Dutt*—for Respondent.

Sanderson, C. J.—In this case the question arises in connection with the will of a man called Fakir Chand Dey. The appellant is the sister's daughter's husband, and the respondent is the son of the testator.

The will was made on the 7th of April, 1903 and under it the appellant took a substantial interest. The will is alleged to have been revoked on the 29th of August, 1913. The testator, apparently, was taken ill in August, 1913; he went to a place called Karmatar and returned from there some time in August, and, according to the endorsement in the will, he cancelled his will on the 29th of August, 1913.

The appellant puts his case in two ways. He says *first* of all that the whole of the cancellation was not genuine. He alleges that the handwriting on the will which purports to be the cancellation is not in the handwriting of the testator, that the signature which purports to be the signature of the testator in respect of the cancellation is not the signature of the testator, and he goes on to say that the date was originally the 9th of August but was altered, at some time or other, to the 29th of August. He also says, though his learned Counsel did not seem to lay so much stress on this part of his case, that although the words of the cancellation may have been written upon the will by the testator himself and although the signature may have been his, still there was no tearing at the time the word "cancelled" was written, and that the tearing was done by somebody after the testator's death.

There is an alternative point which the appellant takes. He *further* says that even if the cancellation in every sense of the word was a genuine cancellation, it is not effective in law, because the cancellation was not attested by two witnesses in accordance with the provisions of the Act, and secondly, that the tearing is not a sufficient tearing in compliance with the provisions of the Act.

On the other hand, on behalf of the respondent it was contended in the Court of first instance that the cancellation was absolutely genuine, that the testator consulted his solicitors Messrs. Bonnerjee and Bonnerjee of whom Jotindra Bonnerjee was the surviving partner, that Mr. Bonnerjee was summoned to the house of the testator, that he took the will with him to the testator's room, that after requesting the testator's partner to leave the room, and in the presence of the testator's son, the testator wrote the word which appears on the will, "cancelled," and signed his name and dated it the 29th of August.

I think it would be quite unnecessary and would be uselessly taking up the time of the Court if I were to go into the facts of the case in great detail. The main facts have been very carefully set out by the learned Judge of the Court of first instance who tried the case: they have been very clearly stated by the learned Counsel who appeared before us, and in addition to that we have a statement of the facts relied upon by him handed up to the Bench this morning. I have stated the contention on the one side and on the other. In my opinion this was a case in which the main question—which was, of course, a very serious question—as to whether this cancellation was a genuine cancellation or not, is a question of fact and which to a very large extent depended upon the evidence of witnesses and the way in which they gave their evidence.

It is quite unnecessary for me to emphasize the point that the learned Judge who has to decide a question of fact has the opportunity and advantage of seeing the witnesses in the witness-box, of hearing them give their evidence and of observing their demeanour when they are giving their evidence and has thus enormous advantage over Judges who are sitting in the Court of Appeal, and for whose guidance there are only the written memoranda of the evidence and the arguments of the learned Counsel, who no doubt place their case before the Court, as in this case, to the best of their ability, and, where the point is really a question of fact, speaking for myself only, I should be very reluctant to interfere with the judgment of the learned Judge of the Court of first instance who has had that opportunity of seeing the witnesses on both sides and has evidently tried the case with very great care and has given the matter his earnest consideration. In my judgment, the opinion of the learned Judge, so formed after seeing the witnesses and hearing their evidence upon a question of fact, ought not to be differed from by this Court except upon very clear ground indeed.

Now, in spite of the very able arguments of the two learned Counsel for the appellant to which I have listened with great attention, they have not satisfied me that Mr. Justice Chaudhuri upon this question of fact has gone wrong: and, that being so, it is really not necessary for me to say more. I quite agree with them that there are matters which might legitimately give rise to suspicion; I may mention, as an instance, the fact that inspection was not given as was asked for; that the reasons for refusing that inspection might not appear to be good reasons; that an unjustifiable charge of Rs. 200 was asked

for as preliminary to giving such inspection - I am only mentioning these facts to show that I have not forgotten but have considered them. Then there is the fact that the day-book was not at first produced and was not actually seen until April, 1914. There is also the fact that there is a blot upon the will which, it is urged by the learned Counsel for the appellant, is a blot of the figure 2 only and, therefore, goes to show that the figure 2 was added afterwards and was not put upon the paper at the same time as the figure 9. I have considered that. Judging through my own eyes, I am not at all certain that the blot is not only of the figure 2 but of part of the figure 9 as well; and, I am not at all certain that there may not have been some more ink used upon the first part of the writing which deals with the date and that part may not have dried so soon as the other. And, while I am referring to this, I may mention that it seems to be quite possible that anybody looking at the figures hurriedly might say this is 9th August, but looking at it more closely, it is not 9th but 29th. The two figures are put so closely together that on casual or short inspection they may appear to be one. I am only mentioning these matters to show that I have not forgotten them, but I do not intend to go into any detail. I may justify my judgment upon this ground that the question is a question of fact, and Mr. Justice Chaudhuri had the evidence which, in my opinion, if believed, justified him in coming to the conclusion to which he did. I have considered the whole of the evidence, and the learned Counsel for the appellant has not satisfied me that the opinion of the learned Judge is wrong. This is quite sufficient to say with regard to the *first* point.

With regard to the *second* point, it raises a very interesting question of law and it is this: Assuming that the cancellation upon the will was a genuine cancellation, still it is not such as complies with the provisions of S. 57 of the Indian Succession Act.

Now, that section, no doubt, requires two things, first of all, an intention to revoke, and secondly, the cancellation to be executed in the same way as a will ought to be executed, or there must be a burning tearing or otherwise destroying the will. The section says, "No unprivileged will or codicil nor any part thereof *shall be revoked otherwise than by* marriage or by another will or codicil or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed." I may pause here for one moment to say that it is admitted in this case that the alleged revocation or cancellation was not executed in the manner in which a will ought to be executed. Then the section goes on to say, "or by the burning, tearing or otherwise destroying the same by the testator . . . *with the intention of revoking the same.*" Therefore, we have got to consider whether there was first of all the burning, tearing or otherwise destroying, and secondly, if there was such burning, tearing or otherwise destroying, whether that was done with the intention of revoking the will. Now, the only thing that is alleged here is tearing. Therefore, all we have got to consider is whether such tearing comes within this section, and secondly, whether this was done with the intention of revoking the will.

Now, it seems to me that if Mr. Justice Chaudhuri's judgment be upheld upon the *first* point—as in my opinion it must be namely, that the cancellation was genuine, then it is obvious that the testator had the intention of revoking his will. Therefore, the only question which is left to be considered is whether there was a tearing of the will in such a way as to comply with the provisions of the section. In my opinion there was. It is to be noted in this case that according to the evidence which Mr. Justice Chaudhuri has accepted, the testator did all that he was told to do. The learned Judge says, "He never intended to tear it up altogether. His intention was only to tear it partially as suggested by his attorney. He completely carried out the instructions of his attorney. He was not told to do anything more and did not intend to do anything more." I draw attention to that, because that seems to me to entirely distinguish this case from the case of *Elms* v. *Elms* (1) to which the learned Judge of the Court of first instance drew attention, and the report of which Mr. Justice Mookerjee has handed to me this morning. In that case there was a tearing of the will, a tearing across all the pages

(1) (1858) 1 Sw. & Tr. 155=27 L. J. P. 96.

of the will, but no one of them was completely torn through, and it came about in this way: The testator when he began to tear them intended to revoke the will. Before he completely tore them he was prevented by the exclamations of those who were in the room from completing the tearing by tearing it right through, and, therefore, he never actually completed that which he set out to do. In this case, if we accept the finding of fact—which I have said we ought to do—that what the testator was told by his attorney to do was to tear the will partially, and Mr. Justice Chaudhuri has found on the evidence that he carried out those instructions, the testator did complete that which he set out to do. It is pretty clear to my mind upon the authority of the learned Judge who gave judgment in that case, and I adopted what he says, that the Legislature does not mean that the testator must rend the will into more pieces than it originally consisted of. The learned Judge adds "and, therefore, although no one sheet of paper was completely divided, I think the tearing might be sufficient to revoke it done with that intention. But in order to make it effectual he must have intended to revoke by so tearing it: by which I mean that he must have intended that which he actually did of itself to have that effect without more." Mr. Justice Chaudhuri has found quite clearly on the evidence—and I do not intend to interfere with that finding—that when the testator did tear the will in the way he did, he did intend to revoke it by so tearing and he did not intend to do any more tearing. That being so, I think the tearing comes sufficiently within the meaning of the section. I have to refer to one other case which the learned Counsel has cited this morning in the course of his argument, *Bibb* d. *Mole* v. *Thomas* (2). In that case the testator being in bed one day near the fire ordered a person to fetch his will, the will was fetched, and then he opened it and gave it a rip with his hands and then rumpled it together and threw it on the fire, but it fell off and was not burnt. The person who was in the room picked it up and kept it without his notice. It was left to the jury to consider whether that was sufficient revocation and the jury found that it was and that the testator intended to revoke it: and when it went to the Court, Chief Justice Grey observed that this case fell within two of the specific acts described by the statute: it was both a burning and tearing, although as a matter of fact in that case the will had got only a rip with the hands and had fallen off the fire being slightly burnt without being seriously injured. I think upon the authority of those two cases, it is clear that a tearing which is such a tearing as to evidence a man's intention to revoke a will, and is all the tearing that he intends to do and then stops as he has done in this case, a tearing which he was directed to do on the evidence of his attorney, and this added to the fact that he writes the word "cancelled," and signs his name, would, in my opinion, be a sufficient compliance with the provisions of the section; and on those grounds I think Mr. Justice Chaudhuri's judgment was right upon the *second* point.

For these reasons I think Mr. Justice Chaudhuri's judgment and decree must be upheld and this appeal must be dismissed with costs.

Woodroffe, J.—I am of opinion that the facts of this case establish that what was alleged to be done constituted an effective revocation in law. The rest of the question is one of simple fact. The appellant has shown no ground for disturbing the Judgment of the Court of first instance, the accuracy of which in the main depends on the value, which the learned Judge attached to the witnesses whom he had an opportunity, which we have not, of seeing. I agree, therefore, that the appeal should be dismissed.

Mookerjee, J.—I agree that Mr. Justice Chaudhuri arrived at the correct conclusion upon each of the two fundamental points in the case, namely, *first*, was there a genuine act of cancellation by the testator? and *secondly*, was the act operative as a valid cancellation in law?

The answer to the *first* of these questions depends upon the evidence. Notwithstanding the careful criticisms of the Counsel for the appellant, I can see no good ground to differ from Mr. Justice Chaudhuri in his estimate of the evidence on the record, which conclusively

(2) (1749) 2 W. Bl. 1043=96 E. R. 613.

establishes that the endorsement of cancellation was made by the testator. There is also satisfactory evidence to show that the will was torn by the testator. There is an entry to this effect in the day-book of the attorney, and I see no reason to doubt the genuineness of that entry. We have consequently the two facts that the will was torn by the testator and that he made an endorsement to show that he intended to cancel the will thereby.

The *second* question is, whether the act of tearing was operative as a valid cancellation in law. The answer depends upon the true construction of S. 57 of the Indian Succession Act. That section, as I read it, lays down that revocation consists of two elements ; intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling or obliterating are sufficient to constitute a total or partial revocation, must depend, to a considerable extent, upon the circumstances of each case. Reference may, in this connection, be made to a passage in the judgment in the case of *Price* v. *Powell* (3) : "If the document should be entirely burnt up, entirely obliterated or torn into scraps or covered with cross-lines, there would be no doubt as to the intent of the testator. But it is not necessary to go to that extent in any of the modes, in order to answer the requirements of the statute, and, the slightest degree of either mode is effectual as to such revocation, provided it appears that the act was done with the intent to have it constitute a revocation." The conclusion consequently follows that by tearing is not meant a literal tearing to pieces : the slightest act of tearing with intent to revoke the whole will thereby is sufficient for the purpose. This view is in agreement with the principle deducible from *Bibb* d. *Mole* v. *Thomas* (2), *Clarke* v. *Scripps* (4), *Elms* v. *Elms* (1), *Price* v. *Powell* (3) and *Williams* v. *Tyley* (5). On these grounds, I agree with the learned Chief Justice that the judgment of Mr. Justice Chaudhuri must be affirmed.

V.B./R.K.

Appeal dismissed.

(3) (1858) 3 H. & N. 341 = 117 R. R. 719.
(4) 2 Rob. Ecc. 563.
(5) (1858) Johnson 530 = 123 R. R. 223.

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MOOKERJEE AND BEACHCROFT, JJ.

Kanchan Mandar and *others*—Defendants—Appellants.

v.

Kamala Prosad Chowdhury and *another*—Plaintiffs—Respondents.

First Appeal No. 439 of 1911, decided on 10th August, 1914, against the Decree of Sub-Judge, Bhagalpur, dated 28th August, 1911.

(a) Transfer of Property Act (4 of 1882), S. 53—Where transfer is not shield to transferor and transfer is *bona fide* it is not fraudulent.

Where there is nothing to show that a transferor intended a sale of his immovable property as a cloak or device for his own protection and where the *bona fides* of the transfer cannot be doubted, the transfer cannot the impeached as fraudulent. 34 Cal. 999, foll. [P. 405, C. 2.]

(b) Evidence Act (1 of 1872), S. 115—Estoppel by misrepresentation by words or conduct will apply only when the person is bound to speak.

The case, where the person against whom the estoppel is sought to be applied is under no duty to speak, is not covered by the principle that where a person, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter that a different state of things existed at the time. [P. 406, C. 1.]

(c) Evidence Act (1 of 1872), S. 115—Execution sale—Purchaser is affected by estoppel raised by judgment-debtors not objecting.

A purchaser at an execution sale is not entitled to raise the question of transferability of the holding and is bound by the same rule of estoppel as the judgment-debtor. 1 I. C. 264 ; 22 Cal. 909, (P. C.) and A.I.R. (1915) Cal. 242 foll. [P. 406, C. 2.]

(d) Co-sharer—He can raise question of transferability and can eject auction-purchaser of non-transferable holding.

A co-sharer landlord having a three-fourths share is entitled to raise the question of transferability of the holding. 26 Cal. 553, foll. [P. 406, C. 2.]

The purchaser can be evicted by any of the co-sharer landlords to the extent of his own share, in a sale of a non-transferable occupancy holding, and if possession of the entire holding has been acquired by some of the co-sharers the other co-sharers are entitled to joint possession thereof. [P. 406, C. 2.]

Caspersz, *Jogesh Chandra Roy*, *Surendra Nath Kumar Bose* and *Khurshed Hossein* —for Appellants.

Umakali Mookerjee, *Jogendra Chunder Ghose* and *Smritis Chunder Ghose*—for Respondents.

Judgment.—The subject-matter of the litigation which has culminated in this appeal is an agricultural holding owned by the members of a family of Mandars under the plaintiffs and the defendants as their landlords. The plaintiffs are interested to the extent of a fourth share and the defendants to the extent of a three-fourths share in the superior interest. The Mandars had mortgaged the holding to the defendants who sued to enforce their security, obtained a decree thereon, and took steps to bring the holding to sale in execution. On the 17th February, 1908, the Mandars transferred the holding to the plaintiffs under a conveyance for Rs. 1,020 which was paid into Court in satisfaction of the mortgage-decree held by the defendants. The defendants had, prior to these proceedings, instituted a suit against the Mandars for arrears of rent payable in respect of their three-fourths share. An *ex parte* decree was at first obtained and was subsequently set aside; finally, on the 20th February, 1908, a decree for rent, which could operate only as a decree for money, was made in favour of the defendants. On the 16th June, 1908, the defendants in execution of that decree purchased the right, title and interest of the Mandars in the holding in dispute. They obtained delivery of possession through Court and thus dispossessed the plaintiffs. On the 29th July, 1910, the plaintiffs instituted the present suit for declaration of their title by purchase and for recovery of possession. The defendants contended that the holding was non-transferable and that the plaintiffs had consequently acquired no title under their purchase. The Subordinate Judge has not allowed evidence to be given upon the question of the existence of a custom of transferability of occupancy holdings in the locality, on the authority of the decision in *Haro Chandra Poddar* v. *Umesh Chandra Bhattacharjee* (1). He has found on the merits in favour of the plaintiffs and has made a decree for possession and for determination of mesne profits.

In the present appeal by the defendants, the decree of the Subordinate Judge has been assailed substantially on four grounds: namely, *first*, that the conveyance by the Mandars in favour of the plaintiffs was fraudulent and did not pass title to them; *secondly*, that the plaintiffs are estopped to deny the validity of the title of the defendants, as with full knowledge of the rent decree and of the execution proceedings thereon they did not raise any objection; *thirdly*, that the defendants in their character as purchasers at an execution sale were entitled to raise the question of transferability of the holding; and, *fourthly*, that the defendants in their character as co-sharer landlords were entitled to resist the claim of the plaintiffs to the extent of a three-fourths share.

In support of the *first* ground, it has been contended that at the time when the conveyance was executed by the Mandars in favour of the plaintiffs on the 17th February, 1908, the transferors as well as the transferees were aware of the pendency of the suit for arrears of rent, and that the transfer was consequently a device to defeat the claim of the defendants as landlords. There is clearly no foundation for this contention. There is nothing to show that the transferors intended the sale as a cloak or device for their own protection; and on the principle explained by this Court in the case of *Hakim Lal* v. *Mooshahar Sahu* (2), the transfer cannot be impeached as fraudulent. The *bona fides* of the transfer cannot be doubted, because during the pendency of the execution proceedings on the basis of the mortgage, the transferors intimated to the Court that they intended to satisfy the mortgage-decree by sale of some of their properties, though they did not specify the particular properties they intended to sell. There was a valid decree against them, and the sale for consideration effected in these circumstances cannot be deemed fraudulent. The first ground thus fails.

In support of the *second* ground, it has been urged that the transferors and the transferees were both aware of the rent suit, that it was their duty to intimate to the Court that the property which the

(1) (1910) 5 I. C. 39.

(2) (1907) 34 Cal. 999.

defendants sought to bring to sale in execution of their decree for rent had already been transferred by the conveyance of the 17th February, 1908 and that their omission to do so estopped them now, on the principle recognised in *Pickard* v. *Sears* (3). That case has plainly no application here. It is well settled that where a person, by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter that a different state of things existed at the time. But this principle has no application where the person against whom the estoppel is sought to be applied is under no duty to speak. Here, it has not been established that the plaintiffs were under any duty to speak and that by reason of their failure to warn the defendants, the position of the latter has been altered. The second ground consequently cannot be sustained.

In support of the *third* ground, it has been argued that the defendants in their character as purchasers at an execution sale were entitled to raise the question of transferability of the holding. This contention cannot possibly be supported in view of the principle laid down by the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (4). As between the plaintiffs and their transferors, no question of transferability could be raised, because the transferors were bound by the doctrine of estoppel not to question the title of their transferees. As between the transferors of the plaintiffs and the defendants, there was no estoppel, because the defendants were purchasers at an execution sale. It was, accordingly, open to the Mandars to impeach the title of the defendants after the sale or to take objection before the sale if they had timely intimation of the execution proceedings. But that stage has been passed and the Mandars have not objected to the validity of the execution sale. Consequently, as between the Mandars and the defendants, it must be held that the defendants are the purchasers of the right, title and interest of their judgment-debtors, and are bound by the same estoppel as binds their judgment-debtors. Upon this question, there has been some fluctuation of judicial opinion, but, as was explained in the case of *Debendra Nath Sen* v. *Mirza Abdul Samed* (5), upon a review of the authorities, it is now well-settled that a purchaser at an execution sale is bound by the same rule of estoppel as the judgment-debtor, on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage. This view is supported by the decision of the Judicial Committee in *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6). The inference follows that the defendants, viewed in their character as purchasers of the right, title and interest of the Mandars, are not entitled to raise the question of transferability of the disputed holding. The third ground accordingly fails.

In support of the *fourth* ground, it has been urged that the defendants, in their character of co-sharers in the superior interest to the extent of a three-fourths share, are entitled to raise the question of transferability of the holding. This contention is clearly well-founded on principle and is supported by the decision in *Dilbar Sardar* v. *Hosein Ali Bepari* (7). In the event of sale of a non-transferable occupancy holding, the purchaser can be evicted by any of the co-sharer landlords to the extent of his own share, and if possession of the entire holding has been acquired by some of the co-sharers, the other co-sharers are entitled to joint possession thereof. Consequently the question of transferability was material for the purposes of the decision of the case, and the fourth ground taken by the appellants must prevail.

It has been argued, however, on behalf of the plaintiffs-respondents, that even if the holding is not proved to be transferable by custom or local usage, the defendants are estopped by their conduct, and that as they have taken the purchase-money in satisfaction of their mortgage dues, they cannot question the title of the plaintiffs under their conveyance. Upon the materials on the record it is not possible for us to give effect to this contention. No doubt, after the purchase by the plaintiffs had been completed, the

(3) (1837) 6 A. & E, 469.
(4) A. I. R. (1915) Cal. 242=27 I. C. 61.
(5) (1909) 1 I. C. 264.
(6) (1895) 22 Cal. 909=22 I. A. 129 (P. C.)
(7) (1899) 26 Cal. 553.

defendants took the money deposited in Court; but, this by itself does not estop them. Yet, it may be possible for the plaintiffs to establish by evidence that the conduct of the defendants, before the sale was completed and during the stage of negotiation, was such as to estop them. This must be determined by the Court below along with the question of transferability of the holding.

The result is that this appeal is allowed in part. The decree of the Subordinate Judge will stand confirmed in respect of an one-fourth share, but will be set aside in respect of the remaining three-fourths share. To this extent, the case will be remanded in order that the title of the plaintiffs may be investigated on the basis of their purchase. The question of transferability raised by the defendants as well as the question of estoppel raised by the plaintiffs will be open for investigation, and both parties will be at liberty to adduce evidence. The plaintiffs-respondents are entitled to one-fourth of the costs of this appeal, and three-fourths of the costs will abide the result.

V.B./R.K.

Appeal partly allowed; Case remanded.

A. I. R. 1916 Calcutta 407

WOODROFFE AMD NEWBOULD, JJ.

Bhata Ram Das—Plaintiff—Appellant.

v.

Kshitish Chandra Lahiri and *others*—Defendants—Respondents.

Appeal Nos. 2538 and 3830 of 1913, decided on 16th July, 1915, from the Appellate Decrees of Dist. Judge, Rangpur, dated 3rd May, 1913.

(a) Occupancy holding—Non-transferable—Transferee of portion is not protected on ouster of tenant by sale of the holding.

Where a tenant is upon his holding, which is not transferable by custom, his possession protects the party to whom he transfers a portion of his interest; but where the tenant is no longer on the land after the holding has been sold, his property becomes the property of the landlord. [P. 407, C. 2.]

(b) Landlord and tenant—Suit—Transferee of portion of non-transferable holding can join in suit for possession against landlord—Civil P. C. (5 of 1908), O. 1, R. 10.

A purchaser of a non-transferable holding can, after the holding has been sold and the original tenant is no longer on the land, be a party to a suit for recovery of possession from the landlord. [P. 407, C. 2 & P. 408, C. 1.]

(c) Evidence Act (1 of 1872), S. 115—Auction-sale in rent decree—Deposit by transferee of portion—Objection by landlord overruled—Deposit withdrawn—Withdrawal does not amount to estoppel—Landlord not bound to appeal.

Where on an auction-sale of a holding not transferable by custom, a transferee of that holding made a deposit to set aside the sale but the landlord objected and on the Court overruling the objection, the landlord withdrew the money:

Held, that this did not amount to an estoppel, since the landlord objected and acted in accordance with the order of the Court. [P. 408, C. 1.]

That there was no duty on the landlord to proceed by way of an appeal to have it established that the transferee had no right to make the deposit. [P. 408, C. 1.]

Dhirendra Nath Bagchi—for Appellant.

Sarat Chandra Roy Chowdhury and *Satya Charan Sinha*—for Respondents.

Judgment.—These two appeals, Nos. 2548 of 1913 and 3830 of 1913, may be heard together. The first appeal refers to a purchase of a part of a non-transferable holding and the second to a purchase of the whole of such holding. The landlord brought a suit for rent against the recorded tenants, the purchasers not having been recognised by him. In that suit he brought the property to sale, purchased it and took possession. Thereupon the purchasers of the part and of the whole of the holdings respectively brought two suits to recover possession, and the Court below held that the purchasers of a non-transferable holding were not entitled to maintain these suits to set aside the sale on the ground of fraud.

In the first case the learned Vakil for the appellant relied upon the Full Bench decision of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (1), which held that "the transferee of a holding not transferable by custom can, by a suit, recover possession from the landlord who had forcibly dispossessed him." That may be so; but that is not the case before us. If the tenant is upon the land, then his possession protects the party to whom he has transferred a portion of his interest. That is not the case here. The tenant is no longer on the land after the holding has been sold, and what was the property of the original tenant is now the property of the landlord. Now nothing in the decision of the Full Bench shows that the

(1) A. I. R. (1915) Cal. 242=27 I. C. 61=42 Cal. 172.

Court below was not correct in holding that the purchasers of a non-transferable holding can, after the holding has been sold and the original tenant is no longer on the land, be a party to a suit for recovery of possession from the landlord. So I hold that this appeal fails.

As regards the second appeal, an argument was based on the ground of estoppel. It is said that after sale, the appellant made a deposit which was withdrawn by the landlord, and he cannot now say that the transferee was not recognised by him. There may be circumstances under which such estoppel may arise. Now, what we have to do is to look at the facts, and we find, as established by the first Court's judgment, that when the appellant sought to make the deposit, the landlord objected to its being made on the ground that the appellant had no *locus standi* to make the deposit. That objection was overruled by the Court below and the landlord withdrew the money inasmuch as the Court allowed the deposit. To my mind it appears that this does not amount to an estoppel, since the landlord objected and acted in accordance with the order of the Court. There was no duty on the landlord to proceed by way of an appeal to have it established that the transferee has no right to make the deposit.

Therefore, both the appeals fail and are dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 408

CHATTERJEE AND BEACHCROFT, JJ.

Sadulla Mridha and *others*—Defendants—Appellants.

v.

Joynabunnessa Bibi and *others*—Plaintiffs—Respondents.

Appeal No. 3456 of 1913, decided on 19th January, 1916, from the Appellate Decree of Sub-Judge, Mymensingh, dated 8th July, 1913.

(a) Limitation Act (9 of 1908), Sch. I, Art. 121—Non-transferable occupancy holding inherited by three brothers B. C. and D. jointly—Sale of portion of E and F—G settled as sub-tenant on another portion—Name of H alone recorded—H purchasing holding in execution of rent decree against B alone and settling it with A—Suit by A for possession within 12 years from date of symbolical possession but more than 12 years from date of execution sale—Suit held not barred against C and D—Suit held barred against G. E. and F—E and F were liable to be turned out by separate suit brought within 12 years of execution sale.

Three brothers, inherited a non-transferable occupancy holding jointly and sold a portion of it to *E & F* and settled a sub-tenant *G* on another portion. But the name of *H* alone was recorded in the *sherista* of the landlord, who in execution of a decree obtained in a suit for rent against *B* alone purchased the holding himself and settled with *A*. The latter within 12 years from the date of symbolical possession, but more than 12 years from the date of the execution-sale, instituted a suit against all the defendants for possession of the holding:

Held, that the suit was not barred as against *C & D*, for they having elected to be represented in their relations to the landlord by their brother, *B*, were parties to the suit in the name of their brother and could not be heard to say that they were strangers to the suit; and that, therefore, against them the symbolical possession gave start to a fresh period of limitation;

[P. 409, C. 1.]

that as *G*, *E* and *F* were strangers to the suit, the delivery of symbolical possession did not affect their possession, and that the suit as against them was barred by limitation.

[P. 409, C. 2.]

that *E* and *F* being unrecognised purchasers of a portion of the holding, were bound by the result of the rent suit and were liable to be turned out by a separate suit brought for the purpose within 12 years from the date of the execution sale. 6 C. L. J. 472, expl. and appl.

[P. 409, C. 2.]

A. K. Fazlul Haq—for Appellants.

Debendra Nath Mandal—for Respondents.

D. Chatterjee, J.—An occupancy holding not transferable by the custom of the locality was inherited by three brothers, defendants Nos. 1, 2 and 3. They jointly sold a portion of the *jote* to the defendants Nos. 12 and 13 and established sub-*ryots* of whom defendant No. 6 is one. The name of defendant No. 1 alone, however, was recorded in the *sherista* of the landlord, who brought suits against defendant No. 1 alone and obtained decrees some of which were satisfied by all the brothers, while in execution of the last of such decrees he sold the *jote* and purchased it himself and after obtaining delivery in execution settled the *jote* with the plaintiff, who brings this suit for possession. The Courts below have decreed the suit and hence this appeal by defendants Nos. 2, 3, 6, 12 and 13, principally on the ground that as against them the suit should have been held as barred by limitation in that the landlord

had obtained only symbolical possession which was of no avail against them as they were no parties to the suit.

It has been found that defendants Nos. 2 and 3 were represented by defendant No. 1 so far as the landlord was concerned. It has also been found that the suit was within time from the date of the symbolical possession. The appellants contend that they are strangers to the suit and are not bound by this symbolical possession and as they have been in possession for more than twelve years, the suit is barred by limitation as against them and their possession cannot be interfered with Reliance is placed in support of this contention on the case of *Mir Wazir-ud-din* v. *Lala Deokinandan* (1). It was held in this case that symbolical possession does not in any way affect the possession of, or give start to a fresh period of limitation against, persons who are not parties to the suit or execution proceedings, notwithstanding that such persons may be bound by the result of the litigation terminating in the delivery of formal possession. The *ratio decidendi* in this case and the cases therein relied on was that the person who is a party to the proceedings must be considered as having been present at the delivery. Another reason relied on by the learned Judges in this case was that under-leases and encumbrances are not avoided *ipso facto* by the sale but must be got rid of by a further suit or proceeding. Now let us see how these principles apply to the present case.

Defendants Nos. 2 and 3 are the unregistered co-sharers of the registered tenant, defendant No. 1. The Courts below have held that they elected to be represented in their relations to the landlord by their brother, defendant No. 1. This is equivalent to saying that defendant No. 1 stood in the place of all the brothers including himself in the rent suit and all further proceedings including the delivery of possession. Their interest would cease *ipso facto* by the sale and no further suit or proceeding would be required to get rid of them. They are neither encumbrancers nor under-lessees. They are to my mind parties in the name of their elder brother and cannot be heard to say that they are strangers. It is true that they plead a separation from their brother and separate possession on their own behalf, but they allowed their elder brother to represent them in all matters connected with their landlord in relation to the lease-hold property. It would, I think, be unjust to allow them to resile from the position in which by their conduct they have placed themselves apart, of course, from any question of fraud or collusion which has not been raised in this case.

Then comes the case of defendant No. 6. Paragraph 5 of the plaint states that defendant No. 6 has his house on *dag* No. 11 and paragraph 6 that he is not a *bona fide* tenant but a trespasser. This defendant did not appear in the first Court, but the plaintiff gave no evidence to prove that he was not a *bona fide* tenant but a trespasser who had been falsely set up as a tenant. On the other hand the plaint admits that he has his house on one of the plots and that he set up a sub-tenancy. I think, therefore he must be taken as an under-tenant who can plead his possession as a stranger to the suit. The case of *Mir Wazir-ud-din* v. *Lala Deokinandan* (1), therefore, comes to his rescue and the plaintiff's suit to turn him out is barred.

As regards defendants Nos. 12 and 13 they are purchasers of portions of the holding long before the suit. The landlord did not recognise them and was not bound to recognise them: he was entitled to treat them as trespassers and has treated them as such in the plaint. They are, therefore, admittedly strangers and although they would be bound by the result of the suit and liable to be turned out, that must be by a separate suit within 12 years from at least the sale when the title of the purchaser began and when at least he would be entitled to evict any trespasser. The suit was filed just in time from the date of the writ of delivery of possession and, therefore, beyond 12 years from the sale and the suit is, therefore, barred against defendants Nos. 12 and 13 and the plaintiff cannot turn them out.

The appeal of defendants Nos. 2 and 3 must, therefore, be dismissed and the appeal of defendants Nos. 6, 12 and 13 decreed with costs: as all the appellants appeared by one *vakalatnamah*, defendants Nos. 6, 12 and 13 will get 3/5ths of the hearing fee and defendants Nos. 2

(1) (1907) 6 C. L. J. 472.

and 3 will pay 2/5ths of the hearing fee to the respondents.

Beachcroft, J.—I agree.

V.B./R.K.

Appeal partly allowed.

A. I. R. 1916 Calcutta 410

TEUNON AND CHAUDHURI, JJ.

Gour Gopal Sinha and *another*—Plaintiffs—Appellants,

v.

Gosta Behari Pramanick and *others*—Defendants—Respondents.

Appeal No. 455 of 1914, decided on 28th April, 1916, from the Appellate Decree against the Decree of the Dist. Judge, Murshidabad, dated 2nd January, 1914.

Transfer of Property Act (4 of 1882), S. 37—*Putnidars* agreeing to pay Government revenue payable in respect of landlord's share in *zamindari*—Held sum payable by *putnidars* into Collectorate to account and credit of landlords was rent—Landlords collecting their share of *putni* rent separately were entitled to have same apportioned.

The *putnidars* of a share in a revenue-paying estate owned by the plaintiffs and their co-sharers agreed by the document creating the *putni* to pay into the Collectorate the Government revenue payable in respect of their landlords' share in the *zemindari*. Subsequently the plaintiffs, opened a separate account in respect of their share under S. 10 of Act XI of 1859 :

Held, that the sum payable by the *putnidars* into the Collectorate to the account and credit of the landlords was rent and that the plaintiffs who had opened separate accounts, collected their share of the *putni* rent separately and made all their co-sharers parties to the suit, were entitled to have the same apportioned and to have an order directing the *putnidars* to pay into the Collectorate the share of revenue, payable by the plaintiffs to their separate credit and account. 33 Cal. 140, dist.; 1 C. L. R. 453 and 27 Cal. 479, ref. [P. 410, C. 2 & P. 411, C. 1.]

Ram Chandra Majumdar, Panchanan Ghose for *Chandra Sekhar Banerjee*—for Appellants.

Hemendra Nath Sen – for Respondents.

Judgment.—In this case it appears that the plaintiffs and their co-sharer defendants (Nos. 8 to 14) are the owners of a 12-anna odd share in a certain revenue-paying estate. The revenue payable on their share is Rs. 462 (*sicca*).

In the year 1242 their predecessors-in-interest created a *putni taluk* in respect of their share in certain *mauzas* in favour of the predecessor of the Pramanick defendants. By the document creating the *putni* it was arranged that the *putnidars* should year by year pay into the Collectorate the sum of Rs. 442, to be credited to the Government revenue payable in respect of their landlords' share in the *zemindari*.

In the year 1909, the plaintiffs who are the owners of a 5 anna 6½ *ganda* share found it expedient to open a separate account in respect of their share under S. 10 of Act XI of 1859 and did so with effect from the September *kist* of that year.

The *putnidars* have, however, continued to make their periodical payments in one sum, and to the credit of the general account of the estate. The result has been that the payments have been credited to the residuary share and that the plaintiffs' share has fallen into arrears and has been advertised for sale to the loss and inconvenience of the plaintiffs.

What the plaintiffs seek in their suit then is to have the yearly sum payable by the *putnidars* apportioned between the plaintiffs and their co-sharers defendants and to obtain an order directing the *putnidar* defendants to make a separate payment to the account and credit of the plaintiffs of the amount due in respect of their share.

The *putnidar* respondents contend that the sum that they have to pay is not rent and that in any case the contract contained in their document of title is one and indivisible.

In support of their contention that the yearly sum payable is not rent, they rely on the case decided by their Lordships of the Privy Council and reported as *Jotindra Mohun Tagore* v. *Jarao Kumari* (1). In that case no doubt on a construction of the document there in question, it was held that the sum payable by the *putnidars* into the Collectorate against the Government revenue payable by their landlords was not rent so as to be recoverable in the manner provided in the Putni Regulation VIII of 1819. But the present case, it appears to us, may be distinguished. The yearly sum here payable is payable in consideration of the *putnidars'* use and occupation of the land and though payable into the hands of the Collector, is agreed to be paid on account and to the credit of the landlords. It is, therefore, rent paid to the landlord, and we can find nothing in the

(1) (1906) 33 Cal. 140.

document which takes away its essential character.

The next question then is, whether there is anything in the circumstances of the present case which should prevent the apportionment of this rent between the two sets of landlords. The apprehension of the *putnidar* respondents that the apportionment will in some way impair the value or affect the character of their permanent lease is necessarily groundless and the objection that at each of the four *kists* they will have to write two *challans* instead of one is frivolous. The plaintiffs landlords have in fact found it necessary to collect their share of the rent separately, and in this suit they have made all their co-sharers parties. That in such circumstances they are entitled to have the rent apportioned would appear to follow from the principle underlying S. 37 of the Transfer of Property Act, and also from the authority of the cases reported as *Sreenath Chunder Chowdhry* v. *Mohesh Chunder Bundopadhya* (2) and *Ishwar Chunder Dutt* v. *Ram Krishna Dass* (3) and *Rajnarain Mitter* v. *Ekadasi Bag* (4).

We, therefore, hold that the sum payable by the *putnidar* defendants is rent, and that the plaintiff appellants are entitled to have the same apportioned, and to have an order directing the *putnidars* to pay into the Collectorate the share due to the share of the plaintiffs to their separate credit and account.

We, therefore, set aside the decrees of the lower Courts and remand the case to the first Court in order that the remaining questions arising in the case may be heard and determined. The appellants will have their costs in this Court and in the Court of first appeal.

The costs in the first Court will abide the result.

V.B./R.K.

Appeal allowed; Case remanded.

(2) (1878) 1 C.L.R. 453.
(3) (1880) 5 Cal. 902.
(4) (1900) 27 Cal. 479.

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CARNDUFF AND RICHARDSON, JJ.

Jogesh Chandra Gupta, In the Matter of.

References Nos. 11 to 13 of 1913, decided on 5th December, 1913, made by Dist. Judge, Mymensingh, dated 6th September, 1913.

(a) Legal Practitioners Act (18 of 1879), Ss. 13 and 14—Pleader filing petition of revival of dismissed suit without any authority—Pleader alleging to have acted on wrong belief that *vakalatnama* in original suit contained his name—Action held to amount to professional misconduct—Calcutta High Court Civil Rules and Orders Ch. 11, R. 45 (e).

A Pleader filed a petition for the revival of a rent suit, which had been dismissed, without having any authority to do so, and he alleged that he had been instructed to appear by a clerk of the *mukhtar* of the plaintiff in the case and that he acted on the belief that the *vakalatnama* filed in the original suit contained his name, although as a matter of fact it did not:

Held, that the Pleader was guilty of unprofessional conduct as he acted in disregard of both S. 13, Clause (*a*) of the Legal Practitioners Act and of Clause (*e*), R. 45 of Chapter XI of the Calcutta High Court Civil Rules and Orders. [P. 412, C. 1.]

(b) Legal Practitioners — *Vakalatnama* — **Acceptance of—Duty of pleader.**

Per *Carnduff, J.*—The duty of a Pleader who accepts a *vakalatnama* in which his name appears, is to note on it the date and the name of the person from whom it is received, with an endorsement to the effect that he is satisfied that the person from whom he received it, is either the party himself or a certificated *mukhtar*, or one who has been authorised by the party to deliver it to him, as the case may be. [P. 412, C. 1.]

(c) Legal Practitioner — *Vakalatnama* — **Acceptance of — Verbal acceptance is not sufficient.**

A mere verbal acceptance of a *vakalatnama* is not sufficient. [P. 412, C 1.]

(d) Legal Practitioner—Duty of—Pleader appearing for another pleader—He ought to inform Court accordingly.

Where a Pleader appears for another Pleader who is unable at the moment to attend Court, he ought to let the Court know that he is so appearing. [P. 412, C. 2.]

(e) Legal Practitioner—*Vakalatnama*—**Acceptance of—Rules in respect of acceptance must be strictly observed in Courts below.**

Per *Richardson, J.*—The rule in regard to the acceptance of *vakalatnamas* should be strictly and scrupulously observed in the Courts below. In connection with the enforcement of the rule, it is always open to a Judge to refuse to hear a Pleader or to refuse to allow a Pleader to act, who has not accepted a *vakalatnama* in the prescribed manner, besides taking such action as may be appropriate in regard to infractions of the rule which escape notice at the time and are brought to light subsequently. [P. 413, C. 1.]

Rash Behari Ghose, A. K. Fuzlul Haq and *Naresh Chandra Sen Gupta*—for Pleader.

Ramcharan Mitter—in support of Reference.

Carnduff, J.—These are three references made to this Court under S. 14 of the Legal Practitioners Act, 1879.

The *first* relates to one Jogesh Chandra Gupta, who is a Pleader practising at Jamalpur, and the charge of professional misconduct against him is that he filed a petition for the revival of a rent suit which had been dismissed, without having any authority to do so.

His reply to the charge is that he had been instructed to appear by a clerk of the *mukhtar* of the plaintiff in the case, and that he acted on the belief, induced by the representation of that person, that the *vakalatnama* filed in the original suit contained his name, although as a matter of fact it did not.

As regards the first part of this reply, it seems to me that far from being any excuse, it indicates a disregard of S. 13, Clause (*a*) of the Legal Practitioners Act, which provides that no practitioner shall take instructions in any case except from the party on whose behalf he is retained, or some person who is the recognised agent of such party, or some servant, relative or friend authorised by the party to give such instructions.

Then as regards the remainder of the reply, the first remark that I would make is that it is high time it should be understood that more is required than the appearance of a Pleader's name in the *vakalatnama* signed by a litigant, and that mere verbal acceptance is not sufficient. The practice at Jamalpur and, I believe, in many other places in the *mofussil* is to use printed forms of *vakalatnama* containing the names of most (if not all) of the members of the local bar. Now the duty of a Pleader who is prepared to accept a *vakalatnama* of this kind in which his name appears, is under Clause (*e*), R. 45, Chapter XI of the High Courts Civil Rules and Orders to note on it the date and the name of the person from whom it is received, with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself, or a certificated *mukhtar*, or one who has been authorised by the party to deliver it to him, as the case may be. Babu Jogesh Chandra Gupta would, therefore, not have been justified in appearing even had the *vakalatnama* contained his name, and the assurance of a person from whom he ought to have refused to receive any instruction, obviously does not extenuate the offence. It appears that he has on other occasions been guilty of similar laches and that on one he actually received adjournment costs, and I agree with the District Judge in holding that he has been guilty of unprofessional conduct.

But having regard to the fact that he is only 24 years of age and has been practising for hardly a year and a half, to the laxity of the practice I have referred to and to the further circumstance that this is, so far as I know, the first case of the kind that has been brought to the notice of this Court, I think it will meet the ends of justice if we record an expression of our severe displeasure and let the matter rest there.

The *next* case relates to one Sasi Mohan Dey, who is also a Pleader of Jamalpur. The charge against him is in respect of his having filed a petition for time to lodge a written statement on behalf of the defendant and subsequently presented a *hazira* (list of witnesses) on behalf of the plaintiff. His excuse is that he was not engaged for either party, but that in each instance he acted simply to oblige an absent Pleader at the instance of the latter's clerk.

A pleader may no doubt, and not infrequently does, appear for a friend who is unable at the moment to attend Court; but in such a case he ought to let the Court know that he is so appearing, and that is the invariable practice so far as my experience goes, and where it is followed there can of course be no confusion or misunderstanding in connection with the matter. This Pleader is of 17 years' standing, and he ought, I think, to have known better. But on the whole it will be sufficient to accept his expression of regret and record our censure.

Regarding the *third* case of Babu Mohim Chandra Dey, it is unnecessary to say much. His offence is of a comparatively trifling nature, and the recommendation of the learned District Judge is merely that he be warned. He has already expressed his regret, and the learned Counsel who appears on his behalf has admitted that his conduct is open to censure. I think that all that we need say is that his conduct is reprehensible, and that we trust that he

will profit by the warning conveyed by this proceeding.

Richardson, J.—I agree. A strict and scrupulous observance of the rule in regard to the acceptance of *vakalatnama* is required in the High Court and the rule must similarly be strictly and scrupulously observed in the Courts below. In connection with the enforcement of the rule, it is always open to a Judge to refuse to hear a Pleader, or to refuse to allow a Pleader to act, who has not accepted a *vakalatnama* in the prescribed manner. But it is also of course the Judge's duty to take such action as may be appropriate in regard to infractions of the rule which escape notice at the time and are brought to light subsequently.

V.B./R.K.

Pleaders censured.

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Full Bench.

SANDERSON, C. J., WOODROFFE, MOOKERJEE, HOLMWOOD AND CHATTERJEE, JJ.

Jnanada Sundari Chowdhurani—Plaintiff—Appellant.

v.

Abdul Rahman Bhaia and *others*—Defendants—Respondents.

Appeals from the Appellate Decrees No. 2915 and 2972 of 1908 and 566 to 577 of 1909, decided on 7th February, 1916, on 27th July, 1914.

(a) Bengal Tenancy Act (8 of 1885), Ss. 52, 105 and 109-A.—Proceeding under S. 105—Rent settled under sub-S. (4) by enhancement according to rules laid down by S. 52—Decision reversed on appeal by special Judge—Second Appeal is not barred by S. 109-A.

Where in a proceeding under S. 105 of the Bengal Tenancy Act, the Settlement Officer settles rent under sub-S. (4) by increasing it in accordance with the rules laid down in S. 52 of the Act and his decision is reversed, on appeal, by the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, a second appeal is not barred by S. 109-A of the Act. [P. 417, C. 2 & P. 419, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 105 and 109-A—Tenancy agreement fixing rent providing for variation if area found to be wrong—Area found to be in excess—Claim by landlord for additional rent—Special Judge dismissing claim in appeal on finding that tenant was not in possession of more land than that for which rent was previously paid—Finding, held assailable in second appeal.

A tenancy agreement fixing a certain rent for the area mentioned therein provided that the landlord could have the land measured within the term of the lease, and if the area or the classification was found to be wrong, the rent would be varied. On measurement the area was found to be in excess of what was mentioned in the agreement. The landlord claimed additional rent, but the special Judge, on appeal, refused the claim on the finding that the tenant was not in possession of more land than that for which rent was previously paid:

Held, that the finding of the Special Judge involved a question of fact as well as of law and was, therefore, assailable in second appeal. [P. 417, C. 2 & P. 419, C. 1.]

(c) Bengal Tenancy Act (8 of 1885). S. 109-A—Scope of—Decision by special Judge settling rent—Appeal lies to High Court with reference to particulars in respect of whom it is given.

Per *Sanderson, C. J.*—S. 109-A of the Bengal Tenancy Act clearly contemplates an appeal from the special Judge to the High Court with reference to *particulars* in respect of which the decision which settles the rent is given. [P. 417, C. 2.]

(d) Bengal Tenancy Act (8 of 1885), Ss. 105 and 109-A—Proceeding under S. 105—Decision by special Judge, other than "decision settling rent"—Appeal is competent.

Per *Mookerjee, J.*—An appeal lies from the decision of a special Judge in a proceeding initiated under S. 105, Bengal Tenancy Act, provided his decision is not "a decision settling a rent". [P. 418, C. 1.]

Scheme of Chapter X of the Bengal Tenancy Act examined. 37 Cal. 30 (F. B.). and A. I. R. (1914) Cal. 48, ref. to. [Pp. 418 & 419.]

(e) Bengal Tenancy Act (8 of 1885), Ss. 105, 105-A, 106 and 109-A — Questions under S. 105-A investigated and determined—Decision of Settlement Officer is subject to second appeal.

If in any proceeding under S. 105, Bengal Tenancy Act, questions under S. 105-A have been investigated and determined, the decision of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of S. 105-A and consequently of S. 106 and is, therefore, subject to second appeal. Case-law discussed. [P. 419, C. 1.]

(f) Bengal Tenancy Act (8 of 1885), Ss. 105 A, 106 and 109-A—Decision whether one merely settling rent—Each case depends on its own circumstances—Whatever goes beyond that simple decision and decides particulars referred to in Ss. 105-A and 106 is subject to second appeal.

Per *Holmwood, J.*—Each case must depend on its own circumstances and no general rule can be laid down as to what is or what is not a decision merely settling a rent. But whatever is found in any case to go beyond that simple decision and to decide any of the particulars referred to in S. 105-A or S. 106 of the Bengal Tenancy Act is open to second appeal. [P. 420, C. 2.]

Order of Reference..

"These appeals arise out of proceedings for the settlement of a fair and equitable rent, and the substantial question in controversy between the parties is, whether the landlord is entitled to rent for the whole area ascertained by measurement to be within the tenants' holding at the rates mentioned in the *kabuliyats*, which were executed by the tenants for these holdings before the passing of the Tenancy Act. One *kabuliyat* has been translated and laid before us as a sample of their tenures. This was executed by the tenant in respect of 6 annas odd "described in the schedule" and the tenant promised to pay Rs. 29 odd as rent for the said lands "according to the description and rates given below." The schedule gave the area, boundaries and classification of each plot and ended in an abstract showing (*i*) the total area of each class of land, (*ii*) the rate of rent per area of that class, and (*iii*) the total rent payable for the area in each class. It was stipulated in the *kabuliyat* that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be entitled to a reduction of rent, as the case might be.

The Settlement Officer, held that these stipulations in the *kabuliyats* regarding the payment of rent according to the result of a further measurement were valid and decided the point in controversy in favour of the plaintiff. The learned District Judge has reversed the Settlement Officer's decision on that point and the plaintiff appeals.

It appears to us that the Settlement Officers' decision is in accordance with the principles laid down in *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1) and *Akbar Ali Mian* v. *Musammat Hira Bibi* (2) with which, on this point, we are in agreement. On the merits, therefore, we think that the appeal should succeed.

A preliminary objection, however, has been taken that no second appeal lies, on the ground that the decision of the District Judge is a decision settling a rent within the meaning of S. 109-A of the Bengal Tenancy Act. It was held in *Akbar Ali Mian* v. *Musammat Hira Bibi* (2), cited above, that in cases of this nature an appeal lay. The question, however, was not discussed and the decision proceeded on the principle of *stare decisis*, the rulings followed being *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3) and *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1) quoted above. The latter ruling is clearly in point. The facts were almost exactly the same as those of the case now before us. The decision in *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3) was under the unamended Act, but the principle on which it proceeded seems to us to be the same. Under the Act as it then stood, an appeal lay to this Court from the decision of a special Judge "in any case under S. 106." S. 106 dealt with disputes over the correctness of an entry in the Record of Rights (not being an entry of a rent settled), consequently disputes over an entry of a rent settled did not come within S. 106 and so could not be the subject of an appeal to this Court. It was held, however, in the case cited that when, in proceedings taken on the application of a landlord for the settlement of rent, the liability of the tenants to pay rent on account of any alleged excess area was decided, an appeal lay to this Court.

On the other hand, the opposite view was taken in *Rameswar Singh* v. *Bhooneswar Jha* (4) and *W. M. Grant* v. *Ram Rakhar Bhagat* (5) that in cases of that nature no second appeal lay. A reference to the papers of the last mentioned case shows that in it increased rent was claimed on the ground of an increase of area. In our opinion these two cases cannot be reconciled with the other cases mentioned above and the point can only be settled by a Full Bench.

We would formulate the point as follows :—"When in a proceeding under S. 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-S. (4) in accordance with the rules laid down in S. 52 and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has

(1) (1907) 5 C. L. J. 538.
(2) (1912) 15 I. C. 332.
(3) (1898) 25 Cal. 34.
(4) (1906) 33 Cal. 837.
(5) (1910) 6 I. C. 501.

been previously paid, is a second appeal barred by S. 109-A of the Act?

We make this reference in Appeal No. 577. The other analogous appeals will remain pending till this is disposed of.

The Rules granted in these cases are discharged as no possible question of jurisdiction arises."

In the reference in S. A. No. 577 of 1909 no one appeared for the respondents. Babu Upendra Lal Roy asked the permission of the Court to be heard, though he did not appear for the respondent in Second Appeal No. 577, on the ground that his clients who were respondents in analogous appeals pending till the decision of the Full Bench, would be affected.

Babu *Upendra Lal Roy* was then permitted to help the Court as *amicus curiæ*.

Maulvi *Nur-ud-din Ahmad*, on similar prayer under similar circumstances was told by their Lordships that if, after hearing Babu Upendra Lal Roy, their Lordships thought it necessary they, would hear him.

Babu *Dwarkanath Chakravarti* (with him Babus *Chandrakanta Ghosh*, *Grija Prossanna Roy Chowdhury* and *Nilkanta Ghosh*), for the Appellant, reads the Order of Reference.

S. 109-A, Clause (3), Bengal Tenancy Act, allows a second appeal—appeal lies from decision on *particulars* of a tenancy which are ancillary "to settlement of rent."

The scheme of Chapter X of the Bengal Tenancy Act, if carefully examined, shows that the Legislature did not intend to exclude second appeals. In a case like this the question is not one of merely "settling rent."

The decision in the present case was not a mere settlement of rent, it was a decision on the rights of the parties to alter the rent on the special conditions and incidents of the tenancy, *vide* S. 102, Clause (*h*)—"Special conditions and incidents, if any, of the tenancy."

The decision of the Settlement Officer really falls within the purview of S. 106, Bengal Tenancy Act, and is, therefore, subject to second appeal. It is not a decision merely under S. 105, Bengal Tenancy Act; it falls within S. 105-A which was not present in the old Act.

[**Sanderson, C. J.**—Within what Clause of S. 105-A would this case fall?]

Clause (*f*) would cover this case.

[**Mookerjee, J.**—Clause (*a*) might apply to this case.]

S. 106 lays down the procedure to be followed when there are disputes as to incidents and conditions of a tenancy.

A Settlement Officer has two duties: (1) to decide disputes, (2) to settle fair rent.

Final settlement of rent is not open to second appeal, but second appeal lies from the first point, *viz.*, deciding disputes as to incidents of a tenancy. Refers to proviso to S. 105-A: Many disputes which might arise under S. 106 can also be raised and decided under S. 105. If in settling rent under S. 105, the Settlement Officer decides any of the disputes under S. 106, then so far as these preliminary matters are concerned, a second appeal will lie but when the final settlement of rent does not involve decision of disputes falling under S. 106, it is not open to second appeal.

Reads proviso to S. 109-A. The High Court can alter the finding as to any of the particulars which are ancillary to the settlement of rent. This proviso shows that second appeal lies in a case like this.

By the conditions of the *kabuliyat* in the present case, the landlord has the right to increase rent when on remeasurement the area is found more. The area mentioned in the *kabuliyat* is not conclusive.

[**Sanderson, C. J.**—The present appeal is not against an order settling rent.]

The present appeal is against an order deciding "particulars" mentioned in S. 109-A. We base our claim upon the terms of the *kabuliyat* executed by the tenants. When there is no special contract between the parties, then only a simple settlement of fair rent is conceivable.

[**Sanderson, C. J.**—The Settlement Officer only finds whether there is excess land.]

Yes, my Lord, he then proceeds to find what should be the rent.

Rajkumar Pratap Sahay v. *Ram Lal Singh* (1) and *Akbar Ali Mian* v. *Hira Bibi* (2) (last paragraph) are in support of my contention.

Further, *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1) has been already approved in the Full Bench decision

reported as *Pirthi Chand* v. *Basarat Ali* (6). So there is no conflict, I submit, on this point.

The present appeal is after amendment of the Act that is, after S. 105-A was introduced.

The point was decided previously and those decisions, *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1) and *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3), were approved by a Full Bench, vide *Pirthi Chand* v. *Basarat Ali* (6).

Babu *Upendra Lal Roy*, for the Respondents.—Reads S. 109-A, Clause (3). A decision under S. 105 is a decision settling rent and a second appeal is, therefore barred by S. 109-A, Clause (3). Further, under S. 100 of the Civil Procedure Code, no second appeal is allowed on questions of facts. In this particular case, the decision as to whether the tenant had excess land or not is a finding of fact and, therefore, no second appeal lies.

[**Woodroffe, J.**—This is no answer to the point of preliminary objection.]

[**Mookerjee, J.**—Then you assume that a second appeal is competent?]

Babu *Upendra Lal.* There is a distinct finding of the Special Judge that there was no excess area.

[**D. Chatterjee, J.**—The Settlement Officer settled rent for the whole holding and not for the excess part only. Do you suggest that a decision as to "particulars" of a tenancy is a finding of fact?]

[**Mookerjee, J.**—This point is beyond our jurisdiction. The referring Court says in the order of reference "on the merits, therefore, we think that the appeal should succeed."]

Babu *Upendra Lal.*—*Rameswar Singh* v. *Bhooneswar Jha* (4) and *W. M. Grant* v. *Ram Rakhar Bhagat* (5) decide that no second appeal lies

Maulvi *Nur-ud-din Ahmad*, followed.—The main decision in this case is in effect a decision settling rent and not settling particulars of a tenancy. Hence no second appeal lies under S. 109-A, Clause (3). The mere fact that in settling fair rent, the Settlement Officer applied S. 52 of the Act would not take his decision out of the purview of S. 105. The finding of the Special Judge in appeal that there was no excess land, does not put his decision outside the scope of S. 105. The question is one of settling fair rent and nothing more and there is no second appeal. The Settlement Officer and the Special Judge might proceed upon various grounds to settle fair rent and the question whether second appeal lies or not does not depend upon what grounds the fair rent was settled, vide *Rameswar Singh* v. *Bhooneswar Jha* (4) and *Dhunmun Panday* v. *Newas Proshad Singh Bahadur* (7). In the case of *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3) and *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1), there was no settlement of rent at all: and moreover in the case of *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3) there was doubt as to under what section the proceeding was instituted, whereas the case of *Rameswar Singh* v. *Bhooneswar Jha* (4) is exactly in point.

There are some earlier decisions in my favour, *viz.*, *Shewbarat Koer* v. *Nirpat Roy* (8) and *Lala Kirut Narain* v. *Palukdhari Pandey* (9), which were not considered in *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3) cited by the other side.

Babu *Dwarkanath* was not heard in reply.

Judgment of the Full Bench.

Sanderson, C. J.—The question which was referred to this Court relates to a preliminary point as to whether there was a second appeal under the circumstances of this case, and it is stated at page 2 of the paper-book before me as follows:

"When in a proceeding under S. 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-S. (4) in accordance with the rules laid down in S. 52, and the claim is refused, on appeal to the special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by S. 109-A of the Act?"

The Settlement Officer had decided that the tenants were in possession of land which was in excess of the area mentioned in the tenancy agreement. The tenancy agreement provided that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be

(6) (1910) 37 Cal. 30=3 I. C. 449 (F. B.).

(7) A. I. R. (1914) Cal. 48=20 I. C. 841.
(8) (1889) 16 Cal. 596.
(9) (1890) 17 Cal. 326.

entitled to a reduction of rent, as the case might be. The Settlement Officer held that by reason of that provision it was open to the landlord to have the matter of the area enquired into. He, therefore, proceeded to enquire into it, and held, as I have already said, that the tenants were in fact in possession of excess land.

The tenants thereupon appealed to the Special Judge, who reversed the decision of the Settlement Officer upon the question as to whether the tenants were in possession of excess land. He then proceeded to deal with the rates of rent with regard to the lands which were specified in the tenancy agreement. His judgment is to be found at pages 26 and 27 of the paper-book of Appeal No. 2915 of 1908. I need not read it. He begins his judgment, with regard to the first finding in this way, "Next comes the question of whether the tenants have been found to be in possession of any excess land;" and his conclusion is that

"for the reasons I hold that the Settlement Officer was wrong in finding that the tenants, or any of them, are in possession of excess land."

Then at page 27 he proceeds to deal with the question of rent. Now, the decision of this question depends upon a few sections of the Bengal Tenancy Act which I propose to read. The first section to which I need draw attention is S. 52. I do not intend to read but merely mention it, for the purpose of showing that I have not forgotten it. S. 105, sub-S. (1), provides that

"when, in any case in which a settlement of land revenue is not being made or is not about to be made, either the landlord or the tenant applies, within two months from the date of the certificate of the final publication of the Record of Rights under S. 103-A, sub-S. (2), for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant." Then S. 105-A, provides, "Where, in any proceedings for the settlement of rents under this part, any of the following issues arise:—(*a*) whether the land is, or is not, liable to the payment of rent, ..., the Revenue Officer shall try and decide such issue and settle the rent under S. 105 accordingly."

Then S. 109-A, sub.S. (3), provides

"subject to the provisions of Chapter XLII of the Code of Civil Procedure, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that Chapter: Provided that, if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding"

and so on.

Now in my judgment, S. 109-A, clearly contemplates an appeal from the special Judge to the High Court, with reference to the particulars in respect of which the decision which settles the rent is given. It was argued by the learned Vakil who appeared for the appellant that the matter upon which the judgment was given in this case was a particular with reference to which the rent of any tenure or holding has been settled, or to put in the negative way, it was not merely a decision settling a rent. I agree with his contention. I can quite see that a matter such as this between the landlord and tenant may be a matter of great importance, which may involve not only a question of fact but a question of law, as it seemed to me the question in this case did involve a question of fact as well as of law. First of all, it was alleged that under the terms of the agreement the landlord was entitled to go beyond the area which was specified in the agreement, and was entitled to have the area of the land remeasured and settled, which was clearly a question of law; and it also involved the question of fact whether the area contended for by the landlord was the right one or that contended for by the tenant was the right one.

For these reasons I come to the conclusion that that part of the judgment of the special Judge in which he overruled the judgment of the Settlement Officer was not merely a decision which settled the rent. Therefore, there was an appeal from the decision of the Special Judge to the High Court. The conclusion at which I have arrived upon a consideration of these sections is supported by the decisions which were cited on behalf of the appellant. It is only necessary for me to say, therefore, that the answer which, in my opinion, ought to be given to the question that has been referred is that the appeal in this case is not barred by S. 109-A of the Act.

I, therefore, think that the appeal ought to be entertained, and having been entertained it ought to be allowed, and the decision of the Settlement Officer restored, with costs including those of both of this reference and in the Division Bench, hearing fee, one gold *mohur* for each hearing.

Woodroffe, J.—I agree that the question referred to us should be answered in the negative and, therefore, an appeal lies. On the merits also, as is stated in the referring order, I think that the appeal should succeed.

Mookerjee, J.—The question referred for decision by this Full Bench has been framed in the following terms :—

"When, in a proceeding under S. 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-S. (4) in accordance with the rules laid down in S. 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by S. 109-A of the Act?"

In my opinion, this question should be answered in the negative, on true interpretation of sub-S. 3 of S. 109-A of the Bengal Tenancy Act. That sub-section provides that :

"Subject to the provisions of Chapter XLII of the Code of Civil Prcoedure of 1882, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that chapter."

In the case before us, proceedings were initiated under S. 105, which is mentioned in sub-Ss. 1 and 2 of S. 109-A. Consequently an appeal lies to this Court from the decision of the Special Judge provided his decision is not "a decision settling a rent."

To determine the precise scope of this expression, it is necessary to examine briefly the scheme of Chapter X of the Bengal Tenancy Act, in which S. 109-A finds a place. This Chapter is divided into four parts. The *first* part, which treats of the preparation and publication of the Record of Rights comprises Ss. 101 to 103-B. The *second* part, contains Ss. 104 to 104-J and deals with questions of settlement of rents, preparation of settlement rolls, and disposal of objections, in cases where a settlement of land revenue is being or is about to be made. The *third* part, which includes S. 105 to S. 109-A, treats of settlement of rents and decision of disputes in cases where settlement of land revenue is not being or is not about to be made. The *fourth* part, which covers Ss. 109-B to 115-A, embodies supplemental provisions. Consequently, when a Record of Rights has been prepared and finally published under sub-S. 2 of S. 103-A, if, as in the case before us, a settlement of land revenue is not being or is not about to be made, it is open to the parties, landlord or tenant, to initiate proceedings, either under S. 105 or under S. 106. S. 106 enables them to institute a suit before a Revenue Officer to challenge the correctness of the entries made in the Record of Rights. This may be regarded as a procedure for a direct challenge of the entries in the record. If a proceeding is, on the other hand, instituted under S. 105 for a settlement of the rent by the Revenue Officer, the duty is cast upon him to settle a fair and equitable rent in respect of the land held by the tenant. Such a proceeding may follow the result of a suit, if any, instituted under S. 106 or recourse may be had to it without the prior institution of a suit under that section. In the latter event, there may be an indirect challenge of the correctness of the entries in the Record of Rights. The provisions for this contingency is embodied in S. 105-A, which authorises the investigation of specified particulars in the course of settlements of fair rent under S. 105, provided there has been no prior decision upon those questions in a suit under S. 106.

The history of the introduction of S. 105-A, which was explained in the judgment of the Full Bench in *Pirthi Chand* v. *Basarat Ali* (6) and later on summarised in *Dhunmun Panday* v. *Newas Proshad Singh Bahadur* (7), throws light upon the solution of the question raised before us. It was pointed out in these cases that although S. 105 did not by itself, in its original form, contemplate an investigation into the question of correctness of the entries in the Record of Rights, yet a practice had grown up in proceedings under that section to decide questions which, the Legislature contemplated, should be determined by a suit under S. 106. To put the matter in another way, the parties were placed in the same position as if a suit under S. 106 and a proceeding under S. 105 had been simultaneously instituted and consolidated, and an amalgamated trial held for the investigation of the question of fair and equitable rent. This led to the enactment of S. 105-A, which regularises the practice that had gradually

developed, and the Revenue Officers, while seized of proceedings under S. 105, were expressly authorised to determine questions mentioned in S. 105-A which, in the ordinary course, would form the subject of an enquiry under S. 106. This conclusively answers the objection suggested in the course of the argument that the Settlement Officer in the case before us had no jurisdiction to determine the question of excess area: *Dhunmun Panday* v. *Newas Proshad Singh Bahadur* (7). It follows accordingly that if in any proceeding under S. 105, questions under S. 105-A have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of S. 105-A, and consequently of S. 106. If the order is of that description, we cannot reasonably hold that the decision of the Settlement Officer is a decision merely settling a rent within the meaning of S. 109 A; and consequently not liable to be challenged by way of second appeal to this Court. We cannot be invited to sacrifice substances to form, to look merely at the label and not the contents of the adjudication. If the questions specified in S. 105-A had been decided in a suit under S. 106, the determination by the Revenue authorities would not be final: the appellate decision of the Special Judge would be liable to be tested in second appeal to this Court. It cannot, on principle, make any difference that those very questions have been determined by the very same authorities in a proceeding under S. 105. This view is amply borne out by the proviso to S. 109-A, which contemplates the possibility of interference by the High Court with the determination by the Revenue Officer and the Special Judge of the particulars essential for a settlement of fair and equitable rent. In the case before us, the substantial question in controversy between the parties was whether the tenant was liable to pay rent in respect of what may be compendiously called "excess land." The case for the landlord was that the area in the occupation of the tenant exceeded the area mentioned in the contract of tenancy, The landlord, consequently, claimed assessment of rent on the difference between these two areas and prayed that a fair and equitable rent might be settled in respect of all the lands in the holding. The tenant repelled the suggestion that he was in possession of excess lands. The Settlement Officer came to the conclusion that the tenant was in occupation of excess area, in other words, that the area in his occupation exceeded the area for which the rent had hitherto been paid by him; and he assessed fair rent on this basis. Upon appeal, the Special Judge has reversed that decision. Consequently, although the decision of the Special Judge has settled a fair and equitable rent, it has also determined a question of fundamental importance to the parties, namely, what are the lands liable to be assessed with fair and equitable rent: clearly, a second appeal is not barred with regard to the determination of the latter question.

The distinction I have just explained was recognised as early as 1897 in *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3) where a question arose, whether the tenant was in occupation of excess land. The answer depended upon the determination of the length of the standard pole used for measurement of the land. The Court of first instance went into this question and came to a finding; but upon appeal, the Special Judge declined to investigate the matter. This Court held that a second appeal was competent, as the question was in essence not of fair and equitable rent, but of the area of the land included in the tenancy. Mr. Justice Macpherson observed that the appeal did not raise any question as to what the fair and equitable rent was, but it did raise questions as to a matter which must be decided before the Settlement Officer could settle the amount of rent payable, namely, the area of the land in respect of which the landlord was entitled to have the rent assessed. This view was followed in the cases of *Rojkumar Pratap Sahay* v. *Ram Lal Singh* (1), *Akbar Ali Mian* v. *Musammat Hira Bibi* (2), *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (10) and *Dhunmun Pandey* v. *Newas Proshad Singh Bahadur* (7). The same principle underlies the decision of the Full Bench in *Pirthi Chand* v. *Basrat Ali* (6), where the Courts below had decided a question falling within the scope of Clause (*c*) of

(10) (1911) 11 I. C. 212.

S. 105-A, namely, a question as to the status of the tenant.

It has been argued, however, that a different view was taken in *Shewbarat Koer* v. *Nirpat Roy* (8), *Lala Kirat Narain* v. *Palukdhari Pandey* (9), *Rameswar Singh* v. *Bhooneswar Jha* (4) and *W. M. Grant* v. *Ram Rakhar Bhagat* (5). In my opinion, this contention is based upon an erroneous interpretation of the decisions mentioned. The case of *Shewbarat Koer* v. *Nirpat Roy* (8) plainly indicates that the question raised there related to the rent settled and not to matters now included in S. 105-A. This is emphasised in *Lala Kirat Narain* v. *Palukdhari Pandey* (9), where Mr. Justice Ghose expressly stated that no question arose before him as to the particulars entered in the Record of Rights: in fact, the question related exclusively to what was the fair and equitable rent. This, so far as I can gather, was also the view adopted in *Rameswar Singh* v. *Bhooneswar Jha* (4) and *W. M. Grant* v. *Ram Rakhar Bhagat* (5). I feel no doubt, accordingly, that the question propounded for the decision of the Full Bench should be answered in the negative.

As regards the merits, it has been argued that Chapter XLII of the Civil Procedure Code of 1882, mentioned in sub-S. 3 of S. 109-A, which has now been replaced by S. 100 of the Civil Procedure Code of 1908, effectively bars the present appeal. There is plainly no force in this contention. Sub-S. 3 of S. 109-A merely provides that if the appeal is otherwise competent, it is to be heard as an appeal from appellate decree, subject to the rules laid down in that behalf in the Civil Procedure Code, in other words, this Court can interfere in an appeal of this description, only if the decision of the lower Appellate Court involves an error of law. In this connection, our attention had been drawn to a passage in the judgment of the Special Judge where he states that the tenant was not in occupation of any excess land. At first sight, this may bear the appearance of a finding of fact not successfully assailable in second appeal. But, upon closer examination, it appears that the finding involves an error of law. The Special Judge has held in substance that the tenant is not in occupation of excess land, because he must be deemed under his contract to be in occupation of the area mentioned therein. This overlooks the fundamental point that the contract itself provides that the landlord will be at liberty to re-measure the lands. The lands have been actually re-measured in the Settlement proceedings under Chapter X of the Bengal Tenancy Act, and the landlord claims assessment of fair rent on the area so determined by the Revenue Authorities, which must, *prima facie*, be deemed correct under S. 103-B. The tenant defendant might possibly, either by the institution of a suit under S. 106 or by way of objection in this very proceeding, have established that the entry in the Record of Rights was erroneous; but he has not done so. Consequently, the landlord was entitled to have fair rent assessed on the basis of the area as found by the Settlement Officer, and this was the view accepted by him.

In my opinion, this appeal must be allowed, the decree of the Special Judge reversed and that of the Settlement Officer restored with costs throughout.

Holmwood, J.—I agree with the judgment delivered by the learned Chief Justice that in the case before us a second appeal does lie under S. 109-A. I am of opinion that each case must depend on its own circumstances and that no general rule can be laid down as to what is or what is not a decision merely settling a rent. But it is clear that whatever is found in any case to go beyond that simple decision and to decide any of the particulars referred to in S. 105-A or S. 106 of the Bengal Tenancy Act is open to second appeal. I also agree with my learned brother Mookerjee that there is no real conflict in the decisions that have been cited before us on either side.

I, therefore, agree that the appeal should be allowed and the judgment and decree of the Settlement Officer restored with costs.

D. Chatterjee, J.—I agree in answering the question referred to us in the negative. I think the proviso to S. 109-A supplies an important clue to the explanation of the bar to second appeals imposed in Clause (3) of the section. This proviso is to the effect that if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new right for the tenure or holding, etc. This,

therefore, contemplates the case of appeals to the High Court lying in cases in which rents have been settled, not against the order settling the rent but against the decision of the Court upon the particulars in respect of which the order settling the rent has been passed. In view of this distinction made by the section itself the controversy that appeals against orders resulting in the settlement of rent are barred, does not seem to be sound.

Then with regard to the merits of the case it has been contended that there is a finding of fact which will prevent our interference in second appeal. That finding of fact is that the tenant is not in possession of excess lands. This to my mind upon the facts of this case is an apparent finding of fact but based upon an erroneous view of the legal rights of the parties as determined by the contract entered into by them and is, therefore, liable to examination in second appeal.

V.B./R.K.

Reference answered in the negative.

A. I. R. 1916 Calcutta 421

HOLMWOOD AND IMAM, JJ.

Nabadip Chandra Nandi and *others*—Petitioners.

v.

The Secy. of State—Opposite Party.

Civil Rule No. 678 of 1915, decided on 3rd January, 1916, against the Order of Settlement Officer, Midnapore, dated 19th February, 1915.

Civil P. C. (5 of 1908), O. 16, Rr. 10 and 12—Order under O. 16, R. 12—Nature of.

No order under O. 16, R. 12, Civil Procedure Code, 1908, can possibly be made until the procedure laid down in R. 10 has been followed where that rule applies. [P. 422, C. 1.]

Bepin Behary Ghose and *Jyotish Chandra Hazra*—for Petitioner.

Ram Charan Mitra—for Opposite Party.

Facts.—This Rule was issued by N.R. Chatterjea and Roe, JJ., on the 9th of July, 1915 upon the Assistant Settlement Officer and the Settlement Officer of Midnapore to show cause why the order of the Assistant Settlement Officer imposing a fine of Rs. 100 on each of the two brothers Nabadip Chandra Nandi and Adhar Chandra Nandi (petitioners) and a daily fine of Rs. 3 on each of them and the order of the Settlement Officer in appeal modifying the order of the Assistant Settlement Officer, should not be set aside on the ground that both the orders were passed without jurisdiction.

The material facts as they appear from the verified petition of Nabadip Chandra Nandy and Adhar Chandra Nandy made to the High Court under S. 115, Civil Procedure Code, and S. 15 of the Charter Act were as follows.

The two petitioners, who were the proprietors of *Mahal* Saridashpur in the District of Midnapore, were served with a notice sent by post in a registered cover by the Assistant Settlement Officer of Midnapore to produce certain *chitahs*, *jamabandi* and collection papers relating to the aforesaid *Mauza* Saridashpur, in which survey and settlement operations under Part II, Chapter X, of the Bengal Tenancy Act were going on. The notice required them to produce those papers on the 1st November, 1914, but the notice itself reached the petitioners on the 2nd of that month. So the petitioners, finding it physically impossible to comply with the requisition, sent a petition in a registered cover to the Assistant Settlement Officer asking for time till the 6th November. An *ammukhtear* of the petitioners was sent to the Assistant Settlement Officer who arrived on the 6th at the camp of that Officer with all the papers in their *sherista*. But the papers required were not filed, whereupon a proceeding for non-compliance with the notice served upon the petitioners by post was drawn up by the Assistant Settlement Officer, with the result that each of the petitioners was fined Rs. 100 and a daily fine of Rs. 3. On the 25th of December, 1914, a distress warrant was issued for Rs. 500 against the petitioners for realisation of the amount of the accumulated fines. The petitioners then appealed to the Settlement Officer, who reduced it to Rs. 314. An appeal was then preferred to the Commissioner of Revenue, Burdwan Division, against the orders of the Assistant Settlement Officer and the Settlement Officer, but this appeal was dismissed on the ground that no appeal lay to him. The petitioners then moved the High Court and obtained this Rule.

Judgment.—We are of opinion that this Rule must be made absolute on the

ground on which it was issued. In the *first* place, there was no summons upon any body to produce the documents, and therefore, O. 16, R. 10, did not apply, and *secondly*, if O. 16, R. 10, did apply, the procedure laid down in that rule was not followed, and until it was followed, no order under R. 12 could possibily be made. The Civil Courts, and particularly the peripatetic Settlement Courts which cause a large amount of disturbance to local interests, cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them. It appears to us that the proceedings of the Assistant Settlement Officer and the Settlement Officer affirming them were wholly without jurisdiction and must be set aside; and if the Assistant Settlement Officer requires any documents from the petitioners he must proceed strictly in accordance with law.

The Rule is made absolute with costs to the petitioners, two gold *mohurs*. The fine, if paid, must be refunded.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 422

CHATTERJEE AND NEWBOULD, JJ.

Ratan Bihari—Plaintiff.

v.

Hira Lal Sarakar and *others*—Defendants.

Civil Reference No. 6 of 1916, decided on 8th May, 1916, made by Dist. Judge, Decca.

(a) Civil P. C. (5 of 1908), O. 46, R. 7—Reference by District Judge on findings of Small Cause Court is competent.

The Court of Small Causes is a Court subordinate to the District Judge, so the District Judge is competent to make reference of cases tried by the Small Cause Court to the High Court under O. 46, R. 7, Civil Procedure Code. [P. 422, C. 2.]

(b) Civil P. C. (5 of 1908), O. 46, R. 7—Reference by District Judge under O. 46, R. 7—On finding by Court of Small Causes—No case for interference held to be made.

Where the Court of Small Causes, upon evidence, came to the conclusion that the defendant was a servant remunerated by a part of the proceeds of the land and the District Judge, holding that the conclusion of the Small Cause Court as regards the nature of the suit was erroneous and that the defendant ought to have been held to be a tenant against whom the plaintiff's suit in the Small Cause Court could not have been entertained, made a reference under O. 46, R. 7, Civil Procedure Code, to the High Court, the High Court refused to accept the reference on the ground that no case was made out for its interference on a question of facts. [P. 423, C. 1.]

Monmotha Nath Roy—for Defendants.

Judgment.—This is a reference from the District Judge of Decca under O. 46, R. 7.

A suit was brought in the Small Cause Court for recovery of damages against the defendant, who is said to have held some land under a contract to take half the proceeds as remuneration for his labour and expense. That was the case of the plaintiff. The defendant said that the case could not be tried by the Small Cause Court but he did not set up any special plea as to his being a tenant and, therefore, not amenable to the jurisdiction of the Small Cause Court. Upon the evidence, the learned Small Cause Court Judge found that the defendant was a servant who was remunerated by the receipt of half the produce. Upon that finding he gave a decree to the plaintiff.

There was an application to the District Judge for making a reference and he has made this reference. According to the learned Judge, the finding of the Trial Court as regards the nature of the suit is erroneous and the defendant ought to have been held to be a tenant against whom the present suit could not be entertained.

It has been contended by the learned Vakil who appears against the reference, *first*, that the reference is incompetent, and *secondly*, that the reference ought not to have been made under the circumstances of the case.

As regards the *first* point, we do not think it can be maintained that the Court of Small Causes was not a Court Subordinate to the District Judge, and O. 46, R. 7, contemplates a reference, of cases tried by the Small Cause Court, by the District Judge.

As regards the *second* point, we see that the Trial Court upon evidence, came to the conclusion that the defendant was a servant remunerated by a part of the proceeds of the land. That was a finding of fact upon evidence before him, and unless we deem it expedient and proper to set aside that finding, we do not see our way to accept the reference by the learned

District Judge. In cases of revision under S. 115, Civil Procedure Code, or under S. 25 of the Small Cause Courts Act, we do not generally interfere with findings of fact arrived at by the first Court if those findings are supported by evidence before the Court, and in this particular case, we do not think that any case has been made out for our interference on a question of fact.

In this view of the case, we discharge the reference with costs, one gold *mohur*.

V.B./R.K.

Reference discharged.

A. I. R. 1916 Calcutta 423

MOOKERJEE AND NEWBOULD, JJ.

Punit Narayan Singh and *others*—Appellants.

v.

Rajkumari Godabari Koeri and *another*—Respondents.

Appeal No. 163 of 1913, decided on 12th August, 1915, from the Original Order of Sub-Judge, Gaya, dated 15th March, 1913.

Hindu Law—Debts—Widow—Personal decree against widow—Her life estate only passes but when sued as representing estate the estate passes in execution—Test of intention is frame of the suit—Addition of reversioners as party is sure indication but it is not the only mode.

Where a suit against a female heir is founded upon a purely personal debt or contract of her own, the decree can only be against her own personal property and a sale in execution of such a decree can only convey her own interest in the property.

But in order tha, a decree may operate against the estate, the suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire state and the interests of all those who come after her.

The test is not merely whether the female heir could have been sued, but whether she was in fact sued, in a representative capacity. If the reversioners be joined as parties, the fact would afford clear indication that the creditor intends to make the inheritance liable and not to restrict his remedy to the qualified interest of the female heir. But it is not essential that the reversioners should be joined; the frame of the suit, the judgment and decree may show that the proceeding is not against the female heir personally but against her as the representative of the estate of the last full owner.

[P. 424, C. 1 & 2.]

Mohendra Nath Roy, *Ganes Dut Singh* and *Sheonandan Roy*—for Appellants.

Dwarka Nath Chakrabarti and *Chandra Sekhar Prosad Singh*—for Respondents.

Mookerjee, J.—This is an appeal by the decree-holders against an order which decides that they are not entitled, in execution of a decree for money obtained by them against Rani Sundar Koer on the 10th May, 1911, to proceed against the estate of her husband, now in the hands of his two daughters. The facts material for the determination of this question are not in controversy. On the 20th February, 1903, Rani Sundar Koer executed a usufructuary mortgage in favour of Punit Narain Singh for a loan of Rs. 25,000. The mortgagee paid Rs. 1,500 in cash and retained the balance for payment of a decree obtained by one Baldeo Lal against the mortgagor on the 18th February, 1903. The usufructuary mortgagee was subsequently deprived of possession of the hypothecated properties as the result of a dispute between the mortgagor and her brother-in-law, which culminated in the Court of Wards taking charge of the entire estate. The usufructuary mortgagee was consequently driven to institute a suit on the 2nd January, 1911, against the mortgagor Rani Sundar Koer for recovery of the money advanced by him. He claimed only Rs. 17,500 as the principal amount, namely, Rs. 1,500 paid in cash to the lady and Rs. 16,000 paid to the decree-holder, Baldeo Lal, in satisfaction of his claim. On the 10th May, 1911, the mortgagor confessed judgment and a decree was made against her for the amount claimed together with interest and costs. Before this decree could be executed Rani Sundar Koer died on the 27th March, 1912. Execution was then taken out against such portion of the estate of the husband as had come into the hands of his two daughters by virtue of his testamentary disposition. The terms of this disposition are not known to the Court as the will mentioned is not on the record. The daughters contended that the decree obtained against their mother could not be executed against the estate of their father, which, upon her death, had passed into their hands. The Subordinate Judge has given effect to this objection and has dismissed the application for execution as against the daughters. We have been invited by

the decree-holders to hold that this view is erroneous.

The principle appiicable to cases of this description is well settled. Where a suit against a female heir is founded upon a purely personal debt or contract of her own, the decree can only be against her own personal property and a sale in execution of such a decree can only convey her own interest in the property: *Jugal Kishore* v. *Jotindra Mohun Tagore* (1). The position is different when the foundation of the decree is a liability which might bind the estate in the hands of the reversioners. But in order that the decree may operate against the estate, the suit must be so framed as to show that it is not merely personal demand upon the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her. The reason is obvious. Although in a suit brought to recover or charge an estate of which a Hindu female is the proprietress she will as defendant represent and protect the estate, as well in respect of her own as of the reversionary interest, still, and on this very account, the plaintiff is bound to give notice that he is seeking so large a remedy, in order to put those who may be ultimately affected upon their guard and to enable them to protect themselves. If the suit is so framed as only to claim a personal decree against the heiress, the decree can only be executed against the female holder personally and against her limited interest in the land, notwithstanding that the debt was one which might have been enforced against the estate in a suit properly framed for that purpose: *Nugenderchunder Ghose* v. *Sreemutty Kamince Dossee* (2): and *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (3). The test consequently is not merely whether the female heir could have been sued, but whether she was in fact sued in a representative capacity. If the reversioners have been joined as parties, that fact would afford clear indication that the creditor intended to make the inheritance liable and not to restrict his remedy to the qualified interest of the female heir: *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (2), *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (4), *Srinath Dass* v. *Hari Pada Mitter* (5), *Bhagirathi Dass* v. *Baleswar Bazarti* (6) and *Rameswar Mandal* v. *Provabati Debi* (7). But it is not essential that the reversioners should be joined; the frame of the suit, the judgment and the decree may show that the proceeding was not against the female heir personally but against her as the representative of the estate of last full owner: *Jugal Kishore* v. *Jotindra Mohun Tagore* (1), *Court of Wards* v. *Maharaja Coomar Ramaput Singh* (8), *Ram Lal Shookool* v. *Akhoy Charan Mitter* (9), *Roy Radha Kissen* v. *Nauratan Lall* (10), *Brojo Nath Lal* v. *Jaggeswar Bagchi* (11), *Kisto Moyee Dossee* v. *Prosunno Narain Chowdhry* (12), *Bisto Behari Sahoy* v. *Lala Baijnath Prasad* (13), *Bireswar Das Dey* v. *Kamal Kumar Dutt* (14), *Mohamed Sadut Ali* v. *Hara Sundari Debya* (15), *Trilochan Hazra* v. *Bakkheshwar* (16), *Rameswar Mandal* v. *Provabati Debi* (7) and *Veerabadra Aiyar* v. *Marugandas Nachiar* (17). Tested in the light of these principles, what is the position of the decree-holders in the case before us? There is no indication whatever that in the suit for recovery of the money, they intended to obtain a decree which would operate against the inheritance. The claim was in form personally against the widow. The decree on the face of it was personally against her. That decree cannot after her death be executed against the estate of her husband in the hands of his daughters who have taken it under his testamentary disposition. In this view, it is needless to determine whether the loan was in whole or in part for purposes which made it binding upon the reversionary heirs to the estate of her husband.

The result is that the order of the Subordinate Judge is affirmed and this appeal

(1) (1884) 10 Cal. 985=11 I. A. 66 (P.C.).
(2) (1867) 8 W. R. 17=11 M. I.A. 241 (P.C.).
(3) (1875-76) 1 Cal. 133=2 I. A. 275 (P.C.).
(4) (1875) 23 W. R. 174.
(5) (1899) 3 C. W. N. 637.
(6) A. I R. (1914) Cal. 143=41 Cal. 69=19 I.C. 686.
(7) A. I. R. (1915) Cal. 141=25 I. C. 84.
(8) (1872) 17 W.R. 459=14 M.I.A. 605 (P.C.).
(9) (1903) 7 C.W.N. 619.
(10) (1907) 6 C.L.J. 490.
(11) (1909) 1 I.C. 62.
(12) (1866) 6 W.R. 304.
(13) (1871) 16 W.R. 49.
(14) (1912) 16 I.C. 437.
(15) (1912) 15 I.C. 351.
(16) (1912) 14 I.C. 839.
(17) (1911) 34 Mad. 188=8 I.C. 1072.

dismissed with costs. We assess the hearing fee at five gold *mohurs*.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 425 (1)

SANDERSON, J.

Emperor—Prosecutor.

v.

Donaldson—Accused.

Original Criminal Jurisdiction decided on 13th March, 1916.

Criminal P. C. (5 of 1898), Ss. 195 and 476—Nearest Magistrate of the 1st Class.

Where a Judge presiding at the Criminal Sessions of the Original Side of the Calcutta High Court is of opinion that there is ground for enquiring into an offence referred to in S. 195, said to have been committed by a prosecution witness and brought under his notice in the course of the trial of a case committed by a Magistrate in the District of Alipore, the proper course for him to take is to send the case against the witness for inquiry or trial under S. 476, to the nearest Magistrate of the 1st class at Alipore, after having made such preliminary enquiry as may be necessary. [P. 425, C. 1.]

B. C. Mitter and *J. T. Hume*—for the Crown.

Judgment.—I think this case is different, as regards the facts, from the cases which have been drawn to my attention. This is a case where the committal of the accused person, Mrs. Drummond, was by the Committing Magistrate sitting at Barrackpore within the District of Alipore and the case was committed to the Sessions of the High Court. The case was tried by me sitting at the Sessions, and the accused on Friday last was acquitted. During the course of the trial one of the witnesses, Mr. Donaldson, went back on the statements which he had made before the Committing Magistrate and which were of a material character. When he was examined by the learned Standing Counsel, he admitted that several of the statements which he had made on oath to the Committing Magistrate were false to his knowledge. This matter was mentioned to me at the conclusion of the case, and was adjourned until this morning.

An application is now made before me on behalf of the Crown for sanction under S. 195 of the Criminal Procedure Code to prosecute Mr. Donaldson for perjury. I think, however, the proper course to take is to send the case for inquiry to the nearest Magistrate of the first class, under S. 476, and inasmuch as the case comes from the District of Alipore, and I am informed that the nearest Magistrate of the first class is in that District, it seems to me the natural thing is to send the case to him.

It does not seem to me that I am prevented from taking this course by the decisions which have been drawn to my attention, *viz.*, *Kedar Nath Kar* v. *Emperor* (1) and *Emperor* v. *Sailendra Kumar Das* (2), because the facts of those cases were not the same as in this case.

For these reasons, the order I make is that I am of opinion that there is ground for inquiring into an offence referred to in S. 195, of the Criminal Procedure Code, namely, an offence punishable under S. 193 of the Indian Penal Code, which was brought under my notice in the course of the trial of Mrs. Drummond, and having made such preliminary inquiry as may be necessary, I send the case against Mr. Donoldson for inquiry or trial, as the case may be, to the nearest Magistrate of the first class. I will not send Mr. Donaldson in custody. I require him to give security for his appearance before such Magistrate to the satisfaction of the officer of this Court. He will have to appear before the Magistrate to-morrow, and, if he be not then ready to proceed, he will no doubt be afforded ample opportunity by the Magistrate to instruct a Solicitor, or otherwise prepare for his defence.

I adjourn the application so far as S. 195 of the Code of Criminal Procedure is concerned, and give liberty to apply, if necessary.

V.B./R.K.

(1) (1906) 3 C. L. J. 357.
(2) (1910) 37 Cal. 618=6 I. C. 476.

A. I. R. 1916 Calcutta 425 (2)

JENKINS, C. J. AND CHATTERJEA, J.

Mahomed Bukth Majumdar—Defendant—Appellant.

v.

Ajmon Raja and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 48 of 1914, decided on 4th June, 1915, from the Judgment of Teunon, J., dated 5th January, 1914.

Mussalman Wakf Validating Act (6 of 1913), S. 3—Aet is not retrospective—Previous decision between parties though in different capacities is conclusive.

The operation of the Mussalman Wakf Validating Act of 1913 is not retrospective.

A previous adjudication of a High Court as to the invalidity of a *wakf* between the same parties but suing in another capacity is conclusive, though not on the ground of *res judicata* in a subsequent suit respecting the same property, and is not affected by the provisions of the Mussalman Wakf Validating Act subsequently passed. (P 426, C. 2.)

Sib Chandra Palit and *Birendra Chandra Das*—for Appellant.

Judgment.

Jenkins, C. J.—(*May* 3, 1915). This is an appeal from a judgment of Mr. Justice Teunon, by whom it has been held that the lower Courts have erroneously regarded certain judgments and decrees as constituting *res judicata*. At the same time he felt that he must affirm the decree of the lower Appellate Court, on the ground that the *wakfnama* to which the decree related, was not before him and that he had no means to form an opinion as to whether or not it was a void and invalid *wakf* as the Court had decided in a previous litigation.

We are in the same predicament. But there is another aspect of the case by which we are influenced and it is this. From the judgment of the Munsif, it appears that the validity or invalidity of the *wakf* was a matter that came before the High Court and was a subject of adjudication in the High Court. We have been told in the course of the argument that the invalidity of the *wakf* was affirmed on legal grounds. The result then is that there is an adjudication by the High Court on the invalidity of the *wakf* which is based on legal grounds, and ordinarily we should feel bound, not on the principle of *res judicata* but out of the defence which is due to a previous decision of the High Court, to follow that authority. Before finally deciding the case on that ground, we give the appellant before us an opportunity of producing the judgment of the High Court before us within a month from this date. If he fails to do so, this appeal will stand dismissed, but without any order as to costs.

Final Judgment.

Jenkins, C. J.—We must affirm the judgment of Mr. Justice Teunon, though possibly not precisely on the ground which commended itself to him.

We are of opinion that the former adjudication as to the invalidity of the *wakf* is, in the peculiar circumstances of this case, conclusive for the purpose of the present litigation.

We have, however, been invited to take a different view of the matter out of deference to the Mussalman Wakf Validating Act of 1913. It has been contended that the remedial operation of that Act relates to the past as well as to the present and future and that it was intended to be a declaration that the Privy Council pronouncement as to the law of *wakf* was erroneous. I do not wish to express any opinion as to the limits of the Indian Legislature's powers But I am doubtful whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the Legislature may think that in future the law should be otherwise administered. That I think is what has happened in this case. The preamble may perhaps give some colour to the argument that the operation of the Act is retrospective as well as prospective. On the other hand the title of the Act seems, if anything, to have an opposite tendency. But both are of ambiguous value. At the same time the terms of S. 3 clearly point to futurity. And this, I think, is most likely to have been in accordance with the intention of the Legislature on general consideration as also on the particular considerations to which I have alluded. This is my view of the Act and I hold on the special circumstances of this case that the previous conclusive decision on which the respondent is entitled to rely has not been affected by the provisions of the Act. I have the satisfaction of knowing that this is in accordance with the view of Mr. Justice Chaudhuri [*Rahimunissa Bibi* v. *Shaikh Manik Jan* (1)], which gives me greater confidence in the probability of this being the true view of the intention of the Legislature.

The result is that the appeal is dismissed. As there is no appearance on the

(1) (1915) 27 I. C. 96.

part of the respondent, we dismiss the appeal without costs.

N. R. Chatterjea, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 427

CHATTERJEE AND BEACHCROFT, JJ.

Asadali Chowdhury and *others*—Petitioners.

v.

Mahammad Hossain Chowdhury and *others*—Opposite Parties.

Civil Rule No. 28 of 1916, decided on 2nd February, 1916, against the Order of Dist-Judge, Backergunj, in Misc. Case No. 1 of 1915.

(a) Civil P. C. (5 of 1908), S. 141 and O. 40, R. 1—Receiver can be appointed in original proceedings.

O. 40, R. 1, does not restrict the appointment of a Receiver only in the case of suits. S. 141 applies the procedure under O. 40, R. 1, to original proceedings. 17 All. 106 (P. C.), foll. [P. 427, C. 2.]

(b) Bengal Tenancy Act (8 of 1885). Ss. 93, 94 and 95—Appointment of Receiver pending application for appointment of common manager is legal—Civil P. C. (5 of 1908), O. 40, R. 1.

A proceeding for the appointment of a common manager under the provisions Bengal Tenancy Act is an original proceeding which may be said to be in the nature of a suit and as such attracts the application of O. 40; R. 1.

A Court has jurisdiction, under O. 40, R. 1, Civil Procedure Code, to appoint a Reciver pending the disposal of an application for the appointment of a common manager under the Bengal Tenancy Act. Such an order may be made without notice to the parties concerned in cases of emergency where the issue of notice may so delay the proceedings as to defeat the object of the order made. [P. 427, C. 1.]

(c) Practice—Appeal.

The party aggrieved by the *ex parte* order may object to it either in the Court making the order or by way of an appeal to a higher Court. [P. 428, C. 2.]

Nur-ud-din Ahmad—for Petitioners.

Jogendra Nath Mukerjee—for Opposite Parties.

Judgment.—Pending an application for the appointment of a common manager under the Bengal Tenancy Act, the learned District Judge appointed a Receiver. This Rule was issued upon an application by the petitioner that the order, made by the learned District Judge, was without jurisdiction in that it was made not in the course of a suit and *secondly*, it was irregular because it was made without notice to the petitioner. We have heard the learned Vakils on both sides and we think that the Rule must be discharged.

With regard to the *first* ground, it is contended that a Receiver can be appointed only in a suit and not in a proceeding of this kind. O. 40, R. 1, however, does not provide that the appointment of a Receiver should be confined to a suit. The old S. 503 of the Civil Procedure Code, 1882, did certainly speak of the appointment of a Receiver in a suit, but R. 1 of O. 40 of the present Code has left out the words "subject-matter of a suit" and is very general.

Then S. 141 is also very general and does seem to apply the procedure under O. 40, R. 1, to proceedings of this kind. That section provides: "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." It has been held in the case of *Thakur Prasad* v. *Fakirullah* (1) by their Lordships of the Judicial Committee that the old S. 647, in place of which stands the present S. 141, was applicable to original proceedings in the nature of suits such as guardianship, probate, etc. The present proceeding is an original proceeding which may be said to be in the nature of a suit because it is initiated by an application by one party, is opposed by another and is determined by a final order. The proceedings, therefore, being proceedings in a case which may be said to be in the nature of a suit, are such as evidently attract the application of O. 40, R. 1. We think that under O. 40, R. 1, the Court has jurisdiction to appoint a Receiver in a case of this kind if upon the facts before it, it thinks that it is just and convenient that it should make an order under that Rule.

Then as regards the question of notice, although an order is generally made by a Civil Court upon notice to the parties concerned, there may be cases in which the issue of notice may so delay the proceedings as to defeat the object of the order made, and the Court has to pass an order without

(1) (1895) 17 All. 106=22 I. A. 44 (P. C.).

previous notice in cases of emergency, leaving the party aggrieved to object to it either in the Court making the order or by way of an appeal to a higher Court. These two grounds therefore, fail. We find that the proceedings for the appointment of a common manager have been postponed pending the decision of this Rule. It was not meant that this should be so.

The petitioner, it seems, upon the view we take of O. 40, R. 1, misconceived his remedy, as he should have come to this Court by way of an appeal against the order appointing the Receiver.

We discharge this Rule with costs. hearing-fee two gold *mohurs*, and direct that the record be sent down at once so that the proceedings for the appointment of a common manager may be continued without further delay.

V.B./R.K.

Rule discharged.

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MOOKERJEE AND ROE, JJ.

Sher Jan Khan and *another*—Defendants—Appellants.

v.

Alimuddi and *another*—Plaintiffs—Respondents.

Appeal No. 1468 of 1913, decided on 13th July, 1915, from the Appellate Decree of Offg. Sub-Judge, Backerganj, dated 31st January, 1913.

(a) Principal and Agent—Liability of principal—Fraud by agent—Agent acting within scope of his authority—Principal is liable.

A Principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. *Lloyd* v. *Grace, Smith & Co.*, (1912) A. C. 716 foll. *British Mutual Bank Company* v. *Charnwood Forest Railway Company*, (1887) 18 Q. B. D. 714, ref. [P. 429, C. 1.]

(b) Principal and Agent—Liability of principal—Agent committing fraud in course and scope of his employment—Principal is liable.

Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. [P. 431, C. 1.]

(c) Principal and Agent—Liability of principal—Decree—Illegal attachment and sale by agent of decree-holder—Suit for damages by judgment-debtor—Held decree-holder was liable.

Where the agent of a decree-holder, on account of the ill-feeling which he bore towards the judgment-debtors, got illegally attached and sold their movable property and the judgment-debtors claimed damages from the decree-holder for the illegal attachment and sale:

Held, that the decree-holder was liable for the fraudulent conduct of the agent and bound to pay the damages.

(d) Principal and Agent—Liability of Principal—Fraud by Agent—Principal sought to be liable—Test.

Per *Roe, J.*—Where the principal is sought to be made liable for an act of fraud committed by his agent, the sole test is the scope of the agent's authority. [P. 431, C. 2.]

Abinash Chandra Guha—for Appellants.

Asita Ranjan Chatterjee—for Respondents.

Judgment.

Mookerjee, J.—This is an appeal by the defendants in an action for recovery of damages for illegal attachment and sale of movable property in execution of a decree for money. The facts found by the Courts below lie in a narrow compass. Two persons who may be called *X* and *Y*, obtained a decree for money against four brothers *A*, *B*, *C* and *D*. The decree-holders applied for execution against *D* alone by attachment and sale of his movables. The warrant of attachment was issued in due course, but the peon, on the identification of *P*, the agent of the decree-holders, attached three heads of cattle which belonged to *B*. *B* protested and tendered the decretal amount, but the peon, who was in collusion with *P*, had the cattle sold for an insignificant sum. It has been established that *P* acted in this manner on account of ill-feeling which he bore towards the judgment-debtors. The judgment-debtors claimed damages from the decree-holders on account of illegal attachment and sale. The Courts below have concurrently decreed the suit. It cannot be disputed that the attachment was illegal; when execution had been taken out against *D* alone, the property of *B* could not be attached; besides, when the judgment-debtors offered to satisfy the decretal debt, their property could not be lawfully sold. It is obvious, consequently, that there was illegal attachment and sale of the movable property of the plaintiffs. The sole question in controversy is, whether the defendants are liable for the fraudulent

conduct of their agent, who, in collusion with the peon, has fraudulently brought about this result. The Courts below have answered this question in the affirmative.

There can be no doubt that on both principle and authority this view should be sustained.

It has not been disputed that under the law of England, a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This is definitely laid down by the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (1), which overrules the dicta to the contrary by Lord Bowen in *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (2) and by Lord Davey in *Ruben* v. *Great Fingall Consolidated Ltd.* (3). But it has been argued on behalf of the appellants that a contrary rule was enunciated in *Barwick* v. *English Joint Stock Bank* (4) and was adopted by the Judicial Committee in *Bombay-Burma Trading Corporation Limited* v. *Mirza Mahomed Ally* (5). There is no foundation, however, for this contention. In the *first* place, as explained by the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (1), the decision in *Barwick* v. *English Joint Stock Bank* (4) is not an authority for the proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal. In the *second* place, it is extremely unlikely that Sir Montague Smith, who was a party to the decision in *Barwick* v. *English Joint Stock Bank* (4), should have misunder, stood its effect and misapplied it in *Bombay Burma Trading Corporation Limited* v. *Mirza Mahomed Ally* (5), the judgment wherein was pronounced with his concurrence by Sir Robert Collier. In the *third* place, the decision of the Judicial Committee was based on the ground that the acts of the alleged agent could not be treated as wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it was not shown that he was a servant or an agent for the purpose of working in the forest on behalf of the company or of doing any class of acts analogous to those complained of. Consequently no question could arise whether the liability of the principal depended on the circumstance whether the wrong had been committed by the servant for the benefit of the master. On the other hand, Sir Robert Collier quotes with approval the observation of Willes, J.. "In all these cases it may be said... that the master had not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." The true meaning and effect of the ruling of Willes, J., in *Barwick* v. *English Joint Stock Bank* (4), which was approved by the Judicial Committee in *Bombay-Burma Trading Corporation Limited* v. *Mirza Mahomed Ally* (5), may also be ascertained from the opinion of the Judicial Committee in two other cases, *Mackay* v. *Commercial Bank of New Brunswick* (6) and *Swire* v. *Francis* (7), the judgments wherein were delivered by Sir Montague Smith and Sir Robert Collier respectively. Reference may further be made to the decision of the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (8), where *Barwick* v. *English Joint Stock Bank* (4), *Mackay* v. *Commercial Bank* (6) and *Swire* v. *Francis* (7) are examined and explained. Lord Selborne observes that the principle on which those cases were decided was a principle, not of the law of torts or of fraud or deceit, but of the law of agency, and adds :—"The decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because, as it was well put by Mr. Justice Willes in *Barwick* v. *English Joint Stock Bank* (4), with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case

(1) (1912) A. C. 716=81 L. J. K. B. 1140=107 L. T. 531.
(2) (1887) 18 Q. B. D. 714=56 L. J. Q. B. 449=57 L. T. 833.
(3) (1906) A. C. 439=75 L. J. K. B. 843=95 L. T. 214.
(4) (1867) 2 Exch. 259=36 L. J. Ex. 147=16 L. T. 461.
(5) (1879) 4 Cal 116=5 I. A. 130=3 Suth 525=3 Sar. 823 (P. C.).
(6) (1874) 5 P. C. 394=43 L. J. P. C. 31.
(7) (1877) 3 A. C. 106=47 L. J. P. C. 18.
(8) (1880) 5 A. C. 317=42 L. T. 194.

of any other wrong." Lord Blackburn is equally explicit: "The substantial point decided was that an innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud." To the same effect is the exposition by Story in his classical work on Agency (Ss. 452, 456), where that distinguished lawyer states: "the principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them." The learned author adds: "The principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done or he has subsequently adopted them for his own use and benefit." This statement of the law was accepted by Blackburn, J., in *McGowan* v. *Dyer* (9) and had been foreshadowed nearly two centuries earlier when Holt, C. J., held in *Hern* v. *Nichols* (10) that a merchant was accountable for the deceit of his factors, though not *criminaliter* yet *civiliter*,

> "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger."

This position is well illustrated by the decisions in *National Exchange Company of Glasgow* v. *Drew* (11), *Brocklesby* v. *Temperance Permanent Building Society* (12), *Pearson* v. *Dublin Corporation* (13), *Citizen's Life Assurance Company Ltd.* v. *Brown* (14), *Glasgow Corporation* v. *Lorimer* (15), *Bowles* v. *Stewart* (16) and *Fitzsimons* v. *Duncan* (17). It may be observed that the rule as formulated by Story is in accord with a long line of authorities in the Courts of the United States, where an instructive attempt has been repeatedly made to justify the doctrine on principle. Thus, in *Higgins* v. *Watervliet* (18), Mr. Justice Andrews observed:—

> "Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission of the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided, only, that the agent was acting at the time for the principal, and within the scope of the business."

Again, in *Jackson* v. *American Telephone Company* (19), Mr. Justice Walker observed:

> "Whoever commits a wrong is liable for it, and it is immaterial whether it is done by him in person or by another acting by his authority, express or implied. *Qui facit per alium, facit perse.* Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment and in furtherance of the master's business."

In *Alger* v. *Anderson* (20) the Court observed that the doctrine broadly stated is rested upon the ground "that the principal having held the agent out as having authority and having clothed him with power to act in a particular matter, as between two innocent persons, should suffer as having given occasion for the loss." The truth is that this rule of liability is based upon grounds of public policy; it seems more reasonable that, where one of two innocent persons must suffer from the wrongful act of a third person, the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeeds rather than a stranger: *Philadelphia*

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(9) (1873) 8 Q. B. 141=21 W. R. 560.
(10) (1708) 1 Salkeld 289=91 E. R. 256.
(11) (1855) 2 Macqueen H. L. 103.
(12) (1895) A. C. 173=64 L. J. Ch. 433=11 R. 159.
(13) (1907) A. C. 351=77 L. J. P. C. 1.
(14) (1904) A. C. 423=73 L. J. P. C. 102.
(15) 1911) A. C. 209=80 L. J. P. C. 175=104 L. T. 354.
(16) (1803) 1 Sch. & Lef. 209.
(17) (1908) 2 I. R. 483=10 Ir. L. R. 506.
(18) (1871) 46 N. Y. 23=7 Am. Rep. 293.
(19) (1905) 139 N.C. 347=51 S. E. 1017.
(20) (1897) 78 Fed. 709.

and Reading Railroad Company v. *Derby* (21), *Washington Gaslight Company* v. *Lansden* (22), *McIntire* v. *Pryor* (23), *Foster* v. *Essex Bank* (24), *Reynolds* v. *Witte* (25), *Andrews* v. *Soloman* (26) and *Milburn* v. *Wilson* (27).

Reference may also be made to the decisions in *Subjan* v. *Sariatulla* (28), *Morrison* v. *Verschoyle* (29), *Iswar Chunder Santra* v. *Satish Chunder Giri* (30), *Gopal Chandra Bhattacharya* v. *Secretary of State* (31) and *Motilal* v. *Govindram* (32). These cases recognised the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. There are, no doubt, dicta in some of these cases, based apparently upon a misapprehension of the rule enunciated by Willes, J., in *Barwick* v. *English Joint Stock Bank* (4), and, particularly of the expression, "for the master's benefit." The true meaning and scope of the rule, however, has now been settled beyond controversy by the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (1). The principle expounded there is based, as we have seen, on justice, equity and good conscience, and no conceivable reason has been suggested, why it should be held inapplicable to this country.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Roe, J.—Negligence and malice, mistake and fraud are so closely allied that they are often, not to be distinguished. It could never be, and never was, a good defence to an action upon a tort done by a servant or by an agent, to plead that the tort was done, not by accident, but on purpose.

My learned brother has so fully traced to its source and exposed the fallacy that to render the master liable, the act of the servant must be for the master's benefit, that there remains nothing for me to add. The sole test is the scope of the agent's authority.

In the case before us the act done by the agent was clearly within the scope of his authority.

I agree that the principal is liable and that the appeal be dismissed with costs.

V.B./R.K.

Appeal dismissed.

(21) (1852) 14 Howard 468=14 Law. Ed 502.
(22) (1898) 172 U.S. 534=43 Law. Ed. 543.
(23) (1898) 173 U.S. 38=43 Law. Ed. 606.
(24) (1821) 17 Mass. 479=9 Am Dec. 168.
(25) (1879) 13 S. C. 5=36 Am. Rep. 678.
(26) (1816) Peter C. C. 360=1 Fed. Cas. 378.
(27) (1901) 31 Can. Sup. Court 481.
(28) 3 B. L. R. 413=12 W. R. 329.
(29) 6 C. W. N. 429.
(30) 30 C. 207=7 C. W. N. 126.
(31) (1909) 36 Cal. 647=1 I. C. 735
(32) (1906) 30. Bom. 83.

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Special Bench.

WOODROFFE, BEACHCROFT AND GREAVES, JJ.

Indar Chand—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 42 of 1915 and Government Appeal No. 2 of 1915, decided on 24th March, 1915, against the Order of the Chief Presidency Magte., Calcutta, dated 4th January, 1915.

(a) Commercial Intercourse with Enemies Ordinance (6 of 1914)—Ordinance is not retrospective—Acts subsequent to it have to be proved to constitute an offence—Meaning of word "destined" in Clause 5 (7) explained—Mica shipped was obtained in London owing to outbreak of war—Agent was instructed to sell mica to German firm on payment—Letter was sent after ordinance but English firm refused to export it to Germany—*Held*, it did not acquire destination.

Ordinance VI of 1914 is not retrospective and for the purpose of establishing an offence of trading with an enemy against an accused under the said Ordinance a Court can look at only such acts as took place after it was enacted. [P. 444, C. 1.]

The word "destined" in the Trading with the Enemy Proclamation No. 2, Clause 5 (7), when used in connection with the word "trading", is not limited to "on the way to" but is equivalent to the term "intended for". Legal destination must not be confused with actual destination. [P. 444, C. 2 & P. 445, C. 1.]

The accused had before the outbreak of war shipped a case of mica to a German firm but owing to the outbreak of war the ship did not proceed beyond London. The accused then communicated with a London firm which took delivery of the case and sold it. On the 20th August, the agent of the accused in Europe wrote to him that the German firm would pay for the mica on receipt of the goods. The accused replied to the agent that he had instructed the London firm to take delivery and that if the agent wanted the mica he could apply to the

London firm whom the accused was instructing to deliver it to the agent but that he the agent must not give it to the German firm without payment. Some other letters followed before the Ordinance VI of 1914. which was passed on the 14th October, 1914. After this date the accused again wrote to his agent in Europe directing him to deliver the case against payment to the German firm but the directions where not carried out an account of the refusal by the English firm to export the mica:

Held, that the goods did not in fact acquire an enemy destination. [P. 441, C. 2.]

(b) Criminal P. C. (5 of 1898), S. 423—Appellate Court can convict for abetment though charged with principal offence.

An Appellate Court can convict an accused for abetment where the charge was only for the principal offence, but in any case it is in the discretion of the Court whether it should allow fresh charges being tried in appeal.

[P. 443, C. 2, P. 444, C. 1 & P. 445, C. 2.]

(c) Commercial Intercourse with Enemy Ordinance (6 of 1914), No. 2, Cl. 5 (7)—Mica shipped before war but sold to German firm after war and ordinance is an offence.

Where, however, the accused shipped mica from India before the war and it was sold, after the declaration of the war and the date of the Trading with the Enemy Ordinance No. 2, by the accused's agent in Europe to a German firm:

Held, that the accused was guilty of an offence under Clause 5 (7) of the Ordinance.

[P. 437, C. 2 & P. 443, C. 2.]

(d) Commercial Intercourse with Enemy Ordinance (6 of 1914). Cl. 5 (7)—(Per *Greaves, J.*) Scope of—Mere intention or willing men to do forbidden acts is not sufficient—There must be actual commission of an act to constitute an offence—So also actual handling of goods is necessary—Mere intention or desire to get goods is not sufficient—Master's or principal's liability for criminal acts of agent or servant—Extent of, explained—Under ordinance intention is not of essence if act is done even by agent though not authorised master is liable.

Per *Greaves, J.*—The proclamation (Royal Proclamation of 15th October 1914) is a penal proclamation and it must be construed strictly and the conviction of an accused under the proclamation can only be upheld if he be shewn to have actually and in fact done one of the acts thereby forbidden, and it is not sufficient for the prosecution to show that he so acted as to show himself willing to do any of the acts forbidden by the proclamation and unless he in fact actually did one of the acts or possibly aided or abetted any such act, the accused cannot be convicted thereunder. [P. 439, C. 2.]

Sub-clause 7 of S. 5 of the proclamation deals only with goods actually in existence or capable of ascertainment and there must be an actual dealing with goods themselves or with the documents of title thereto to constitute an offence under the third part of the said clause, and the mere intention or desire to get goods for the enemy does not constitute an offence under this part of the sub-clause unless there are goods in existence or capable of coming into existence. [P. 440, C. 2.]

Ordinarily a person is not criminally liable for an act or omission unless he has himself committed or omitted the act or authorised or known of, or shut his eyes to, the commission or omission, and the condition of mind of an agent is not imputed to the master or principal so as to make him criminally liable and a master is not criminally liable merely because his agent commits a wrongful act. But in cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of an agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults and even where they were against his orders.

[P. 443, C. 1.]

To constitute an offence punishable under the proclamation a particular intent or state of mind is not necessary, it is sufficient to constitute an offence thereunder by the principal that the act has been committed by the agent even although not expressly authorised by the principal.

[P. 443, C. 1.]

(e) Commercial Intercourse with Enemy Ordinance (6 of 1914), Clause 5 (7)—(Per *Beachcroft, J.*) Meaning of term "trading" explained—It includes any transaction for transfer of goods—Goods may pass from hand to hand.

Per *Beachcroft, J.*—The term "trading" includes any commercial transaction between parties which has for its object the transfer of goods by purchase, sale, barter, or exchange. It is not necessary that goods should in fact pass and the term cannot be limited to cases where one of the parties is actually in physical possession of the goods. [P. 434, C. 2.]

S. P. Sinha, C. C. Ghose, Khaitan and *Manmatha Nath Mookerjee*—for Appellant.

Monnier and *Manindra Nath Banerjee*—for the Crown.

Beachcroft, J.—The appellant has been convicted on two charges under S. 3 of Ordinance No. VI of 1914 for having contravened the provisions of S. 5 (7) of the Royal Proclamation of the 9th September relating to trading with the enemy. He was tried on three charges, but acquitted on the second. The first charge was to the effect that he had traded in a case of mica destined for a German firm in Germany, and the third was to the effect that he had supplied to one Checcacci of Genoa 11 cases of mica for and by way of transmission to a certain firm in Germany, and thereby traded in the said goods destined for the said enemy country and the said enemies. The Magistrate convicted the appellant on both charges of trading in goods destined for the enemy, and sentenced him to rigorous imprisonment for 18 months on each charge, the sentences to run concurrently, and also to a fine of Rs. 1,000 on the third charge.

The facts are not in dispute. The appellant is a member of a firm in Calcutta and was in charge of the mica business of the firm. The firm had an agent, named Checcacci, in Genoa, who was apparently their sole agent in Europe. Before the outbreak of the war the appellant had shipped a case of mica *per* ss. "Nore" to a German firm, trading under the name of *Rheinische Glimmerwaren Fabrik* at Cologne, *via* Antwerp. Owing to the outbreak of war the ship did not proceed beyond London. On the 20th August Checcacci wrote to the accused that the German firm, whom for brevity I shall call the *Rheinische Co.*, would pay for the case of mica on receipt of the goods. The accused then communicated with a London firm, Messrs. Baker and Startin, who had been buyers of mica from accused's firm, asking them to take delivery of the case from the London branch of the National Bank of India, and at the same time asked the National Bank in Calcutta to instruct their London branch to deliver the case to Baker and Startin. This was done, and the mica came into the hands of Baker and Startin. Apparently it never again came directly into the hands of the accused or Checcacci, for the Magistrate states in his judgment that Baker and Startin sold it. He does not, however, say when Baker and Startin received it, nor when they disposed of it, and we have not been referred to any evidence on the point.

The prosecution relies on certain correspondence between the accused and Checcacci to establish the fact that negotiations went on between the *Rheinische Co.*, and Checcacci on behalf of and with the authority of the accused, and that attempts were made to get the mica to Checcacci at Genoa to be forwarded to the *Rheinische Co.*

It will not be necessary to quote the correspondence in detail. A short reference to the various letters will be quite sufficient to indicate the position of the parties. In dealing with the correspondence it must be remembered that postal arrangements were so dislocated that we generally find answers dated about a month later than the letters to which they are replies.

On the 20th August, Checcacci wrote to accused that the *Rheinische Co.* would pay for the mica on receipt of the goods. The accused replied, on the 24th September, that he had instructed the Bank to deliver the mica to Baker and Startin, that if Checcacci wanted the mica he should apply to Baker and Startin, whom the accused was instructing to deliver it to Checcacci, but Checcacci must not give it to the *Rheinische Co.* without payment. On the 9th September, Checcacci wrote that the *Rheinische Co.*, in common with other German firms, was enquiring for mica. He mentioned the arrival of ss. "Nore" in London. In the answer, on the 8th October, the accused stated that he had already told Checcacci of the arrangements in connection with the mica on the ss. "Nore." He recommended him not to sell to German buyers, but in a postscript added that he might sell to German buyers, if the Government did not mind or it was not illegal or if London people were selling. On the 16th September, Checcacci wrote that the *Rheinische Co.* wanted the case of mica sent to Rotterdam, but that he himself wanted it at Genoa. Replying on the 15th October, accused referred to the information given in his letter of 24th September, adding that he hoped Checcacci had done the needful, which apparently means had applied to Baker and Startin, and repeated his injunction not to deliver without payment. On the 22nd October, in answer to a letter referring to offers by German firms, accused repeated his information about telling Baker and Startin to deliver the case of mica and again told Checcacci to deliver it against payment. These instructions were again given in a letter of the 29th October, but this letter being detained by the censor never reached Checcacci. In a later letter of 5th November accused expressed the hope that Checcacci had applied to Baker and Startin, that he had done the needful, which evidently means sold the mica and sent on the money. This letter was stopped by the censor.

This is as much as is material to the first charge, though the matter was referred to in two other letters of Checcacci, one of 21st October, in which he showed his displeasure at accused having mixed up Baker and Startin in the matter and refused to ask for the case, and another of 12th November, in which he promised to enquire of Baker and Startin, who had never said a word.

The Magistrate has found that with the full authority of the accused Checcacci had entered into an arrangement with the *Rheinische Co.*, under which the case was to

be transferred to the *Rheinische Co.*, which was to pay for it and was awaiting its arrival, and that the arrangement was sufficiently completed to justify the inference that but for the difficulty of exporting the mica from England it would have been delivered to the enemy. He found that the acts of the accused and his agent constituted trading in goods destined for the enemy. To his resume of the facts established, he might have added this that the accused had done all in his power to enable the goods to be sent to Genoa.

It is argued for the appellant that the facts found by the Magistrate do not justify the conviction. It is contended in the first place that, as all the other acts specified in S. 5 (7) imply handling of goods, the term "trade" in the same section involves handling, and the offence of trading is not complete without it. I cannot accept this contention. This is not one of those cases where the words used to define the offence are more or less synonymous and relate practically to the same or similar acts. The section contemplates four sets of acts which are entirely separate, the one from the other.

All commerce is presumed to be for the benefit of the country which is a party to it, whether the country is paying for goods received or is receiving payment for goods supplied. And as commerce is presumed to be advantageous to an enemy country, the object of the proclamation is to prevent the enemy receiving assistance by way of commerce. S. 5 (7) is designed to strike at that commerce by making penal certain operations of commercial intercourse, and has in view not only direct but also indirect means of supply. When analysed the section will be found to contemplate four distinct acts, any one of which may form, closely or remotely, part of the process of supply to an enemy or receipt from an enemy. The *first* is supply to or receipt from the enemy himself, the *second* is supply to an intermediary for transmission to the enemy or receipt from an intermediary by way of transmission from the enemy, the *third* is the dealing in goods which are to be sent to the enemy or which have come from the enemy, the *fourth* is the carrying of goods to the enemy or from him. The *third* is the case under discussion.

The terms are wide enough to include trading between persons neither of whom is an enemy, if the goods are intended to be sent to an enemy, and also the case where one of the parties trading is an enemy. In the latter case if the trading comprises an actual supply of goods, the offence would also fall within the first clause.

It will be noticed that there are two essentials requisite to complete the offence, (*i*), a trading, (*ii*) in goods destined for an enemy. What is trading? There was considerable discussion at the Bar as to the meaning of the term, and reference was made to various decisions on Prize Law to support the proposition that actual handling of goods was essential. I do not propose to refer to these authorities, for decisions on Prize Law must in the very nature of things relate to instances of handling of goods. I take to be included in the term "trading" any commercial transaction between parties which has for its object the transfer of goods by purchase, sale, barter or exchange. I do not consider it necessary that goods should in fact pass. A man who takes a cargo of beads or bangles and offers them for sale to South Sea Islanders trades in those goods, even though he may not succeed in selling a single article. Language must keep pace with changes in the actual conditions of life. And with improvements in communications and development of commerce many kinds of goods become the subject of trading even before they actually come into existence. The term "trading" cannot be limited to cases where one of the parties is actually in physical possession of the goods.

Now what are the facts? The accused had had dealings with the *Rheinische Co.* before the outbreak of the war. After the outbreak of war, his agent Checcacci is in communication in respect of the case of mica with the *Rheinische Co.*, which offers to pay on receipt of the goods. The accused writes to Baker and Startin to send the goods to Checcacci, and writes to the latter to get the goods from Baker and Startin and to deliver them to the *Rheinische Co.* on payment. We do not know the exact understanding on which Baker and Startin paid for the goods. They were old customers of accused, and it may be that the accused wanted them to oblige him by purchasing the goods, or that he merely wanted them to get the goods from the Bank and hold them at his disposal. We have only one letter which passed between the two firms, the letter of the 23rd October from Baker and Startin to accused's

ed's firm, and this letter to my mind supports the latter conclusion. Baker and Startin write, "We are taking up this case as requested by you and will do our best to dispose of it at invoice rates." If Baker and Startin were purchasers of the mica, it would be matter a of no concern to the accused at what price they disposed of it. Also they point out that it will be impossible to send the mica to Checcacci. Then referring to some other goods which presumably accused had also asked them to pay for they say, "We await details before deciding if we can pay for them. It is understood, of course, that we can dispose of any such goods in order to realise our money as quickly as possible." I read the whole letter as an agreement to temporarily accommodate accused, by paying the Bank, getting delivery of the goods and disposing of them, for accused. The accused also evidently thought the mica was at his disposal when he instructed Baker and Startin to send it to Checcacci. In fact Baker and Startin disposed of the mica: I don't know when, nor whether on their own account or on account of accused. They could not have got it before the 23rd October, and the letter of the 14th December from the National Bank, Calcutta, to accused suggests that they did not even get the documents before November allowing six weeks for communication of that fact to pass from the Bank in London to the Calcutta branch and from the latter to accused.

But whatever may have been the position of Baker and Startin, does the mere accident that accused could not actually get the goods to Checcacci alter the fact that he was trading in them! I think not. He offered to an enemy firm goods which he thought he was in a position to send to them, and he did all that lay in his power to get the goods to them. This to my mind was clearly trading.

Now I come to the second essential of the offence. It is argued that the mica does not come within the description of goods "destined for an enemy," for when originally consigned to the *Rheinische Co.*, that firm was not an enemy, and when the mica was taken by Baker and Startin in London its destination was no longer Germany. This argument is based on what is to my mind a misinterpretation of the meaning of the words "destined for an enemy." That phrase cannot refer to the destination before the trading takes place, but to what will be the destination as the result of the trading, or after it takes place. An example will show that it must be so. Suppose *A* ships a quantity of goods for Germany in the care of an agent *B*. On the way *B* sells the goods to *C* who diverts them to England. Here the goods are in the first instance destined for Germany, they are so destined at the time that *B* and *C* trade in them, but *B* and *C* obviously do not commit an offence against the Proclamation for they in effect carry out its object by preventing the goods from reaching the enemy country. But if *A* sells to *B* goods, which he knows *B* intends to send to Germany, *A* and *B* both commit an offence against the Proclamation, for they trade in goods, which are intended for, for that is all that "destined for" means, an enemy country. In this case the accused in trading in the goods intended that they should go to Germany and the purchasing company intended the same. The offence of the accused is, therefore, in my opinion complete.

He is also, on the facts established, guilty under S 3 of the Ordinance for another reason, in that he abetted the supply of goods to an enemy. It was suggested in the course of argument that even if he was not guilty of trading in goods destined for the enemy he was guilty of such abetment. Learned Counsel's answer was that though instigation to sell to an enemy would be an abetment yet, as the proposal in this case came to accused from Checcacci, the accused could not be said to have abetted supply by his agent. The argument is ingenious but fallacious. Instigation is not limited to the person from whom the proposal first moves. In his letters both of 22nd October and 29th October the accused directed Checcacci to deliver the goods to the *Rheinische Co.* against payment. The last mentioned letter not having reached Checcacci would not be an instigation, but the letter of 22nd October was. It was not, as suggested, merely a case of acquiescence but of positive direction.

Even if the charge as framed failed I should, therefore, be prepared to convict accused of abetment of supplying goods to the enemy. It was not suggested that he would be in any way prejudiced by the absence of a charge of abetment. The case depends entirely on the correspondence, and it has been reiterated on behalf of the accused that he has in every way assisted the prosecution by putting at the disposal

of the Crown the whole of his correspondence.

The mica which forms the subject-matter of the third charge had also been shipped from India before the war broke out. Fourteen cases of mica had been shipped to Marseilles, eight cases by ss. "Chybassa," for one Drouet of Paris, and six cases by ss. "Nevassa," three for Drouet and three for the *Manufacture Parisienne*. The former consignment was landed at Marseilles, but the latter was sent on by mistake to London. The consignees were unable to take delivery, and the accused, having been advised of this by the Bank, wrote to Checcacci on the 17th September to try and get the goods and re-ship them to him. On the 24th September, having in the meanwhile received a letter from Checcacci, dated 20th August, reporting what he had already learned from the Bank, accused wrote that he had instructed the Bank to deliver to Checcacci. Letters from Checcacci of the 7th and 10th September speak of a growing demand both in Germany and elsewhere for mica, and Checcacci advised accused to have a stock of mica at Genoa. In answer to the first letter accused wrote the letter of the 8th October, to which I have already referred, advising Checcacci not to sell to Germans, subject to the qualification mentioned in the postscript. Then on the 16th September Checcacci wrote that Jaroslaw had telegraphed to have the mica which had been consigned to Drouet and the *Manufacture Parisienne* sent to Genoa, and he asked accused to tell the Bank to make over the documents to him, on which he would dispose of the goods.

The firm of Jaroslaw's, *Erste Glimmerwaren Fabrik*, was an old customer of accused, with its head office in Berlin. From the terms of Checcacci's letter it would appear that he had been in communication with Jaroslaw about this particular consignment of mica. Accused answered this letter on 15th October saying that he had told the Bank to deliver the documents. He says,

"We trust you would have received the same from them and brought those cases to Genoa. Please try your best to sell them elsewhere and remit us the amount."

It is suggested for the appellant that the word "elsewhere," in view of the previous letter of the 8th October, means to some persons other than Germans. I think there can be not doubt that it means elsewhere than to the original consignees. Accused obviously does not mean to exclude Germans, for in the same letter he is consenting to the sale to the *Rheinische Co.* What he said in his letter of the following week is very clear. Checcacci had written on the 23rd September,

"Jaroslaw ....wish to buy the R. C. 1, 2 & 3 lying at Marseilles . . . . . Please instruct the Bank to deliver me free the documents for these goods. I shall have them sent to Genoa and will sell them from here. I cannot sell them for Marseilles, as buyers are Jaroslaw or Brandt or others whom the English Banks will not accept drafts upon . . . . . ."

Then he refers to an offer by the *Rheinische Co.*, and an Austrian merchant, and says

"there are no stocks on the Continent; if we are clever we shall gather all the trade of the Continent in our hands for now and for the future, but we must act quickly and in earnest."

Accused's reply was an acceptance of the proposal and a direction to sell at profitable prices. He wrote,

"We have already paid the money which the Bank advanced to us and instructed the Bank to deliver those documents to you free by cable, which we trust on receipt of that cable they have delivered those documents to you and you have brought those cases to Genoa. Please try to sell them promptly at profitable prices."

On the 30th September, Checcacci, who of course did not receive any of accused's instructions, even in answer to his earliest letters, till a latter date, again wrote that Jaroslaw wanted the goods. Accused's answer of the 29th October, in which he repeated his instructions, was detained by the censor. On the 7th October, Checcacci reported the sale of six cases to Jaroslaw, and that he hoped to sell him the other eight. Accused's reply on the 29th October, for this letter answered two of Checcacci's, was that Checcacci ought to have sold the six at a higher price, and that he must try to sell the eight at profitable prices. On the 14th October Checcacci reported having sold all 14 cases to Jaroslaw, but he had cancelled the sale of three as Drouet wanted them. On the 12th November, Checcacci reported having shipped eight cases to the Jaros Mica Company and received a cheque for the amount. The other three cases were apparently not delivered as, on the 19th November, Checcacci writes that the six cases were still under consideration at the London Custom House.

There was some discussion arising out of this last letter as to whether the eight cases

of mica were delivered to Jaroslaw or to some other Company. I feel no doubt that Checcacci in writing of the Jaros Mica Company refers to Jaroslaw in spite of some confusion raised by the passage in the letter which refers to "this American Co." and the later passage "send me samples . . . . and I shall propose them to the Jaros Cincinnati Company and Microw Mica Company of Chicago." It is suggested by the learned Advocate-General that the letter is a blind and that the writer is referring to German Companies. Perhaps it is so. But that fact should not go against the accused. Up to this point the correspondence had been perfectly straightforward. There is no reason to suppose that accused had at any time used veiled language in his letters to Checcacci, and if the latter suddenly took to doing so, any adverse inference that might be drawn against Checcacci from that fact must not reflect on the accused.

In this case, as in the first case, we have the fact that Checcacci was dealing with an enemy firm and finally sold to it the cases of mica which form the subject-matter of the charge, and delivered some of the cases. We also have the fact that accused directed Checcacci in the letters of 15th, 22nd and 29th October, the first two of which reached Checcacci for they were answered, to sell the mica. But it is sought to exonerate the accused by a fact which distinguishes this case from the first *viz.*, that Checcacci sold the goods before he had any instructions from the accused to do so. He reports the sale of six cases in his letter of the 7th October and of all 14 in his letter of the 14th October, whereas it was only on the 21st October that Checcacci received accused's letters of 17th and 24th September, and even in those two letters accused did not authorise Checcacci to sell to Germans. In the first he only told his agent to get the goods into his possession or re-ship, in the second he says he has told the Bank to deliver the mica to him and asks for an advance on it.

Checcacci, however, did not actually part with the mica till the 12th November on which date he also got payment for it. At that time he had received accused's letters of 8th October and 15th October. In the first accused had instructed him not to sell to Germans and then qualified the instructions in the postscript. The letter of the 15th was the one in which he told Checcacci to try and sell "elsewhere." At the time of the writing of the former letter, though trading with the enemy had been forbidden in the Royal Proclamation of the 5th August, published in India on the 12th September, a month before the letter was written, disobedience to the Proclamation had not been made an offence. But when the second letter was sent, the Ordinance making disobedience to a Royal Proclamation penal had been published. Accused's instructions even of the 8th October did not reach Checcacci till early in November: long before they reached him they had become penal, accused was in a position to countermand the instructions and as he did not do so, he must be held liable for the result arising out of his instructions. It is true that he qualified the permission to sell by the proviso,

> "If the British Government do not take any offence or be contrary to their law or the London people are still selling them."

But the accused cannot shelter himself by saying he left the matter to the discretion of his agent. The nature of his instructions will, of course, very largely affect the punishment to be awarded, but it will not affect the liability. As the goods, or some of them, were in fact delivered to an enemy, the accused has committed an offence within the first clause of S. 5 (7), *viz.*, "supplying goods to an enemy." The offence does not come within the terms of the second clause, which was the charge framed by the Magistrate, for accused supplied the goods to Checcacci not for transmission to an enemy, but with instructions contained in his letters of the 17th and 24th September.

The accused would also be liable for abetment of the offence of supplying goods, in that in his letter of 22nd October he instigated his agent to sell to an enemy firm. The instigation constitutes the offence. In fact Checcacci had reported the sale of all 14 cases before the letter reached him, but that was obviously a revocable arrangement and was revoked in respect of three cases. Eight of the cases had also been delivered before the letter reached Checcacci. There may be abetment by instigation of an offence which cannot in fact be committed. In this case three of the cases out of the 11, which Jarsolaw was to have remained undelivered when Checcacci got accused's letter of the 22nd October, and in respect of these three, at any rate, there cannot be the slightest doubt that the accused

committed the offence of abetting the supply to an enemy.

On two grounds, therefore, I consider the accused has been rightly convicted in respect of the subject-matter of the third charge.

It may even be that accused would be liable for acts contravening the Proclamation, done by his agent, even if those acts were directly contrary to his instructions, on the principle that where an act is itself an offence apart from any intention, a principal is liable for his agent's acts. Whether that principle applies in the present case I do not consider it necessary to express an opinion.

The offence of trading with the enemy in contravention of the Royal Proclamation is an extremely serious one, and it is doubly serious if it takes the form of one of His Majesty's subjects supplying an enemy with material which can be used for the prosecution of the war while the efforts of His Majesty's naval forces are directed to stopping such supply. If the sentence of imprisonment imposed by the Magistrate has had the effect of bringing home to the public the gravity of a disregard of the Royal Proclamation it will have done good. But in the circumstances of this case I do not consider it necessary that a sentence of imprisonment should be imposed. The situation is novel, and the legislation is novel. The effects of the Proclamation were for some time but indistinctly realized even in England ; there must be still more uncertainty in India. In both cases the goods had been shipped before the outbreak of war, and though there is reason to think that owing to Checcacci's bad advice the accused allowed his business instincts to overcome his ideas of good citizenship, there is this much to be said in respect of the first charge that he was carrying out a bargain entered into before the war. I think the convictions should be upheld, but that we should alter the sentence on the first charge to one of the maximum fine which the Magistrate could have imposed, *viz.*, a fine of Rs. 1,000 and on the third charge remit the sentence of imprisonment allowing the fine to stand : in default of payment of fine in either case the accused to undergo rigorous imprisonment for six months. I trust the reduction of the sentence will not give birth to any false ideas as to the sentence that is likely to be imposed in case of any contravention of the Royal Proclamation in future.

I understand that my learned brother, while agreeing that the appeal on the third charge should be dismissed, subject to the reduction of sentence proposed, is of opinion that the appellant should be acquitted on the first charge. In the circumstances the conviction on the third charge is upheld and the sentence reduced to one of a fine of Rs. 1,000. In regard to the first charge our opinions must be laid before the learned Chief Justice for reference to a third Judge under S. 429 of the Code of Criminal Procedure.

Greaves, J.—This is an appeal from a conviction of the accused by the Chief Presidency Magistrate of Calcutta of two offences in contravention of the provisions of Clause 5 (7) of His Majesty's Proclamation of the 9th September, 1914, "The Trading with the Enemy Proclamation Number 2." The accused was further charged with an offence in contravention of the provisions of Clause 5 (9) of the said Proclamation but was acquitted on this charge. The Crown have appealed against the acquittal, but do not desire to proceed with the appeal. The accused was sentenced, under the provisions of Clause 3 of Ordinance VI of 1914, which was published in the *Gazette of India Extraordinary* of the 14th October, 1914, to eighteen months' rigorous imprisonment under one charge (the first charge) and to a like term of rigorous imprisonment and a fine of Rs. 1,000 under the other charge (the third charge), or in default of payment of the fine to six months' rigorous imprisonment, the sentences of imprisonment to run concurrently.

The accused is a member of the firm of Gunput Roy & Co., of Calcutta. The firm consists of six members including the accused and the accused was, at the time that the offences against the Ordinance, of which the accused was convicted, were committed, in control of that branch of the firm's business which exports mica, and the correspondence of the firm which deals with that branch of the business was conducted by and under the direction of the accused, and it was under his direction that the correspondence before us was written.

The firm of Gunput Roy & Co. prior to the war had been in the habit of exporting mica to European countries including Germany. Their course of business was as follows :—One Checcacci, an Italian resident at Genoa, was the sole agent of the firm in Europe for the sale of mica, having been

appointed such under or by virtue of an agreement dated the 8th May, 1912 and made between Gunput Roy & Co. and Checcacci, and whereby Checcacci agreed (*inter alia*) to devote his whole time and attention to the business and not to engage in any other business. Checcacci was in the habit of forwarding to Gunput Roy & Co., orders for mica from firms in Germany and elsewhere, bills were drawn by Gunput Roy & Co., on the various purchasers and discounted by the Calcutta branch of the National Bank of India, who forwarded the bills together with the shipping documents to their head office in London for realization and for the handing over of the shipping documents to the purchasers against payment of the bills. In the event of the purchasers failing to pay or accept the bills the National Bank of India were entitled to call on Gunput Roy & Co. to refund the money paid by the Bank to Gunput Roy & Co., and against such refund the shipping documents would be made over to the order of Gunput Roy & Co.

The charges against the accused, in respect of which he was convicted, were (*i*) that during the months of September, October and November, 1914, and during the continuance of a state of war between His Majesty and the German Empire, he at Calcutta unlawfully did contravene the provisions of Clause 5 (7) of His Majesty's Proclamation of the 9th September, 1914, "The Trading with the Enemy Proclamation Number 2" being a Proclamation of His Majesty for the time being in force relating to trade, commercial intercourse and other dealings with any subject of the said German Empire or any person residing, carrying on business or being in the territories of the said German Empire, by trading in goods, wares and merchandise, to wit, one case of mica shipped by the ss. "Nore" destined for an enemy country, to wit, the said German Empire and for enemies, to wit, certain persons trading and carrying on business together under the name and style of *Rheinische Glimmerwaren Fabrik* at Weisling, Cologne, in the said German Empire, and thereby committed an offence punishable under S. 3 of the Commercial Intercourse with Enemies Ordinance No. VI of 1914, (*iii*) that during the months of September, October and November 1914, during the continuance of the state of war aforesaid, at Calcutta, he unlawfully did contravene the provisions of Clause 5 (7) of the said Trading with the Enemy Proclamation No. 2 by supplying to a certain person, namely, one G. Felice Checcacci of Genoa in Italy, certain goods, wares and merchandise, to wit, 11 cases of mica (which had been previously shipped to Marseilles *per* ss. "Nivassa" and ss. "Chybassa") for and by way of transmission to an enemy country, to wit, the German Empire, and to enemies, to wit, certain persons trading and carrying on business together under the name and style of *Jarosla Erste Glimmerwaren Fabrik* at Berlin in the said German Empire, and thereby traded in the said goods destined for the said enemy country and the said enemies and thereby committed an offence punishable under S. 3 of the Commercial Intercourse with Enemies Ordinance No. VI of 1914.

The Proclamation in its preamble contains a recital that it is contrary to law to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without permission.

Clause 5 (7), which is the clause under which the accused was charged and convicted, divides itself into three parts and forbids (*i*) the supply of goods, etc., to or for the use of the enemy or the obtaining goods, etc., from the enemy, (*ii*) the supply of goods by way of transmission to or from the enemy, (*iii*) the trading in or carrying of goods destined for or coming from the enemy: and the direct and the indirect carrying out of any of the acts above mentioned is prohibited by the sub-clause, and the clause itself contains a provision at the end making any person who commits, aids or abets any of the aforesaid acts, guilty of a crime.

The Proclamation is a penal proclamation and it must be construed strictly, and the conviction of the accused can only be upheld if he be shown to have actually and in fact done one of the facts thereby forbidden, and it is not sufficient for the prosecution to show that he so acted as to show himself willing to do any of the acts forbidden by the proclamation and, unless he in fact actually did one of the acts or possibly aided or abetted any such act, the accused cannot be convicted thereunder. The accused is, of course, fully entitled to raise and rely on any defence, however technical it may be, to meet a penal charge and is entitled to have the fullest weight given to any such defence. On the other hand it is, of course, necessary that, so far

as possible, no restricted meaning should be placed on the words of the Proclamation and that it should be so construed as to, as far as possible, prevent the mischief aimed at, namely, the enhancement of the actual resources of the enemy by supplying him with goods or with money.

It was forcibly contended before us that sub-clause (7) involves an actual dealing with goods, and that unless it can be shown that goods were actually supplied to the enemy or so dealt with as to be placed in the enemy's power, there was no breach of the provisions of the sub-clause, and that if the words "trade in," in the last part of the sub-clause refer to any commercial dealing or intercourse falling short of the supply of goods, or the putting of the enemy in the position of obtaining goods, there was no need for sub-Clause (9), as the matters there mentioned would, in this interpretation of the clause, equally fall within the provisions of sub-Clause (7). The first two parts of the sub-clause present no real difficulty. To constitute an offence under the *first* part of the sub-clause there must be a supply of goods to or for the use or benefit of the enemy, or an obtaining of goods from the enemy, and in my opinion it would be an offence under this part of the sub-clause if the enemy, as for example, by being placed in possession of the shipping documents, was placed in a position to obtain the goods.

To constitute an offence under the *second* part of the sub-clause, there must be a supply of goods by way of transmission to or from an enemy country, or an obtaining of goods by way of transaction to or for the use of the enemy. Under the first part of the sub-clause the merchant who supplies goods to or obtains goods from the enemy is aimed at, and under the second part of the sub-clause the person who acts as the medium for the transmission of goods to or from the enemy is aimed at.

It is the *third* part of the sub-clause which presents the difficulty, but, whatever may be the exact meaning of the words "trade in," the use of the word "destined" makes it, in my opinion, clear that what is contemplated is an actual dealing in or negotiation with regard to actual ascertained goods or goods capable of ascertainment which are destined for or coming from an enemy country or an enemy, and this, of course, would include a dealing with the documents of title to the ascertained goods.

In my opinion, therefore, sub-Clause (7) deals only with goods actually in existence or capable of ascertainment, and there must be an actual dealing with the goods themselves or with the documents of title thereto to constitute an offence under this part of sub-Clause (7), and in my opinion the mere intention or desire to get goods for the enemy does not constitute an offence under this part of sub-Clause (7) unless, as before stated, there are goods in existence or capable of coming into existence. To constitute an offence thereunder there must be (*a*) definite ascertained goods in existence or goods capable of ascertainment which can be dealt with by the person accused, (*b*) they must be goods destined for the enemy or coming from the enemy, (*c*) there must be actual dealing in these goods. In my opinion the offer, for example, by a manufacturer of boots to supply boots to an enemy or to an enemy's firm, even if these boots are not in actual existence at the time of the offer, provided they are capable of being made and forwarded to the enemy by the manufacturer, would be an offence against the Proclamation and a trading in goods destined for the enemy, and in this view the sending to the enemy of a catalogue of goods manufactured by or stocked by the sender of the catalogue may be an offence against the Proclamation, and I think this is nonetheless so because sub-Clause (9) forbids the entering into commercial, financial or other contracts with or for the benefit of any enemy. It may well be that an offence which may be covered by the latter of part sub-Clause (7) is specified in greater detail in sub-Clause (9).

It is now necessary to consider what actually happened with regard to the case of mica forwarded by the ss. "Nore," which is the subject of the first charge. On or about the 30th June, 1914 Gunput Roy & Co. shipped by the ss. "Nore" from Calcutta one case of mica to the *Rheinische Co.* of Cologne, who were old customers of Gunput Roy & Co., and in response to an order received by Gunput Roy & Co. from the *Rheinische Co.*, through the medium of Checcacci, Gunput Roy & Co. drew a bill on the *Rheinische Co.*, for the value of the goods, which was discounted by the Calcutta branch of the National Bank of India and handed to them by Gunput Roy & Co. together with the shipping documents. The case was shipped to Cologne *via* Antwerp. When the ss. "Nore" arrived at London war had been

declared, and the Peninsular & Oriental Steam Ship Company, who owned the ss. "Nore," notified Gunput Roy & Co. that the ship would not proceed any further and that the case of mica had been landed in London. The case of mica was in fact so landed towards the end of September 1914. Gunput Roy & Co. thereupon instructed the Calcutta branch of the Bank to instruct the head office of the Bank in London to take delivery of the case of mica from the shippers and to make over the same to an English firm trading in London in mica, named Baker and Startin, who had previously had dealings in mica with Gunput Roy & Co.

Gunput Roy & Co. at or about the same time, namely ,the 24th September, 1914, asked Baker and Startin to take the case of mica and dispose of it, which they eventually did, paying for the goods and informing Gunput Roy & Co. of this by letter dated the 23rd October, 1914.

It is now necessary to refer shortly to the correspondence which passed between Checcacci and Gunput Roy & Co. in the months of September and October, 1914, and in so doing I do not forget that the Ordinance under which the accused is convicted only came into force on the 14th October, 1914. On the 24th September, 1914, Gunput Roy & Co. write to Checcacci saying they have instructed the National Bank of India to deliver the case of mica to Baker and Startin, whom they had instructed to pay for it, and take delivery from the Bank, and they tell Checcacci that if he wants the case, he is to ask Baker and Startin for it, but that he is not to give the case to the *Rheinische Co.* without payment; and on the 8th October, 1914, Gunput Roy & Co. write to Checcacci recommending him not to sell any goods to German buyers, but in a postscript they add that he may sell to German buyers if the British Government do not take offence and if it is not against the law; they again write on October 15th telling Checcacci not to deliver the case to the *Rheinische Co.* without payment; and on October 22nd they tell him to receive the case from Baker and Startin and to deliver it to *Rheinische Co.* against payment; and on October 29th they tell Checcacci to ask Baker and Startin to send the case to him and that he is to deliver it to *Rheinische Co.* against payment; this last letter was stopped by the post and never reached Checcacci.

I should add that it appears from a letter of Checcacci of the 16th September, 1914, written to Gunput Roy & Co. that Checcacci was in communication with the *Rheinische Co.* who wanted the case of mica, that he passed on this information to Gunput Roy & Co. on the 16th September, 1914, who got the letter on October 13th, and replied to it by the letter of October 15th, above referred to. I have come to the conclusion from the correspondence that at the time this letter was written the case of mica was no longer destined for the enemy within the meaning of sub-Clause (7) of the Ordinance. On the 24th September, 1914, Gunput Roy & Co. wrote to Baker and Startin asking them to pay for and take from the Bank and dispose of the case of mica. (I have no copy of this letter, but the reply of Baker and Startin of the 23rd October, 1914, and Gunput Roy & Co.'s letter of the 24th September, 1914, make it clear what the letter contained). Whether the transaction with Baker and Startin was an out-and-out sale or not, or merely an arrangement whereby they paid for and took the mica to oblige Gunput Roy & Co., hoping to dispose of it, if possible, but looking to Gunput Roy & Co., as the real owners and liable to them if the case were not sold, is difficult to say, but after the 24th September, 1914, that is to say, when the letter of October 15th was written, in my opinion, the goods in question were not destined for an enemy country within the meaning of the Proclamation and were not capable of being sent to an enemy country in view of the fact that the export of mica from England had been forbidden, and there has been, as before stated, no offence against that part of the Proclamation under which the charge was framed. The mere willingness of Gunput Roy & Co., that the mica in question should be delivered to an enemy firm is not, in my opinion, under the circumstances, a breach of that part of the Proclamation under which the charge was framed and the conviction on this charge cannot, in my opinion, be upheld.

The circumstances with regard to the goods which form the subject-matter of the *third* charge are as follows: On the 4th June 1914 Gunput Roy & Co., shipped from Calcutta by the ss. "Chybassa" eight cases of mica to the order of a Drouet of Paris, and on the 16th July they shipped other three cases by the ss. "Nevassa" to

the same Drouet and three cases to the orders of the *Manufacture Parisienne* of Paris. Bills were drawn by Gunput Roy & Co., on the purchasers, and discounted by the Calcutta branch of the National Bank of India and sent to the National Bank of India in London for realisation. By the time the goods arrived in Europe war had broken out and both Drouet and the representatives of the *Manufacture Parisienne* had been called up for military service and were actually with the French forces at the front and could not be communicated with or take the delivery of the goods, and the position was that the National Bank wanted to be recouped the monies paid by them to Gunput Roy & Co., for discounting the bills and Gunput Roy & Co., were desirous of disposing of the goods as they had to repay the Bank.

The eight cases of mica shipped by the ss. "Chybassa" were delivered at Marseilles and the six cases shipped by the ss. "Nevassa" were delivered in London. There is no evidence before us as to what happened to three of the six cases which were delivered in London, but I am satisfied on the evi dence that the remaining three were ultimately taken by Drouet, the original consignee, and that the eight cases shipped to Marseilles, under the circumstances hereinafter set forth, ultimately reached a firm called Jaroslaw carrying on business at Berlin in Germany (but having branches in England and other European countries) and an enemy within the meaning of Clause 3 of the Proclamation, and I am satisfied on the evidence that these eight cases reached the Jaroslaw German business. Gunput Roy & Co. had had previous dealings with Jaroslaw and with the German branch of the business. The circumstances under which the eight cases of mica reached Jaroslaw are set forth in the correspondence which was before us dealing with the third charge.

The first material letter is one from Checcacci addressed to Gunput Roy & Co. on the 16th September, 1914, wherein he states that Jaroslaw had telegraphed to him asking him to have all the mica shipped to Marseilles and refused by Drouet sent to him at Genoa where they (Jaroslaw) would take delivery, and saying that he thought Gunput Roy & Co. should instruct the National Bank to make over to him free the documents for all the Marseilles goods and that he (Checcacci) would dispose of them at Genoa.

This letter was received by Gunput Roy & Co. on the 13th October, 1914 and answered by them on the 15th of that month, the answer stating that with regard to the 14 cases at Marseilles they had instructed the Bank to deliver to him the documents and trusting that Checcacci had received the same from the Bank and brought the cases to Genoa, and asking him to do his best to sell them elsewhere and remit the amount—the word "elsewhere," in my opinion, clearly means elsewhere than to the original consignees, Drouet and the *Manufacture Parisienne*. Checcacci wrote another letter to Gunput Roy & Co. on the 23rd September, 1914, stating that Jaroslaw wished to buy the mica lying at Marseilles and not taken over by Drouet and the *Manufacture Parisienne*, and asking Gunput Roy & Co., to instruct the National Bank to deliver the documents to him and that he would then have the mica sent to Genoa, as the buyers were Jaroslaw and he could not sell the mica from Marseilles. This letter was received by Gunput Roy & Co. on the 20th October and answered by them, on the 22nd, in a letter which stated that Gunput Roy & Co. had instructed the National Bank to deliver the documents, and asked Checcacci to sell the goods promptly at profitable prices and remit the money.

Checcacci wrote a further letter to Gunput Roy & Co. on the 30th of September, saying that he could sell the Marseilles goods, and that possibly Jaroslaw would take them. This letter was received by Gunput Roy & Co. on the 28th of October, and answered by them on the 29th of October, the answer stating that Gunput Roy & Co. had instructed the National Bank to deliver documents to him (Checcacci) and expressed a hope that he had received the documents and brought the 14 cases to Genoa and asking him to dispose of them at profitable prices ; the letter further said that "we note that you have sold six cases to Jaroslaw." This letter was intercepted in the post and never in fact reached Checcacci.

From the 14th October onwards Checcacci wrote various letters to Gunput Roy & Co. which were intercepted in the post, and letters were written to Checcacci by Gunput Roy & Co. on various dates in November, but these were with one exception intercepted in the post, and in my opinion this further correspondence does not carry matters any further and need not be considered.

It is in evidence before us that Checcacci effected the sale to Jaroslaw on or about the 9th October, and before he received the letters of Gunput Roy & Co. above referred. I cannot find any letter from Gunput Roy & Co. to Checcacci which in express terms directs or sanctions a sale of the mica to Jaroslaw, but in my opinion the correspondence certainly shows that Gunput Roy & Co. knew that Checcacci was effecting a sale to Jaroslaw and that they did not in express terms forbid such a sale. Under these circumstances, did the accused commit the offence against sub-Clause (7) with which he is charged, that is to say, did he supply goods for transmission to an enemy country or an enemy and trade in goods destined for an enemy? In my opinion he clearly did unless he is saved by the fact that Checcacci effected the sale before he, the accused, knew or impliedly assented thereto.

Ordinarily a person is not criminally liable for an act or omission unless he has himself committed or omitted the act, or authorised or known of, or shut his eyes to, the commission, or omission, and the condition of mind of an agent is not imputed to the master or principal so as to make him criminally liable, and a master is not criminally liable merely because his agent commits a wrongful act. But in cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of an agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults and even where they were against his orders: *Commissioners of Police* v. *Cartman* (1), and *Coppen* v. *Moore* (2), the Laws of England by the Earl of Halsbury, Vol. IX, p. 235 [note (*d*)] and cases there cited. In my opinion the principles expressed above apply to the acts forbidden by the Proclamation. To constitute an offence punishable thereunder a particular intent or state of mind is not in my opinion necessary, it is sufficient to constitute an offence thereunder by principal that the act has been committed by the agent, even although not expressly authorised by the principal, although, of course, in awarding punishment for the offence these circumstances would and must be taken into account.

Considering the enormous importance as illustrated by the present war of the cutting off from the enemy of all sources of supply, this view of the Proclamation and its effect is not, in my opinion, unduly harsh or an undue straining of the words and spirit of the Proclamation. It is necessary that the trading community should realise not only that they must take no actual steps to add to or increase the resources of the enemy, but that they must be active to prevent any act by their servants or agents which can possibly add to the enemy's resources and that unless they do so, they fall within the mischief aimed at by the Proclamation and render themselves liable to the penalties imposed by the Ordinance for any breach of what is forbidden by the Proclamation.

The result is that, in my opinion, the accused was rightly convicted on the third charge, but, in my opinion, the sentence was, under the circumstances, excessive and, in my opinion, the sentence of imprisonment should be remitted, but the fine of Rs. 1,000 imposed by the Presidency Magistrate should stand. I wish to add that, in my opinion, the correspondence is perfectly open and straightforward, but I regret that the accused, although he apparently had considerable doubt as to whether any sale to the enemy was not illegal, did not take immediate steps to make it impossible that any of the goods in question should reach the enemy and take legal advise as to his position. It is only fair to the accused to add that he apparently made no attempt to ship goods after the outbreak of war but only concerned himself with goods which had been shipped sometime before war broke out. And, of course, the matters dealt with by the Ordinance are new so far as this generation is concerned; the Ordinance, moreover, was not, I understand, translated into the vernacular and the accused is ignorant of the English language. With regard to the question as to whether the accused could, in respect of either or both charges, be convicted of abetment, the fact remains that he was not originally charged with any such offence, and although our powers are wide under S. 423 of the Code of Criminal Procedure, and although the question was to some extent argued before us and the advisers of the accused were offered an opportunity for further argument on this point, which they did not desire to avail themselves of, I for myself should be loath, under the circumstances

(1) (1896) 1 Q. B. 655=65 L. J. M. C. 113=74 L. T. 726=44 W. R. 637.
(2) (1898) 2 Q. B. 306=62 [illegible] 453=67 L. J. Q. B. 689=78 L. T. 520=46 W. R. 629.

Vakil High Court.
SRINIVAS SAMUEL

of this case, and, at this stage, to alter the charge and convict the accused of abetment, and, moreover, there seems considerable doubt whether a conviction for an offence can be altered into a conviction for abetment of that offence.

Judgment.—This matter has been referred to me on a difference of opinion between Mr. Justice Beachcroft and Mr. Justice Greaves.

The accused was charged with three offences. He was acquitted on the second charge by the Magistrate and the Government appeal against that acquittal was withdrawn. Both the learned Judges convicted the accused under the third charge. Therefore, the only matter before me for decision is that on which the learned Judges differed, namely, the first charge, Mr. Justice Greaves being of opinion that the accused should be acquitted and Mr. Justice Beachcroft expressing the opinion that he was guilty of the offence, and if not, of abetment of it though not charged therewith. He would, therefore, have fined the accused Rs. 1,000 on this charge in addition to the fine which both the learned Judges have agreed should be imposed in respect of the third charge.

It is not necessary for me to recapitulate the facts, which are set out in the judgments which are before me. The questions are, *firstly*, as to the meaning of the word "trading" in the first charge, and *nextly*, whether, if there was a trading here in respect of one case of mica shipped by ss. "Nore," it can be said that, at the date of the operation of the Ordinance, that is, the 4th October, 1914, the goods were destined for an enemy country.

For the prosecution it is contended that the acts of the accused in directing the Bank to make over the goods to Messrs. Baker and Startin of London the direction to the latter to take up the goods, the direction to the latter to send the goods to Checcacci, an Italian agent at Genoa on his application, and lastly his direction to the latter to deliver the goods to *Rheinische Co.*, and receive payment constitute trading. Now, it seems to me clear that, as the Ordinance was not retrospective, the only acts at which I can look, for the purpose of establishing the offence with which the accused has been charged, are such as took place after it was enacted, namely, the directions to Checcaci to hand over the case of mica to the German firm. The other facts are only relevant as establishing the circumstances under which it is alleged that it became possible to do the last-mentioned act, unless they also amount to ratification of acts done and directions given prior to the date of the publication of the Ordinance.

I may here mention that the prosecution does not rely on the letter of the 5th November, 1914, as it was never sent, being intercepted by the censor.

Now, does the act to which I have referred, assuming for the sake of argument that there is a ratification of instructions given to Messrs. Baker and Startin, amount to "trading"? For the defence it is contended that this term involves an actual handling with the goods and not mere directions such as we have before us, which were in fact not carried out. For the prosecution it is contended that the word "trading" includes all forms of commercial intercourse. Both the learned Judges appear to have rejected the contention on this point which was put forward on behalf of the accused. It is not necessary, however, to go further into this part of the case, for, even assuming in favour of the prosecution that the acts charged amounted to "trading" within the meaning of the Ordinance, I agree with Mr. Justice Greaves that, whether there was a trading or not (which it is unnecessary to decide), the goods were not, on or after the 14th October, 1914, the date of the Ordinance, destined for an enemy country. Now, what is the meaning of the word "destined"? For the defence it is contended that if we look at the words "or coming from" in the Proclamation, "destined" must mean going to, that is, on the way to an enemy country. The goods were then, it is said, in London and remained there from before the date of the operation of the Ordinance and were, it is contended, incapable of being sent to an enemy country as export of mica from England had been forbidden except to Belgium, France, Russia, Spain and Portugal (see page 407 of the Manual of Emergency Legislation). I do not assent to all the terms of the argument by which the accused's contention is sought to be supported. But I come to the conclusion on the whole that the contention itself should be given effect to.

I agree with Mr. Monnier, who appears on behalf of the prosecution, that we must not confuse legal destination with actual destination. It is true that after the Proclamation the exportation of mica was

prohibited at law. But it is possible, of course, that it might in fact be exported in disobedience of that law. Nextly, the export of mica was not altogether forbidden. It was allowable to some countries from which the goods exported might possibly have found their way to enemy destination. Nextly, I am disposed to accept his argument that the word "destined," when used in connection with the word "trading," is not limited to the sense which the defence asked me to accept, but is equivalent to the term "intended for." But assuming this point in favour of the prosecution, can it be then said that the goods had an enemy destination at any time after the proclamation of the Ordinance on the 14th October, 1914. The case of mica was shipped before the war. It had then undoubtedly an enemy destination. But on its arrival at London war had then broken out and the goods were landed there. Messrs. Baker and Startin of London under instructions of the accused took up and paid for the goods. If this was a real purchase by them and not a mere accommodation, there is no case for the prosecution. For in that event the goods were not in existence, so far as any disposition of them by the accused was concerned, after the date upon which Messrs. Baker and Startin took over the goods from the Bank and paid for them. But I will again assume for the sake of argument in favour of the prosecution that Messrs. Baker and Startin did not purchase outright for themselves, but merely took over the goods on behalf of the accused and held them for him subject to his further directions. If so, when was it that the enemy destination, which had been intercepted by the landing of the goods and the taking over of them by Messrs. Baker and Startin, again arose? As regards any acts which are said to re-establish the enemy destination by the accused, I can, as I have already said, only look to what was done by him subsequent to the date of the Ordinance of the 14th October. Then, are the two letters of the 15th and 22nd October in which the accused directed his Italian agent to deliver the case against payment to the German Company sufficient to give the goods an enemy destination? The point is one which is not altogether free from doubt. But on the whole I am of opinion that the question should be answered in the negative; and in any case, if the point is a doubtful one, the accused is entitled to the benefit of it. For we must note that at the time when these two letters were written, the accused was unaware of what had happened to the goods at home, namely, that Messrs. Baker and Startin had refused to export the goods and in fact the goods were never exported. They had refused to export the goods, because, as they stated, such exportation was forbidden by the Ordinance. The directions given by the accused in ignorance of this fact could in any event only take effect on the arrival at London of the letters in which they were contained; and even upon such arrival they had no operation for the reasons stated and the goods, therefore, never in fact acquired an enemy destination.

I may point out in this connection that the letter of the 15th October was sent only one day after the Ordinance, which may, therefore, very well not have come to the notice of the accused. The Ordinance itself was not translated into the vernacular until the 22nd of December, after the date of the second letter of the 22nd of October. Nothing, moreover, has been shipped by him after the date of the Ordinance.

Then it is sought to establish that, if that be the case, there has been an abetment of supplying or of trading by the accused, which is prohibited by the Ordinance. I am not prepared to hold as a universal rule that in no case can there be a conviction for abetment where the charge was only for the principal offence. In the present case the accused was not originally charged with abetment. There is also the question, which has been raised by Mr. Ghose on behalf of the accused, as to whether there can be in fact an abetment of an offence under the Ordinance where in fact no offence has been committed, in other words, whether the principle enacted by the Indian Penal Code is applicable to an offence punishable under the Ordinance. In any case it is in the discretion of the Court whether it should allow fresh charges being tried in appeal. Mr. Justice Greaves expressed the opinion that this was not a case in which this should be done. I agree with him in holding that, assuming that the Court has jurisdiction to entertain this new charge in appeal, this is not, under the circumstances, a case in which I should do so.

I, therefore, agree with him that this first charge has not been established and I acquit the accused of it. As a result the accused is acquitted of the first two charges and convicted of the third charge, for which he has been fined Rs. 1,000.

The accused is entitled to get back the briefs made over for the use of the Court and books of account and other papers which have been taken by the prosecution and which are now held by them.

V.B./R.K.

Appeal partly allowed ; Sentenced reduced.

A. I. R. 1916 Calcutta 446 (1)

CHATTERJEA AND SHEEPSHANKS, JJ.

Wajid Ali and *another*—Plaintiffs—Petitioners.

v.

Khurshed Assam and *others*—Defendants—Opposite Parties.

Civil Rule No. 1048 of 1915, decided on 31st July, 1916, against the Order of Munsif, Sandip.

Civil P.C. (5 of 1908), S. 151—Scope.

A Court has no power to vary or set aside under S. 151, a consent decree made by it when there is no variance between the decree and the *solenamah*. [P. 446, C. 1.]

Girija Prosonno Sanyal — for Petitioners.

Ramdayal Dey—for Opposite Parties.

Judgment.—The plaintiff, who is the petitioner in this Rule, obtained a decree by consent against the defendant. Sometime after the decree was passed he applied for amendment of the decree. The decree, as we have said, was a consent decree and there is no variance between the decree and the *solenamah*. That being so, the decree cannot be varied or set aside in this suit under S. 151, Civil Procedure Code. Both the *solenamah* and the decree refer to schedule *kha*. The plaintiff said that it was schedule *kha* of a *dunpattru* ; but this was denied by the defendant. The Munsif set aside the *solenamah* decree and restored the original suit. We are, of opinion, that the Court had no power to do so ; the decree being one passed by consent it could not be set aside in the way it has been done. Moreover, neither party asked the Court to set aside the decree and restore the suit for trial.

Under the circumstances the order complained of is set aside and this Rule is made absolute.

We make no order as to costs.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 446 (2)

CHATTERJEE AND BEACHCROFT, JJ.

Ananda Kumar Bhattacharjee—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

Appeal No. 3695 of 1913, decided on the 31st January, 1916, from the Appellate Decree of Addl. Dist. Judge, Sylhet, dated the 10th July, 1913.

(a) Assam Land and Revenue Regulation (I of 1886), S. 28—Proviso, Clause (4)—Property held by owner without payment of revenue for more than 60 years—S. 28, Proviso Clause (4) does not authorise assessment of revenue unless right to hold revenue free is shown to have been lost within 60 years.

Per *Curiam*.—Clause 4 of the proviso to S. 28 of the Assam Land and Revenue Regulation, I of 1886, does not authorise assessment of revenue on a property, otherwise assessable under S. 28, which has been held by the owner for more than 60 years without payment of revenue, unless it is shown that the owner had a right to hold it revenue free and that right has been lost within 60 years.

(b) Assam Land Revenue Regulation (1 of 1886), S. 28—Suit by plaintiff against Secretary of State for declaration of revenue free title to *mahal*—*Thagbasht* proceedings of 1861 in which *mahal* was described as resumed *mahal*, proved—It does not amount to admission of Government's title to assess revenue in 1861.

Per *D. Chatterjee, J.*—The mere fact that the plaintiff in a suit against the Secretary of State for India in Council for a declaration of his revenue-free title to a *mahal* produced and proved the *thakbast* proceeding of 1861, in which the *mahal* was described by the *Thak* authorities as a resumed *mahal*, does not operate as an admission on the part of the plaintiff of Government's title to assess revenue in 1861. [P. 448, C. 1.]

(c) Assam Land and Revenue Regulation (1 of 1886), S. 28—Assessment of revenue—Property held without assessment and payment of revenue for sixty years—Government's right to assess becomes barred.

The Government's right to assess revenue on a property assessable to revenue becomes barred by limitation after it has been held without assessment and payment of revenue for sixty years. [P. 449, C. 1.]

(d) Limitation Act (9 of 1908), Sch. I. Art. 149—Revenue not assessed for 60 years—Government's right to assess held to be barred.

Where at the time of the Permanent Settlement in 1793 the Government had to abstain from making a settlement of land revenue on a certain land on its owner claiming a *lakheraj* title:

Held, that the cause of action arose in 1793 and no revenue having been assessed within 60 years the Government's right to assess revenue was barred by limitation. [P. 449, C. 1.]

(e) Assam Land and Revenue Regulation (1 of 1886), S. 28—Assessment of Revenue—Decision by Revenue Board that property is assessable—Owner holding property without payment of revenue for 60 years—Claim of Government to assess revenue is barred—Limitation Act (1908) Sch. 1, Art. 149.

A claim of Government to assess revenue becomes barred by limitation where, after a decision of the Board of Revenue in a resumption proceeding that the property is assessable, the owner continues to hold it without payment of revenue for 60 years. [P. 449, C. 1.]

(f) Assam Land and Revenue Regulation (1 of 1886)—Land Revenue—Assessment of—Limitation.

The right of Government to assess revenue may be barred by the operation of the Law of Limitation. 27 Mad. 16, diss. from. [P. 449, C. 2.]

(g) Interpretation of Statutes—Retrospective effect—Statute, when retrospective.

A Statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing *Reg.* v. *St. Mary, Whitechapel*, (1848) 12 Q. B. 120 foll. [P. 449, C. 2.]

(h) Evidence Act (1 of 1872), S. 65—Original of public document destroyed or lost—Any secondary evidence of contents is admissible.

Per *Beachcroft, J.*—A certified copy is not the only admissible secondary evidence of the contents of a public document, when the original of the public document has been destroyed or lost, any secondary evidence of its contents becomes admissible. [P. 450, C. 1.]

(i) Assam Land and Revenue Regulation (1 of 1886), S. 28, Proviso 4—Scope of—Effect of proviso 4 is to save land from assessment of possession for 60 years without payment of revenue is proved.

The effect of proviso 4 to S. 28 of the Assam Land and Revenue Regulation I of 1886 is to save a land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within 60 years there was a cessation of the assessee's right to so hold it. [P. 450, C. 2.]

(j) Assam Land and Revenue Regulation (1 of 1886)—S. 28, Proviso 4—"Held revenue free"—Meaning of.

The words "held revenue free" in the proviso 4 to S. 28 of the Assam Land and Revenue Regulation I of 1886 mean "held without the payment of revenue," and not "held revenue free" as of right. [P. 450, C. 2.]

(k) Assam Land and Revenue Regulation (1 of 1886)—Land Revenue — Assessment — Government's right to assess—Whether can never be barred.

Quære.—Whether the right of Government to assess land revenue can never be barred.

Bepin Behary Ghosh—for Appellant.

Advocate-General—for Respondent.

D. Chatterjee, J.—This was a suit for a declaration that the plaintiff had a revenue-free title to the property in suit and the defendant, the Secretary of State, had no right to assess revenue upon it. Both the Courts below have dismissed the suit and the plaintiff appeals mainly on the grounds (1) that there is no evidence of any resumption decree having been passed in favour of the Government in 1842, and the findings based on the existence of such a decree are bad; (2) that assuming that there was such a decree or a resumption by the Revenue Authorities, no action having been taken upon the same for more than 60 years the right of the Government is barred: (3) that the plaintiff having held the property without payment of revenue for more than 60 years, no assessment can be made by reason of Clause 4 of the proviso to S. 28 of the Assam Land and Revenue Regulation I of 1886.

Before discussing these points I may shortly state the facts that are admitted or found. The disputed property which was formerly a tank and has now silted up was owned by certain Muhammadans, who in 1806 sold it to the ancestor of the plaintiff: the deed of sale does not state that the property was *lakheraj* and there is no documentary evidence of a grant in *lakheraj* right. The defendant admits that Kasba Beniachong, the *mahal* in which the disputed property is situate, was excepted from the Permanent Settlement in 1793 as the then holders of the same claimed a *lakheraj* right. The plaintiff admits that there was a measurement in 1839-40 with a view to resumption. The defendant says there was a resumption suit in 1842 which was decided in favour of Government. Neither the decree nor an attested copy of the same is forthcoming, but there are recitals of a resumption case and decree in a number of papers, including a *kabuliyat* by the father of the plaintiff but not in respect of the disputed land. These documents make out a resumption of the *mahal* in 1842, but it does not necessarily follow from that that the disputed land was included in the resumption. Next in point of time is the *thakbust* proceeding,

Exhibit 3 produced and proved by the plaintiff. Under the heading "Number Touji and name of Mahal" we find the entry is "Non-settled resumed Mahal," and under the heading "the Mahals which have been enclosed by boundaries or plotted," we find No. 170 the disputed property, and under the heading of "Remarks" we find that the name of the Government was originally recorded as the owner in possession but was removed on the objection of the plaintiff's ancestor, whose name was recorded instead. It is contended by the learned Advocate-General that this document being filed by the plaintiff it operates as an admission of the title of the Government in 1861. I do not see how this may be. The description of the *mahal* as a resumed *mahal* was made by the *Thak* Authorities, and not by the plaintiff or his ancestor. It was not the business of the *Thak* Authorities to decide whether a particular piece of land was resumed or not: they took the name as it was given by the Government Revenue Authorities who succeeded in getting an entry as owner in possession but that entry was expunged on objection by the plaintiff's ancestor. The enclosing by boundaries of the disputed plot also does not show that it was resumed, for *lakheraj* lands were as a matter of fact enclosed by boundaries during the *thak*. Even if the description of the *mahal* as resumed *mahal* could apply to the disputed plot, there is nothing in this to show that it was resumed under a decree of the Civil Court. This is all the evidence that we have of a resumption decree as it is called. I do not see my way to adopt this view and I think the appellant is right in contending that there is no evidence of a resumption decree in 1842 in respect of the disputed land.

There was, however, admittedly an attempt at resumption. The resumption *chitta* is clear evidence of that and we may take it there was a resumption by the Revenue Authorities, that is to say, a decision by the Revenue Board that the land was assessable to revenue. S. 21, clause 4, Regulation II of 1819 provides that upon such a decision by the Board the duty of the Collector would be to make an assessment after notice to parties. See also S. 23, Regulation II of 1819. There is no provision in this Regulation as to the time within which this assessment was to be made. Now this Regulation was modified by S. 10 of Regulation III of 1828, which directed the assessment to be made at once and that if the owner declined to pay he must be dispossessed. In the present case there was no immediate assessment and the owner was allowed to continue in possession. It is said that this was so because the land was a tank and unfit for settlement. The learned Judge says this is clear from Exhibits V and T. I do not see how this is so. Exhibit T describes No. 2532 as a tank and gives its boundaries and Exhibit V does not mention No. 2532 at all. If Exhibit T shows anything it shows that the property was a tank which would ordinarily be more valuable than waste land. Then again the learned Judge says the possession of the plaintiff was permissive, but that was never the case of the defendant who only said that no assessment was made of tanks, *gopaths* and waste lands as unfit for the settlement and as no one applied for them. The finding of the character of plaintiff's possession, therefore, is against the case of the defendant and is an inference which, as far as I can see, is not supported by evidence. On the other hand if the defendant had a right to dispossess the plaintiff in 1842 and did not exercise its (*sic*) right. the possession of the plaintiff became adverse to the defendant from that time. That possession continued for more than 60 years and the defendant's right of recovery of possession is lost. It is said, however, that the right to assess revenue is a sovereign right and cannot be lost. Reliance is placed in support of this view on the case of *Boddupalli Jagannadham* v. *Secretary of State* (1). With great respect to the learned Judges I do not feel at all pressed by the opinion expressed in that case in favour of a sovereign right of assessment. The particular Madras Regulation 25 of 1802 which was the subject-matter of discussion expressly reserved the right of Government, to continue or abolish exemptions from the payment of revenue and no question of prerogative was pertinent. The unreported case relied on by the learned Judges goes perhaps a little further, but there it was stated that "no limitation is placed on the exercise of that right by any Statute or law." That

(1) (1904) 27 Mad. 16.

Statute. Sub-S. 2 of S. 2 of Regulation II of 1805 is to the effect "that all claims on the part of Government, whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption or for the recovery of arrears of the public assessment or for any other public right whatever (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force), shall be heard, tried and determined, etc., if the same be regularly and duly preferred at any time within the period of 60 years from and after the origin of the cause of action."

The origin of the cause of action was in 1793 at the time of the Permanent Settlement, when the predecessors-in-title of the plaintiff claimed a *lakheraj* title and the Government had to abstain from making a settlement. If the proceedings of 1842 declared the land liable to assessment the Collector should have proceeded to assess it at once but he did not. Whether we count 60 years from 1793 or from 1842 the claim of the Government is barred. This disposes of the second question.

The last question argued is that the assessment is barred by S. 28 of Assam Regulation I of 1886. That section enacts that all land shall be liable to assessment except land expressly exempted and land for which a tax is levied under S. 47:

"provided that nothing in this section shall authorize the assessment of any land which has been held revenue free for sixty years continuously unless it is shown that the right so to hold it has ceased to exist."

The land in this case has been admittedly held revenue free for more than 60 years and the Bengal Regulation under which assessments were previously made being repealed by this Regulation as to Assam and the operation of this section being excluded by the said proviso, there would be no law under which the disputed land could be assessed.

The learned Judge, however, thinks that to apply this section to the present case would be to give a retrospective effect to it and that 60 years have not elapsed from 1886. It is true that all legislation must be considered as prospective unless a nything to the contrary is expressly or by necessary implication provided. But a statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing: see *Reg* v. *St. Mary Whitechapel* (2). If the proviso is considered to be an enacting part of the section, which it apparently is not, it operates on the state of things that it finds existing on its promulgation. If it finds that a particular piece of land answers to the description contained in its wording, it operates by excluding it from the operation of the enacting part.

But the matter may be looked at from another point of view. The proviso excepts a particular class of lands from the operation of the enacting part of the section. The enacting part, therefore, does not apply and no retrospective effect is given to any enactment.

In the next place, it may be said that it does not take away or affect any vested right: it declares what the legal position of these lands was at its passing. The Limitation Regulation had barred the right of assessment in such cases and it was thought proper to add this proviso just for the purpose of preventing misconception and dispute.

The second clause to the proviso might at first sight appear to authorise the assessment of the disputed lands as excepted from the Permanent Settlement.

In construing that clause, however, it must be remembered that the Regulation was orginally passed for the Province of Assam, where the Permanent Settlement came very much later where it did come and in many places it has not come even now, so that it cannot be said that the assessment of lands excepted from the Permanent Settlement in 1793 was contemplated in 1886 after more than 93 years. Clause 2 of the proviso, therefore, would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and in the present case Clause 4 has saved them.

In this view of the case I would allow the appeal and decree the suit with costs in all Courts in the following manner that it be declared that the disputed land is

(2) (1848) 12 Q. B. 120.

not liable to be assessed with revenue and the Secretary of State be enjoined not to realise the sum claimed in the notice of December, 1908. If the amount has been realised it will be refunded to the plaintiff.

Beachcroft, J.—As regards the first point argued on behalf of the appellant, I am not prepared to say that there is no evidence that the land was resumed in 1842. There is no doubt that there was evidence before the learned Judge that resumption proceedings were taken in respect of the whole of the Baniachong, in which area was included the subject-matter of dispute, and that this particular piece of land, then a tank, figured in the resumption *chitta*. Then the learned Judge says :

" the *rubakari* (Exhibit V) shows besides that the plaintiff or his rather preferred no objection with regatd to the disputed tank."

It has not been suggested that this is an incorrect statement of the contents of the exhibit nor has it been taken as a ground of appeal that the learned Judge has in this passage misstated the evidence. An extract from the exhibit has been printed. It mentions that objections were made in respect of some lands. But the whole exhibit has not been placed before us, and though in the portion printed there is no mention of this particular plot there is no reason to suppose that the portions not printed, to some passage in which the learned Judge presumably refers, does not bear out his statement of their contents.

It was urged that as under S. 65 of the Indian Evidence Act, the only secondary evidence admissible of the contents of a public document is a certified copy, there was no evidence of the contents of the resumption decree. But that rule is obviously subject to the rule that when the original has been destroyed or lost any secondary evidence may be given.

The appeal must, however, in my opinion, succeed on the ground that the assessment complained of is barred by S. 28 of the Assam Land and Revenue Regulation, 1886. It is argued for the respondent that the right of the Government to assess land revenue, which, as is pointed out in the preambles to Regulations XIX and XXXVII of 1793, is based on the ancient law of the country, can never be barred. As to the proposition stated in those general terms it is not necessary to express an opinion. For it is clear that Government can divest itself of the right to assess revenue and can make such Regulations for the guidance of its officers as will have the same practical result as renunciation of the right to assess revenue. Now the Assam Land and Revenue Regulation has repealed Bengal Regulations so far as they apply to territories to which the Regulation has been extended, so the only provisions for assessment of the land revenue as extant in Sylhet are those to be found in the Regulation itself. S. 28 provides that all land shall be deemed liable to be assessed to revenue, subject to exceptions in favour of two classes of land, and subject also to certain provisos. Exemption is claimed under the 4th proviso which declares that nothing in the section shall " authorise the assessment of any land which has been held revenue free for sixty years continuously unless it is shown that the right so to hold has ceased to exist." The learned Advocate-General argued that the words " held revenue free " meant so held " as of right," but he was not prepared to argue that they could not mean merely " held without payment of revenue " apart from any question of the right so to hold the land. I think that if the former meaning had been intended it would have been expressed in definite terms and that the meaning to be attached to the words is the alternative one suggested. The proviso then would seem intended to reproduce the rule of 60 years' limitation provided by S. 2 of Regulation II of 1805. It is also definitely enacted that the proviso is made inapplicable if it be shown in the case of land so held that the right so to hold it has ceased to exist. The qualification is probably intended to save the land revenue in cases where at some time the land has been rightly held without payment of revenue within the sixty years. The effect of the proviso appears to be to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years there was a cessation of the assessee's right to so hold it. If it were sufficient for Government to show that at any time, even before the 60 years, the owner had no right to hold the land

revenue free or had lost the right, the practical effect of the proviso would be merely to raise a presumption in favour of freedom from assessment after 60 years' holding without payment of revenue. If that had been the intention, I think, it would have been expressed in simpler language. It seems to be a case of an exception within an exception. So that if in fact there has never been a right to hold the land revenue free, the second exception will not apply and the holding of the land without payment of revenue for 60 years will bar the assessment.

I must confess that I express this opinion as to the meaning of the 4th proviso with considerable diffidence in view of the fact that the 2nd proviso contemplates case of assessment of land which was not included in the assets of an estate at the time of the Permanent Settlement, but I do not see what other construction can be placed upon it.

The learned District Judge favoured the view that the proviso to S. 28 could not have retrospective effect, in other words, that it could not come into operation till the year 1946. This view was only faintly supported in this Court and does not commend itself to me. There does not appear to be any parallel between this case and the case relied on by the learned Judge.

In the present case the appellant has held the land for more than 60 years without payment of revenue: it is not shown that he lost the right within the 60 years preceding the suit, in fact it is not shown that he ever had the right to hold revenue free. The result is that the Regulation does not authorise assessment in his case.

I, therefore, agree in allowing the appeal and decreeing the plaintiff's suit.

V.B./R.K.

Appeal allowed; *Suit decreed.*

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WOODROFFE AND NEWBOULD, JJ.

Eusuffzeman Sarkar and *others*—Judgment-debtors—Appellants.

v.

Sanchia Lal Nahata and *others*—Decree-holders—Respondents.

Appeal No. 11 of 1913, decided on 14th June, 1915, from the Appellate Order of Dist-Judge, Rungpur, dated 23rd September, 1913.

(a) Civil P. C. (5 of 1908), O. 21, R. 2—Payment of interest on judgment debt notified to Court by application for execution saves limitation.

O. 21, R. 2 of the Civil Procedure Code, does not stand in the way of payment of a sum by the judgment-debtor to the decree-holder by way of interest on the judgment-debt operating to save limitation, when that payment, though not certified separately, was notified to the executing Court by a subsequent application of the decree-holder for execution and was acted upon by that Court. [P. 452, C. 1.]

(b) Civil P. C. (5 of 1908), O. 21, R. 2—Certification—Decree-holder may apply to certify payment on his application for execution—Application acted upon by Court—No formal recording of certification is necessary.

The certification which may be given by a decree holder under O. 21, R. 2 of the Civil Procedure Code, need not be a certification on some days or at some time different from that on which the application for execution is made. A decree-holder may apply to certify payment on his application for execution of the decree and where such application is acted upon by the Court, no formal recording of certification is necessary. [P. 451, C. 2.]

Purna Chandra Ray—for Appellants.

Mohini Mohan Chakravarti and *Abinash Chandra Chakravarti*—for Respondents.

Judgment.—The point in this appeal is very narrow and very technical. It is the case of a decree-holder applying for execution of his decree. At the time of the application for execution, he notified to the Court by his application that he had received a certain sum from the judgment-debtor, and the finding of the Court is that that sum had been paid in fact by the judgment-debtor by way of interest on the judgment-debt.

The decree-holder relies upon this payment as saving limitation and the judgment-debtor replies that it cannot have that effect, because the payment of Rs. 10 by the judgment-debtor was not certified; and in the next place, it did not operate to extend the limitation under the provisions of Ss. 19 and 20 of the Limitation Act. The *first* point practically is this, that the certification which may be given by the decree-holder under O. 21, R. 2, must be a certification on some days or at some time different from that on which the application for execution was made. It appears to us that the decree-holder may either apply to certify payment before execution or may do so on his application for execution of

the decree. In the present case, he did notify to the Court that he had received this sum of Rs. 10; and that is all that he has to do in order to certify payment. It is, however, said that the Court should then have recorded this certification. It does not seem to me necessary under the circumstances, seeing that the application for execution was made and the Court acted on such application by allowing such execution to issue. Moreover, the section speaks of "certified" or "recorded." We are, therefore, of opinion that O. 21, R. 2, does not stand in the way.

As regards the *other* point, it has been found that Rs. 10 was in fact paid by the judgment-debtor himself by way of interest. That finding is sufficient.

The fact of the endorsement and the question as to who made it and the authority by which it is made, are immaterial. The appeal fails and is dismissed with costs. We assess the hearing fee at three gold *mohurs*.

V.B/R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 452

JENKINS, C. J. AND WOODROFFE, J.

Chandi Prosanna Sen and *others*—Defendants—Appellants.

v.

Gour Chandra De and *another*—Plaintiff and Defendants—Respondents.

Letters Patent Appeal No. 51 of 1911, decided on 30th March, 1915, against the Decree of Coxe, J., dated 20th February, 1911.

Occupancy holding—Mortgage—Non-transferable occupancy holding mortgaged without consent of landlord—Co-sharers landlords sold and purchased holding in their share of rent decree—Suit on mortgage—Held no question of transferability arose.

The defendant No. 2 mortgaged his untransferable holding without the consent of his landlords to the plaintiff. Before the mortgage the defendants Nos. 3 to 12, who were co-sharer landlords, had sued for their share of the rent and had obtained a decree. In execution of that decree they purchased the land themselves. In a suit by the plaintiff to enforce his mortgage:

Held, that no question of transferability arose in the case. [P. 453, C. 2.]

Trailokhya Nath Ghose for *Hem Chandra Sen*—for Appellants.

Gunada Chandra Sen—for Respondents.

Facts appear from the following judgment of the lower Appellate Court.

"This is a suit on a mortgage bond. The defendants Nos. 3 to 12 are co-sharer landlords. They have been made parties as they purchased a part of the mortgaged property in execution of their decree for rent. The defendants objected to the suit, stating that the property No. 1 is not transferable by custom or usage. The lower Court has found that the property is not transferable by custom or usage and has dismissed the suit as against the defendants Nos. 3 to 12. The plaintiff has appealed. The only ground pressed in appeal is that the question does not arise since the defendants No. 3 to 12 claim the property by virtue of their purchase and they are in no better position than the mortgagor. The authorities bearing on the point are reported as *Krishna Lal Saha* v. *Bhairab Chandra Rahat* (1) and *Achanulla Sarkar* v. *Salemonnessa Bibi* (2), *Bibi Asmatunnessa Khatun* v. *Harendra Lal* (3), *Hari Das Bairagi* v. *Udoy Chandra Das* (4), *Srimati Bibjan Bibi* v. *Kishorimohun Bandopadhya* (5) and *Ayenuddin Nasya* v. *Srish Chandra Banerji* (6). The case reported as *Krishna Lal Saha* v. *Bhairab Chandra Bahat* (1) is distinguishable from the present, since in that case the defendant claimed not only by virtue of his purchase but also upon a settlement by the landlord. The decision in that case was evidently based on the right which the subsequent purchaser got by virtue of his settlement from the landlord. The word "landlord" in that decision means the sole landlord. In this view the decision is not against the other authorities on the point. The decision reported in *Bibi Asmatunnessa Khatun* v. *Harendra Lal* (3) was also based on the fact that all the landlords were the subsequent purchasers, and so that decision is not on all fours with the present case in which some of the landlords purchased the property subsequently. The case directly in point is that reported as *Ayenuddin Nasya* v. *Srish Chandra Banerji* (6). This case was discussed in the case reported as *Bibi Asmatunnessa*

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(1) (1905) 9 C. W. N. 248 N.
(2) (1905) 9 C. W. N. 24 N.
(3) (1908) 35 Cal. 904.
(4) (1908) 12 C. W. N. 1086.
(5) (1907) 11 C. W. N. clix.
(6) (1907) 11 C. W. N. 76.

Khatun v. *Harendra Lal* (3). In that discussion there is one passage which may be construed as supporting the defendants' case.

The passage stands thus :

"None of the landlords were parties to the suit."

Suit referred to as *Ayenuddin Nasya* v. *Srish Chandra Banerji* (6). I do not think that by these words their Lordships meant to say that if any of the landlords had been party to the suit, the question could have been raised, for in that case it would be opposed to the case reported as *Ayenuddin Nasya* v. *Srish Chandra Banerji* (6). Even if it be supposed that their Lordships had that intention, I think they meant that the co-sharer landlord must be a party in his character as a landlord in order to entitle him to raise the plea of non-transferability and in this view it would not be opposed to the decision reported as *Ayenuddin Nasya* v. *Srish Chandra Banerji* (6). The decision reported as *Srimati Bibyan Bibi* v. *Kishorimohum Bandopadhya* (5)is distinguishable from the prior one by the fact that the purchaser in that suit purchased with the consent of all the landlords. The point of distinction has been clearly stated to be so in the body of the judgment. The only distinction between the present case and the case reported as *Ayenuddih Nasya* v. *Srish Chandra Banerji* (6) is that in this case the co-sharer landlords, who are purchasers, are parties to the suit but in the other case the defendant derived his right from the purchasers. This difference is in my opinion not material, if the co-sharer landlords, as purchasers, would have been entitled to raise the question. It must be stated here that in that case the co-sharer landlords are not parties as landlords but are parties as purchasers of the interest of the mortgagor. Had the co-sharer landlords disclaimed any right by their purchase they would not have been necessary parties to the suit. The accident that the subsequent purchasers of the equity of redemption are co-sharer landlords does not entitle them to any benefit at all. In the case reported as *Ayenuddin Nasya* v. *Srish Chandra Banerji* (6) their Lordships said that

"no doubt, on the 13th November and on the 17th November. 1899, the holdings were brought to sale at the instance of some one or other of the part proprietors in execution of the decrees obtained for their shares of the rent . . . . . all that was sold was . . . . . the right, title and interest of Dharmodas (tenant) as they existed at the time when the sales were held and it is obvious, therefore, ...They (the landlords) by their purchases simply stepped into the shoes of Dharmodas and they can not take any higher position than what Dharmodas himself could take upon the dates when the sales were effected."

They further observed that

"the co-sharer landlords . . . . did so (purchase) subject to the mortgage decree which the plaintiff Company held and subject also to the sale which took place at their instance."

These observations show clearly that in their Lordships' view the co-sharer landlords in this case have purchased the property subject to the plaintiff's mortgage and have simply stepped into the shoes of the mortgagor by their purchase. The question of transferability does not, therefore, arise. The decision reported as *Hari Das Bairagi* v. *Udoy Chandra Das* (4) is indirectly to this effect. The only case which is apparently opposed to the above decision is that reported as *Achanulla Sarkar* v. *Salemonnessa Bibi* (2). In that case, however, the facts are not given in full and we are unable to see whether the subsequent purchaser recognised by all the landlords or not or whether he got any settlement from all the landlords or not. This decision was not cited in any of the later cases. The facts of the case not being known I cannot hold that the decision is really opposed to the law laid down in *Ayenuddin Nasya* v. *Srish Chandra Benerji* (6). Although apparently it is so. Moreover, in none of the later decision was the correctness of the decision in *Ayenuddin Nasya* v. *Srish Chandra Banerji* (6) questioned. I can, therefore, accept that decision as the law which governs a case like the present. I, therefore, hold that the question of transferability does not arise in this case. but the defendants Nos. 3 to 12 will not be barred from raistng this question when they appear as landlords. I have already said that the defendants Nos. 3 to 12 are necessary parties only so long as they claim as purchasers. It appears from their written statement that they took their stand on their purchase and not on any right as landlords. In their written statement they pray that the property No. 1 be sold last. The plaintiff's Pleader has no objection to it and I think it is not at all inequitable. The appeal is allowed. The decree of

the lower Court will be modified in accordance with the finding of this Court, but the property No. 1 would be sold in case the decree be not satisfied by the sale of the property No. 2. The remaining portion of the lower Court's order will stand. The appellant will get the costs of this appeal from the respondents and will get full costs of the lower Court."

The defendants Nos. 3 to 12 preferred an appeal against this judgment to the High Court, which came on for hearing before Coxe, J., who delivered the following judgment on the 20th February, 1911 :—

"Defendant No. 2 in this case appears to have mortgaged his holding, which is not transferable without consent of the landlord, to the plaintiff. Before the mortgage the defendants-appellants who are co-sharer landlords had brought a suit for their share of the rent, obtained a decree, and in execution sold the land which they bought in themselves.

It has been held by the learned Subordinate Judge in the Court below that the question of transferability does not arise.

The only point that arises in this appeal is, whether the decision is or is not right. The case appears to be exactly similar to that of *Haro Chandra Poddar* v. *Umesh Chandra Bhattacharjee* (7). The only difference is that the co-sharer landlords in that case purchased the holding in execution of a money-decree and in the present case they have purchased in execution of a decree for their own share of the rent. But this makes no difference. Before the amendment of the Bengal Tenancy Act a decree obtained by a co-sharer landlord in his share of the rent was simply a money decree. Consequently the two cases seem to be wholly indistinguishable. The learned Pleader for the appellant has criticised the correctness of the learned Subordinate Judge's decision. But his criticisms apply in exactly equal measure to the case I have cited and to the case now before me. I am bound by that former decision and I must follow it.

I may say that the learned Pleader for the appellants asked for time on the ground that the 12th defendant, who is on the record as a minor represented by his mother, had come of age and also on the ground that his mother had sold the minor's interest in the property to a certain other person who is not a party to the case, and who ought to be brought on the record. No formal application has been put in nor has any affidavit been filed. The suit was instituted in September, 1907, and I think it is too late now to delay the proceeding on a mere verbal application of this nature. The learned Pleader for the respondents is content to take his chance with regard to this question of parties, and agrees that the appeal should be dismissed on the record at it stands. Accordingly the appeal is dismissed with costs."

Judgment.

By the Court.—The appeal is dismissed. We make no order as to costs.

V.B./R.K.

Appeal dismissed.

(7) (1910) 5 I. C. 39.

A. I. R. 1916 Calcutta 454

NEWBOULD, J.

Sakayet Mollah—Defendant—Appellant.

v.

Alam Mollah and *another*—Plaintiffs—Respondents.

Appeal No. 717 of 1914, decided on 8th March, 1916, from the Appellate Decree of Sub-Judge, Khulna, dated 31st July, 1913.

Bengal Tenancy Act (8 of 1885), S. 87—Abandonment of tenancy does not extinguish rights of transferee of lessee under T. P. Act (1882).

Though abandonment may terminate a tenancy under the Bengal Tenancy Act, it is not by itself sufficient to extinguish the tenancy rights of a transferee of a lessee under the Transfer of Property Act. [P. 455, C. 1.]

Jadunath Kanijilal and *Bhudhar Haldar*—for Appellant.

Brojalal Chakravarty—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of possession of the disputed land after establishment of the plaintiff's title by auction-purchase. This suit was instituted as far back as the 30th September, 1907. It was first dismissed by both the lower Courts on the ground that it was barred by the special law of limitation under the Bengal Tenancy Act. On appeal to this Court, it was held that Article 3 of the Schedule 3 of the Bengal Tenancy Act did

not govern the case and the case was remanded to the lower Appellate Court for a re-trial. The sole issue in this case is whether the tenancy purchased by the plaintiff was transferable or not. The lower Appellate Court to which the case was remanded has held that the Transfer of Property Act governs the case and not the Bengal Tenancy Act. It has granted the plaintiff a decree for *khas* possession.

It is now *first* contended that the Transfer of Property Act should not have been held applicable in the absence of a finding that the tenancy was not created before the passing of that Act. I was asked to remand the case again for a determination on this question of fact. It is too late now for the defendants to raise this plea. At the hearing of the suit he tried to take the case outside the Transfer of Property Act, which is the general law relating to the rights of the landlords and tenants, by showing that the land was agricultural land and was thus excepted under S. 117 of the Act and governed by the Bengal Tenancy Act. Having failed on this plea he cannot now be allowed to resist the plaintiff's case on an entirely different plea.

It is *next* contended that the lower Appellate Court was wrong in holding that a tenancy under the Transfer of Property Act is not extinguished by abandonment. It is urged that an abandonment is a form of implied surrender which under Clause (*f*) of S. 3 of the Transfer of Property Act is one of the methods by which a lease may be determined. The section gives an illustration to Clause (*f*) which indicates what is meant by implied surrender; and the example there given is a very different matter from abandonment. Abandonment and surrender are quite distinct, as surrender, express or implied, must be mutual between the parties. Though abandonment may terminate a tenancy under the Bengal Tenancy Act, it is not by itself sufficient to extinguish the rights of a transferee of a lessee under the Transfer of Property Act.

It is *lastly* contended that the lower Appellate Court should have held that the Bengal Tenancy Act applied to this tenancy. On the finding of fact that the land is mainly homestead and there is nothing to show that the land was taken for horticultural purposes but was evidently taken for homestead purposes and also on the finding that the former tenants were not *ryots*, I cannot say that the learned Subordinate Judge has committed any error of law in holding that the Bengal Tenancy Act did not apply.

The appeal is, therefore, dismissed with costs.

V.B./R.K.

Appeal dismissed.

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MOOKERJEE AND SHEEPSHANKS, JJ.

Nabin Chandra Aich—Applicant.

v.

Noakhali Municipality—Opposit Party.

Criminal Reference No. 65 of 1916, decided on 10th May, 1916, by the Sessions Judge, dated 26th April, 1916.

Bengal Municipal Act (3 B. C. of 1884), S. 218—Non-compliance with provisions of Ss. 175, 176, 178 and 179—Conviction under S. 218 not valid.

The conviction of, and sentence passed upon, an accused under S. 218 of the Bengal Municipal Act cannot be sustained, where the essential preliminary steps in compliance with the provisions of all the Ss. 175, 176, 178 and 179 of the Act had not been observed before an application was made to the Magistrate under S. 202 of the Act for his criminal Prosecution. [P. 456, C. 2.]

Order.—This is a reference under S. 438, Criminal Procedure Code, by the Sessions Judge of Noakhali recommending that the conviction of the accused and the sentence passed on him under S. 218 of the Bengal Municipal Act by the Sub-Divisional Magistrate of Noakhali may be set aside.

The accused put up a fence and is alleged to have thereby encroached on a public drain, which lies towards the east of a public road within the Noakhali Municipality. On the 20th December, 1915, the Municipality served a notice on him under S. 202 requiring him to remove within eight days the fence, which was described as an obstruction. The accused preferred an objection on the 23rd December, stating that the fence put up by him was not an obstruction as the eastern part of the drain appertained to the land of an adjoining school. On that very day the Chairman passed an order in the following terms:

"I have seen the place. Nabin Chandra Aich (the accused) has encroached on the Municipal drain. Move District Magistrate requesting criminal prosecution against him."

The petitioner was then placed on his trial and was fined Rs. 10 under S. 218 of the Bengal Municipal Act by the Sub-Divisional Magistrate, to whom the case was made over by the District Magistrate. The legality of this conviction is in question before us.

Part V of the Bengal Municipal Act includes Ss. 173—219. S. 175 prescribes the procedure to be followed in all cases where the owner or occupier of any land is required to execute any work or to do anything within a specified time. The first step is the service of the notice on the owner or occupier, who is required to execute such work or to do such thing in the manner provided in Ss. 356 and 357. The second paragraph of S. 175 sets out the substance of the contents of the notice. S. 176 allows the person on whom the notice has been served to prefer a written objection to the Commissioners within a prescribed time. The second paragraph of S. 176 and the first paragraph of S. 177 specify the Municipal authority by whom the objection is to be heard and disposed of. S. 178 then lays down that after the objection has been heard, an order shall be recorded, withdrawing, modifying or making absolute the requisition against which the objection is preferred. If the requisition is not withdrawn on the objection, the order must specify the time within which the requisition shall be carried out, which shall not be less than the shortest time which might have been mentioned in the original requisition. S. 179 next provides that such order shall be explained orally to the objector, should he be present at the office of the Commissioners, or if such order cannot be so explained, notice of the order shall be served on him in the manner laid down in S. 356. Then follows the very important provision in S. 179 that such explanation of or service of the notice of the order shall be deemed a requisition duly made under the Act to execute the work or to do the thing required. It is consequently plain that there are two distinct stages in the preliminary procedure; there is, *first*, the initial notice under S. 175 followed by the objection, if any, on the part of the person notified and there is, *next*, the explanation or notification of the order absolute, if any, made after his objection had been heard. This procedure is, by virtue of S. 175; applicable in its entirety to a case under S. 202. In the case before us, as is clear from the facts already recited, there was compliance with the provisions of Ss. 175 and 176 but not with those of Ss. 178 and 179. Consequently there was a failure to observe the essential preliminary steps before an application could be made to the Magistrate under S. 202. The proceeding before the Magistrate was thus without jurisdiction and the conviction and sentence cannot be sustained.

We accordingly accept the recommendation of the Sessions Judge, set aside the conviction and sentence on the petitioner and direct that the fine, if paid, be refunded.

V.B./R.K.

Conviction and sentence set aside.

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HOLMWOOD AND IMAM, JJ.

Hiramati Dassya—Judgment-debtor—Petitioner.

v.

Annada Prasad Ghosh and *others*—Decree-holders—Opposite Party.

Rule Nisi No. 930 of 1915, decided on the 31st January, 1916, against the Order of District Judge. Khulna, in Miscellaneous Judicial Case No. 65 of 1915.

(a) Jurisdiction — Absence of — Proceedings without jurisdiction cannot be transferred—Civil Procedure Code.

Proceedings in a Court which are without jurisdiction are not proceedings which can be transferred by a superior Court either under the old Code of Civil Procedure or the new. 37 Cal. 574, foll. [P. 458, C. 1.]

(b) Jurisdiction—Absence of—Suit for recovery of possession with mesne profits—Mesne profits exceeding pecuniary jurisdiction of Court decreeing suit—Decreeing Court has no jurisdiction to deal with the mesne profits—Application should be presented to proper Court.

A Munsif, whose pecuniary jurisdiction was limited to Rs. 2,000, decreed a suit for recovery of possession of an immovable property with mesne profits. The value of the suit with mesne profits claimed up to the date of the institution of the suit amounted to a gross valuation of Rs. 1,200, but the mesne profits *pendente lite* and thereafter up to the date of delivery exceeded his pecuniary jurisdiction:

Held, that the Munsif's decree for possession and mesne profits antecedent to suit must stand but as regards the assessment of mesne profits from the institution of the suit to the date of delivery of possession, the Munsif had no

jurisdiction and that such an application for mesne profits filed in the Munsif's Court should be returned for presentation to the proper Court. 8 I. C. 34, foll. 21 Cal. 550, not foll.

(P. 458, C. 1 & 2.)

Sarat Chandra Basak and *Bipin Chandra Bose* - for Petitioner.

Jogesh Chandra Roy and *Amarendra Bhusan Ghose*—for Opposite Party.

Facts of the case appear from the following petition of the judgment-debtor :—

"1. That the decree-holders opposite party instituted a suit, being Suit No. 44 of 1902, in the Court of the Subordinate Judge of Khulna against your petitioner and others for recovery of *khas* possession and for *wasilat* and valued the said suit at Rs. 1,200, *i. e.*, Rs. 800 being the market value of the land in dispute and Rs. 400 being the approximate value of mesne profits.

2. That the said suit was subsequently transferred to the Court of the 2nd Munsif of Khulna who was vested with powers to try cases valued up to Rs. 2,000.

3. That the learned Munsif dismissed the plaintiffs' suit with costs and against the said judgment and decree the plaintiffs preferred an appeal to the District Judge of Khulna, who decreed the plaintiff's suit without costs and directed *wasilat* to be ascertained in execution.

4. That against the said judgment and decree of the learned District Judge your petitioner preferred an appeal from Appellate decree, being No. 2031 of 1905, to this Hon'ble Court but the said appeal was dismissed by their Lordships and the plaintiffs' suit was decreed.

5. That thereafter the plaintiffs instituted Execution Case No. 457 of 1908 in the Court of the 2nd Munsif of Khulna against your petitioner and others for ascertainment of mesne profits and notices were served upon your petitioner and other defendants.

6. That the other defendants in the said suit filed petitions of objections on the allegations that they had no right to or possession in the property decreed, and consequently they were not liable for the mesne profits, but the learned Munsif rejected the said petitions and made all of them liable for mesne profits.

7. That against the decision of the learned Munsif your petitioner preferred Appeal No. 72 of 1909 and the other defendants preferred Appeal No. 71 of 1909 to the District Judge of Khulna, but the learned Subordinate Judge who finally tried the appeal decided that the appellants in Appeal No. 71 of 1909 were not liable for mesne profits but only your petitioner, appellant in Appeal No. 72 of 1909, was liable for mesne profits of the plaintiffs decree-holders.

8. That the plaintiffs decree-holders preferred an appeal from order, being No. 120 of 1909, to this Hon'ble Court against all the defendants, but their Lordships held that your petitioner alone was liable to the plaintiffs decree-holders for mesne profits.

9. That thereafter a Commissioner was appointed to investigate into the amount of mesne profits due to the plaintiffs decree-holders and the Commissioner submitted his report that according to the decree-holders' identification of the disputed land the amount of mesne profits would be Rs. 10,841-7-9, and according to your petitioner's identification the mesne profits would be Rs. 764-1-0 only while according to the Commissioner the amount of mesne profits would be Rs. 3,600-7-8.

10. That your petitioner filed petition of objection to the report of the Commissioner and your petitioner also filed an application to the effect that the amount of mesne profits cannot exceed Rs. 2,000 as the learned Munsif had no jurisdiction to try cases exceeding Rs. 2,000, but after hearing the Pleaders of the parties the learned Munsif came to the conclusion that he had no jurisdiction to decree more than Rs. 2,000 to the decree-holders.

11. That thereafter on 7th August, 1915 the decree-holders filed an application to the District Judge of Khulna for transfer of the Case No. 457 of 1908 from the file of learned 2nd Munsif to the file of the 1st Subordinate Judge of Khulna, and the very day the learned District Judge passed an *ex parte* order transferring the said suit to the Court of the Subordinate Judge of Khulna.

12. That on the same day your petitioner appeared before the District Judge of Khulna after the above order was passed and after hearing both the parties the learned District Judge by his judgment dated 18th August, 1915 affirmed his former order of transfer and the suit was transferred to the file of the Subordinate Judge of Khulna.

13. That being aggrieved by the orders of the learned District Judge, dated the 9th August, 1915 and 18th August, 1915, your petitioner begs to move your Lordships on the following amongst other.

Grounds.

1. For that the learned District Judge acted without jurisdiction in transferring the case from the file of the 2nd Munsif to the file of the Subordinate Judge of Khulna.

2. For that the plaintiffs having instituted their case in the Court of the Munsif having limited pecuniary jurisdiction, the learned District Judge acted without jurisdiction in transferring the case to the Court of the Subordinate Judge.

3. For that the order made by the learned District Judge for transfer of the case for mesne profits to the file of the Subordinate Judge is *ultra vires* and void.

Under the circumstances your petitioner most humbly prays that your Lordships will be pleased to send for the records, to issue a Rule and to set aside

the said orders of the learned District Judge, dated 9th and 18th August, 1915, or to pass such other or further orders as to your Lordships may seem fit and proper and your petitioner further prays for *ad interim* stay of the hearing of the case..."

Dr. *Sarat Chandra Basak* and Babu *Bipin Chandra Bose*—for the Petitioner.

Babus *Joges Chandra Roy* and *Amarendra Bhusan Ghose*—for the Opposite Party.

Judgment.—We think that the proper way of dealing with this matter is to treat it precisely in the same manner as this Court treated a similar application in the case of *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (1). There is no question now that the Munsif had full jurisdiction to decide the original suit with mesne profits claimed up to the date of the institution of suit, which amounted to a gross valuation of Rs. 1,200. There is also no doubt that he had no jurisdiction to adjudicate upon mesne profits *pendente lite* and thereafter up to the date of delivery, inasmuch as those mesne profits are said by one party to amount to Rs. 3,000, and by the other to over Rs. 10,000, and the special pecuniary jurisdiction of the Munsif is limited to Rs. 2,000. Something, therefore, must be done to enable the decree-holder to have the full benefit of the decree so far as he is entitled to it; and the only question seems to be whether we should follow the procedure adopted by a Bench of this Court in the case of *Rameswar Mahton* v. *Dilu Mahton* (2), or the more recent decision to which we have already referred. That the order of the learned District Judge in the Court below transrerring the case to the Subordinate Judge is incompetent there can be no doubt on the principle which is laid down in the case of *Shamsunder Saha* v. *Anath Bandhu Saha* (3). Proceedings which are without jurisdiction are not proceedings which can be transferred either under the old Code or the new. We cannot now say that the Munsif had jurisdiction to ascertain and decree mesne profits which are in excess of Rs. 2,000, nor can we remove from the cognizance of the Munsif the decree which has already determined the possession and mesne profits antecedent to suit. That must remain with the Munsif and must be confined to the limits of his pecuniary jurisdiction. But the proper course to follow with regard to the assessment of mesne profits from the institution of the suit to the date of delivery of possession is to direct the return of the plaint or application for mesne profits subsequent to suit for presentation to the proper Court, that is, the Court of the Subordinate Judge.

The Rule is, therefore, made absolute in these terms and the execution case will be returned at once to the Munsif's Court for carrying out the order.

We make no order as to costs.

V.B./R.K.

Rule made absolute.

(1) (1910) 8 I. C. 34.
(2) (1894) 21 Cal. 550.
(3) (1910) 37 Cal. 574=6 I. C. 97.

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FLETCHER AND TEUNON, JJ.

Lalit Mohan Sinha Roy—Plaintiff—Appellant.

v.

Haran Chand Khamrui and *others*—Defendants—Respondents.

Appeal No. 1015 of 1915, decided on 18th July, 1916, from the Appellate Decree of Sub-Judge, 1st Court, Hooghly, dated 5th February, 1915.

Contract Act (9 of 1872), S. 43—Suit for rent against some of tenants' heirs is maintainable.

A count for rent is the common *indebitatus* count, namely, a count to recover a debt. It falls within the provisions of S. 43 and the promise is entitled to require performance by any one or more of the promisors. The mere absence of one of the promisors in a suit in British India, where no plea in abatement or a similar plea is permitted, is not fatal nor a bar to the suit. [P. 459, C. 2.]

A suit against the heirs of a deceased tenant for arrears of rent, which did not accrue due during the lifetime of the deceased, is maintainable, even though all the heirs are not made parties to the suit. 7 I. C 840 and 19 I. C. 989, foll. [P. 459, C. 1.]

Basanta Kumar Bose—for Appellant.

Haradhan Chatterjee—for Respondents.

Fletcher, J.—This is an appeal from the decision of the learned Subordinate Judge of Hooghly, dated the 5th February, 1915, affirming the decision of the Munsif at Arambakh. The suit was brought against certain tenants to recover arrears of rent. It appears from the evidence that one Gour Mohun and his

others were entitled to the holding. our Mohun was dead and the suit was ought against his brothers and some of s heirs, the remaining heirs of Gour ohun not being made parties to it. ne rent in this case sued for in the aint, which was traversed in the written statement, was clearly the rent at had become due from the defend- nts. There is no suggestion in the case nywhere that portion of this rent accrued ue in the lifetime of Gour Mohun. But ne point that was urged before the earned Judge in the lower Appellate ourt and before the learned Munsif and ith success was that, as the heirs of Gour Mohun succeeded on his death, herefore, no suit could be maintained gainst the heirs to recover the arrears of ent unless all the heirs of Gour Mohun were parties to the suit. The decision that is relied upon in support of that proposition is the decision of Mr. Justice Mookerjee and Mr. Justice Sharfuddin in the case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadra* (1). But the facts of that case, as appears from the judgment of Mr. Justice Mookerjee, are very different from the facts of the present case. In that case, the rent sued for became due in the lifetime of the father and some of the heirs only were sued for the arrears. Mr. Justice Mookerjee in a considered judgment held that the suit did not lie against some of the heirs only of the deceased father. On the other hand, we have got the decision of Jenkins, C. J., and Mullick, J., in the case of *Chamatkarini Dasi* v. *Triguna Nath Sardar* (2), the facts of which case are practically on all fours with the facts of the present case. There, the learned Chief Justice stated in the course of his judgment that the liability of the tenants to pay the rent was contractual and that, applying the provisions of S. 43 of the Indian Contract Act, any one or more of the promisors could be compelled to fulfil the promise. He pointed out, however, that for the purpose of bringing the holding to sale under Chapter XIV of the Bengal Tenancy Act other considerations would arise and it might be that, ordinarily, in order to pursue the special remedies given by Chapter XIV of the Bengal Tenancy Act, it was essential that all tenants should be made defendants in the suit. But so far as the plaintiffs' getting a money-decree was concerned, the learned Chief Justice expressed the clear opinion that, under the terms of S. 43 of the Indian Contract Act, the plaintiffs were entitled to get a decree for money against any one or more of the tenants. That seems to me to be clearly right. A count for rent is the common *indebitatus* count, namely, a count to recover a debt. That clearly falls within the provisions of S. 43 of the Indian Contract Act and the promisee is entitled to require performance by any one or more of the promisors. The mere absence of one of the promisors in a suit in this country, where no plea in abatment or a similar plea is permitted, is not fatal nor a bar to the suit. The Indian Contract Act provides ample remedies where one of the joint promisors has been sued and has paid the whole rent for that promisor to recover the amount paid by him in excess of his share by contribution from the other promisors. I think, in the present case, the appeal ought to be allowed and the decrees of the Courts below reversed and *in lieu* thereof a decree should be passed in favour of the plaintiff for the amount claimed in the plaint with interest thereon at the rate of six per cent. per annum, from the 5th January, 1914, until realization. The respondents must pay to the appellant his costs in this Court as well as in the Courts below.

Teunon, J.—I agree.

V.B./R.K.

Appeal allowed.

(1) (1910) 7 I. C. 840.
(2) (1913) 19 I. C. 989.

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MOOKERJEE AND CUMING, JJ.

Jagannath Panja—Appellant.

v.

Mahesh Chandra Pal—Respondent.

Appeal No. 385 of 1914, decided on 10th July, 1916, against the Orders of Dist. Judge, 24 Parganas, dated 6th June, 1914.

(a) Guardian and Wards Act (8 of 1890), S. 34—Appointment without enquiry of fitness is bad.

No person should be appointed guardian of the person or property of an infant without some enquiry about his fitness for the office.

[P. 462, C. 2.]

(b) Guardian and Wards Act (8 of 1890), S. 45—Removal without giving opportunity to explain charges is bad.

No order for removal of a guardian should be made till the guardian has been apprised of the charges brought against him and has been allowed a reasonable opportunity to explain and, if possible, to defend his conduct. 16 I. C. 567, ref.
[P. 461, C. 1.]

(c) Guardian and Wards Act (8 of 1890), Ss. 34 and 45—Fine when can be imposed—Failure to deposit balance due on requisition under S. 34 (d) is the ground for fine but not failure to deposit amount alleged to be misappropriated.

S. 45, sub-S. (1), Clause (*b*) of the Guardians and Wards Act authorises the Court to impose a fine on a guardian, only if the guardian fails to pay into Court, on a requisition under S. 34 (*d*), the balance due on the accounts exhibited by him in compliance with a requisition under S. 34 (*c*) and not for failure to deposit moneys alleged generally to have been misappropriated.

Where the balance due from a guardian on accounts exhibited under S. 34 (*c*) was Rs. 186 only, but the Court on the report of an officer who examined the accounts ordered the guardian to bring into Court a larger sum alleged to have been in his hands on behalf of the infant and, on his failure to do so, imposed a fine upon the guardian under S. 45 (*b*) of the Guardians and Wards Act:

Held, that, as the requisition to bring into Court was not in conformity with S. 34 (*d*), no fine could validly be imposed on the guardian for his failure to comply therewith.
[P. 462, C. 1.]

Anilendranath Roy Choudhury—for Appellant.

Brojalal Chakraberty and *Gurudas Sinha*—for Respondent.

Judgment—This appeal is directed against three orders made under the Guardians and Wards Act, 1890. The appellant, Jagannath Panja, along with another person, Sashi Bhusan Kandar, was on the 25th of April, 1911 appointed guardian of the property of an infant named Manmotha Nath Panja. On the 31st July, 1913, the respondent Mahesh Chandra Pal, who alleges that he is a brother of the step-mother of the infant, made an application to the District Judge and prayed that the guardians might be called upon to file and to explain the accounts. Notices were thereupon served on the guardians to appear and explain why they had not filed the accounts. Some accounts, which were then filed on behalf of the guardians, were examined by the translator; his report disclosed that the original account books and vouchers were required for the proper scrutiny of the accounts. Abstracts of accounts and vouchers were subsequently filed by the guardians and supplemental accounts also were brought into Court, which the translator was directed to examine. On the 3rd December, 1913, Mahesh Chandra Pal was granted permission to inspect the accounts and the translator was directed to note the objections. The translator submitted his report on or about the 10th February, 1914, and on that date the 26th February was fixed for the guardian to appear "so that an attempt might be made to secure some more satisfactory arrangement." This evidently had reference to the report of the translator which showed that, if his view was correct, the management of the estate of the infant had been far from satisfactory. This was followed by subsequent orders in which the question was considered whether a fresh guardian of property might not, with advantage to the infant, be appointed, and on the 23rd April, 1914, the appellant as also his colleague were removed from the office of guardians of the estate of the minor on the ground that they were not trustworthy. They were, however, not discharged, and were called upon to bring into Court Rs. 300 which was stated by them to have been in their hands on the 16th April, 1914. They were also directed to produce a sum of Rs. 500 or Rs. 600 alleged to have been realised by them by the sale of paddy. Up to this stage, no notice had been served upon the guardians of any application to remove them from the guardianship of the infant; nor had they been called upon to show cause why they should not be so removed. On the 23rd April, 1914, the appellant prayed that an enquiry might be made as to the truth of the charges brought against him by his colleague who, upon his own motion, had been discharged from guardianship on that date. On the 7th May, 1914, the Court recorded an order that neither of the two guardians of property had produced Rs. 300 and that contrary to the statements said to have been made before the Court on a previous occasion, each now alleged that the other held the money realised by sale of the paddy. The Court thereupon proceeded to impose a fine of Rs. 50 each on the appellant and the other guardian under S. 45 (*b*) of the Guardians and Wards Act. The order further directed that if the previous directions of the Court were not carried out in the course of five days, a daily fine of Rs. 10 would be imposed on each guardian from the following day. On that date, the respondent Mahesh

Chandra Pal, who had moved the Court, and initiated these proceedings, was appointed temporary guardian both of the person and property of the infant. On the 6th June, 1914, there is an order recorded in the order-sheet that the fine imposed upon the appellant must be realised and that he must bring into Court Rs. 150 as the value of the paddy in his hands. It may be mentioned here that a sum of Rs. 150 had already been brought into Court by the other guardian who was discharged at his own instance. This appeal is directed against the order of the 23rd April, whereby the appellant was removed from the guardianship, as also the orders of the 7th May and 6th June, 1914, whereby fines were imposed upon him and he was directed to bring into Court the value of the paddy alleged to have been sold by him.

As regards the order for removal, it has been urged that the guardian should not have been removed till notice had been served upon him and he had been allowed reasonable opportunity to defend himself against the charges of mismanagement. The Guardians and Wards Act does not prescribe the procedure to be followed when the Court finds it necessary, either of its own motion or at the instance of a party interested in the welfare of the infant, to take steps for the removal of a guardian appointed by itself. But it is perfectly plain that no order for removal should be made till the guardian has been apprised of the charges brought against him and has been allowed reasonable opportunity to explain and, if possible, to defend his conduct. The procedure adopted in England for the removal of a guardian will be found described in the standard work on Chancery Practice by Daniell (Volume 1, page 982). It is there pointed out that an application to remove the guardian of the person or the estate of an infant must be made to the Court and be supported by evidence as well of the facts which render the application necessary as of the fitness of the proposed guardian and his consent to act. In the companion volume on Chancery Forms by Daniell, there are two forms (1398 and 1401) which set out the terms of the application and the contents of the affidavit whereby the application must be supported. It is clear from the form of the affidavit that special grounds for the application must be made out. Substantially, the same procedure is followed in the Courts of the United States. This procedure should, in our opinion, be followed in our Courts, based as it is upon the elementary rule that no order adverse to a party litigant should be made by a Court of Justice till he has been apprised of the charges brought against him and has been allowed reasonable opportunity to show cause. As was observed by this Court in the case of *Tekait Ajant Singh* v *Sundar Mall* (1), it is a rule of universal application, based on the plainest grounds of justice, equity and good conscience, that a judicial order, which may possibly affect or prejudice any party, should not be finally made, unless he has been afforded an opportunity to be heard. Consequently, the order for removal of the appellant from the office of guardian cannot be supported. The charges brought against him were of a grave character; if the view taken by the translator, on an examination of the accounts, is well-founded, there is good reason to apprehend that there as been serious mismanagement of the estate of the infant by the guardians, and their conduct may possibly amount to a criminal offence. It is obviously just that, in a case of this character, opportunity should be given to the appellant to explain the accounts filed by him and to justify his conduct.

As regards the orders under S. 45 (1) (*b*), whereby fines have been imposed upon the appellant and he has been called upon to bring into Court the sum of Rs. 150 as the value of paddy sold, we are of opinion that they have not been passed in conformity with the provisions of the Guardian and Wards Act and cannot consequently be supported. S. 45, sub-S. (1), Clause (*b*), authorises the Court to impose a fine on a guardian, if the guardian fails to pay into Court the balance due from him on "those accounts," *i. e.*, the accounts exhibited by him in compliance with a requisition under S. 34 (*c*). The payment contemplated has to be made in compliance with a requisition under S. 34 (*d*). A reference to S. 34 shows that under Clause (*c*), the guardian is under an obligation, if so required by the Court, to exhibit his account in Court at such times and in

(1) (1912) 16 I. C. 567.

such form as the Court may from time to time direct : under Clause (*d*), it is obligatory upon the guardian, if so required by the Court, to pay into Court, at such time as the Court directs, the balance due from him (or so much of the balance as the Court directs) on those accounts, that is, the accounts exhibited on a requisition made under Clause (*c*). In the case before us, on the accounts exhibited under S. 34 (*c*), Rs. 186 only was due from the guardians. Consequently the only order which the Court was competent to make was to call upon the guardians to bring into Court the sum of Rs. 186. As the requisitions was not in conformity with S. 34 (*d*), it is clear that no fine could validly be imposed on the guardians for failure to comply therewith.

The result is that this appeal must be allowed, the orders dated the 23rd April, 7th May and 6th June set aside, and the case remitted to the District Judge for re-consideration. Any sums realised from the appellant under the orders now discharged will be refunded to him. In the circumstances of this case, we direct each party to pay his own costs up to this stage.

We find from the record that no security was taken from the appellant at the time of his appointment as guardian of the property of the infant or at any subsequent period. In view of the allegations made against his management of the estate, it is obviously essential, in the interest of the infant, that he should not be allowed to continue as guardian of the property, unless he furnishes security to the satisfaction of the Court, and he has in this Court expressed his readiness to do so. We accordingly direct that within one month of return of the record to the Court below, he do furnish security to the extent of Rs. 1,500 to the satisfaction of the District Judge, and in such form as he may determine. The security so taken will cover the past management of the estate by the appellant as also his future dealings therewith if he continues as guardian. If he fails to furnish security as now directed, he will stand removed from the guardianship. If he furnishes security and continues as guardian under the jurisdiction of the Court, his accounts will be scrutinised, and the charges brought against him will be investigated. If on examination it transpires that his management of the estate has been of such a character that he should not be allowed to remain in charge of the estate of the infant any longer, he will be removed. If, on the other hand, it transpires that although his conduct has not been wholly satisfactory he may yet be allowed to remain in possession of the estate as guardian, additional security may, in the discretion of the District Judge, be taken from him for the protection of the estate. The sole point for consideration in cases of this description is the welfare of the infant and the matters mentioned will be investigated from that standpoint alone. We may, in this connection, refer briefly to another point which does not require detailed consideration in view of the order we have already made. When the Court decided to remove the guardians on the ground that they were not trustworthy and proceeded to appoint Mahesh Chandra Pal as guardian of the person and property of the infant, no enquiry was made as to his fitness. But it is eminently desirable that no person should be appointed guardian of the person or property of an infant without some enquiry about his fitness for the office.

The accounts and papers already filed will remain in the custody of the Court. But all facilities will be given to both parties to have access to them under proper safeguards. We may finally add that as the appeal has been filed by Jagannath Panja alone, he will be restored as guardian under our orders. As his colleague was removed on his own application and has expressed no desire to undertake again the responsibilities of the office, the order of the District Judge will stand untouched in that respect.

V. B./R. K.

Appeal allowed.

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JENKINS, C.J. AND MOOKERJEE, J.

Birendra Kisore Manikya Bahadur—Plaintiff—Appellant.

v.

Nabin Chandra Chakravarty and *others*—Defendants—Respondents.

Appeal No. 3472 of 1912, decided on 11th July, 1913, from the Appellate

Decree of Offg. Dist. Judge, Tipperah, dated 20th August, 1912.

Landlord and Tenant—Relationship—Suit for declaration of title and assessment of rent—Claim based on entry in Khatian—Defendant found in adverse possession without rent even before the entry—Held inference was that no relationship of tenant existed and defendant was in adverse possession.

In a suit for declaration of title and assessment of rent to the land in suit the plaintiff relied on an entry in a *khatian* for the purpose of establishing the relationship of landlord and tenant. The defendant set up title by adverse possession. It was found that the defendant was in possession even prior to the entry :

Held, that inasmuch as no rent was ever paid the inference was that not only there was no relationship of landlord and tenant between the parties but that the defendant was in adverse possession. [P. 464, C. 1.]

Romes Chandra Sen—for Appellant.

Facts appear from the following judgment of the lower Appellate Court, dated 20th August, 1912 :—

"This appeal arises out of a suit by plaintiff for declaration of title and assessment of rent to the land in suit. Plaintiff's case is that the land is in his *zemindari* and the defendant has been in possession of it without obtaining settlement from him or from his predecessors.

The defendant set up title by adverse possession for over the limitation period.

The lower Court has dismissed the suit and the plaintiff has appealed.

The only question urged for determination in this appeal was that of *limitation*.

It is admitted on behalf of the appellant that defendant has been in possession for over the limitation period. The only question for determination is whether that possession has been adverse possession for over 12 years before this suit.

Now it appears that the defendants set up their title by adverse possession before the Settlement Officer in March 1896, *i.e.*, 12 years before this suit. This claim of adverse title was set up to the knowledge of the plaintiff. The period of limitation starts from the date when an adverse title and possession are set up to the knowledge of the opposite party. Thus the plaintiff's claim is clearly barred by limitation and the appeal must fail. This case, I may remark, is exactly analogous to the case reported as *Birendra Kishore Manikya Bahadur* v. *Roshan Khan* (1), in which their Lordships of the High Court held the same view.

The learned Pleader for the appellant has filed a certified copy of a judgment of the Hon'ble High Court in another analogous case reported as *Aman Gazi* v *Birendra Kishore Manikya Bahadur* (2), decided by Stephen, J., and Richardson, J., on the 3rd May, 1912, in which their Lordships held that the period of limitation began to run from the date of the final publication of the Record of Rights, and not from the date of the actual setting up of the adverse title by the defendant. With all due respect to the judgment of their Lordships in the last case I consider it right to follow the ruling laid down in *Birendra Kishore Manikya Bahadur* v. *Roshan Khan* (1). It is not clear how an inquiry by the Settlement Officer followed by an entry in the Record of Rights can nullify the effect of the claim of adverse title and possession previously set up by the defendant so far as the running of the period of limitation is concerned. Let us look at the position clearly. In March, 1896, while the Settlement operations were in progress, the defendant, to the knowledge of the plaintiff, set up before the Settlement Officer his title by adverse possession. He asserted that he paid no rent in respect of the land in question and that so far as this land was concerned, he had acquired title by holding the land without paying rent to any one. All that the Settlement Officer did was to record his opinion in the finally published *khatian* that the defendant held the land without paying rent. It is clear that so far as the question of title was concerned, the entry in the Record of Rights left the matter indeterminate. That this was so is quite clear from pages 88 and 89 of the Settlement Officer's (Mr. J. G. Cumming) report on the survey and settlement of the Chakla Roshanabad Estate 1892-99, to which the learned Munsif has made reference. While thus leaving the question of title open, the Settlement Officer found the defendant's plea of possession without payment of rent correct. The parties were thus left on the same status as before. It is difficult to see how the entry in the Record of Rights could have made any difference in the defendant's position and how it could have

(1) (1912) 39 Cal. 453=13 I.C. 518.

(2) (1912) 15 I. C. 64.

prevented limitation running from the date of his claim of adverse title and possession; for it is admitted that his possession continued.

In the appeal decided by their Lordships Stephen and Richardson, JJ., they observe that in the case reported as *Birendra Kishore Monikya Bahadur* v. *Roshan Khan* (1) their Lordships did not consider the effect of any entries in the Record of Rights. But it will appear that in the judgment of Chatterjee, J., in the latter case the entry in the *khatian* is expressly referred to and the *khatian* entry was evidently held not to have prevented limitation from running from the actual date of the setting up of the adverse title and possession.

The appeal is accordingly dismissed under O. 41, R. 11 of the Civil Procedure Code."

Judgment.—We dismiss this appeal for this reason. It appears to us that a fair reading of the judgment under appeal is that there was no such relationship between the parties established as would preclude the application of the doctrine of adverse possession. The plaintiff in this case, as in all other cases, relied on the *khatian* and that alone, for the purpose of establishing that relationship. The Courts were not satisfied on the entry in the *khatian* that there was the relationship of landlord and tenant. Although there was an entry which was susceptible of that meaning, having regard to the fact of long possession—possession which, according to the judgment of the Munsif, was prior to the entry—and to the fact that no payment of rent was ever made, evidently the inference drawn was that not only was the relationship of landlord and tenant not established, but further that there has been an adverse possession proved which furnishes an answer to the plaintiff's claim.

The appeal is accordingly dismissed under O. 41, R. 11, Civil Procedure Code.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 464 (1)

MOOKERJEE AND SHEEPSHANKS, JJ.

Lakhimi Ram Gagoi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal, decided on 2nd May, 1916, against the Order and Sentence of the Asst. Sess. Judge, Assam Valley, dated 17th March, 1916.

Criminal P. C. (5 of 1898), S. 408—Assistant Sessions Judge sentencing accused under each of two sections of Indian Penal Code—Sentences to run concurrently—Appeal lies to Sessions Judge and not to High Court.

Where an Assistant Sessions Judge sentences an accused to imprisonment for a period not exceeding four years under each of two sections of the Penal Code, the sentences to run concurrently, an appeal lies to the Sessions Court and not to the High Court. [P. 464, C. 2.]

Order.—In the case mentioned, *Somiruddin Sonar* v. *Emperor*, the accused had been convicted of an offence under one section only of the Indian Penal Code and sentenced to imprisonment for a term of two years: it was ruled by Sharfuddin and Chapman, JJ., that as the trial had been held by an Assistant Sessions Judge, the appeal lay, under S. 408 of the Criminal Procedure Code, to the Court of Session and not to the High Court. In the case before us, the accused has been convicted and sentenced under two sections of the Indian Penal Code; the sentences, however, are directed to run concurrently. The appeal, we think, lies to the Court of Session; this view is in accord with that adopted by Chandavarkar and Heaton, JJ., in *Tulsidas Lakshman* v. *Emperor* (1), namely, that where an Assistant Sessions Judge passes sentences upon an accused, each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Sessions Court and not to the High Court. A similar opinion had been expressed by Clarke, C. J. and Maude, J., in *Sher Muhammad* v. *Emperor* (2).

Let the petition of appeal be returned for presentation to the proper Court.

V. B./R. K.

Appeal petition returned.

(1) (1909) 3 I. C. 171.
(2) (1901) 25 P. R. 1901.

A. I. R. 1916 Calcutta 464 (2)

D. CHATTERJEE AND BEACHCROFT, JJ.

Purna Chandra Sarkar—Defendant—Petitioner.

v.

Rassoraj Pramanik—Plaintiff—Opposite Party.

Civil Rule No. 1015 of 1915, decided on the 28th February, 1916.

Provincial Small Cause Courts Act (9 of 1887), S. 17—Proviso—Provisions must be strictly complied with—Substantial compliance is not sufficient.

A substantial compliance with the provisions of the proviso to S. 17 of the Provincial Small Cause Courts Act is not sufficient. Therefore, where the defendant at the time of his application for setting aside an *ex parte* decree deposits an amount which is shorter than the amount due from him under the decree even by a very small amount (through a mistake in calculation), his application cannot be entertained by the Small Cause Court.

Babu Gunada Chandra Sen—for the Petitioner.

Judgment.—The law imposes upon the applicant for review or re-hearing the duty of putting in into Court the amount due from him under the decree at the time of his presenting the application, the other alternative being a discretion of the Court not to take the deposit but to allow an application to be made upon a proper security being given. In the present case an amount short by about 11 annas was put in my mistake. That, therefore, did not comply with the requirements of the section.

It is contended that a substantial compliance with the provision of the Act should be sufficient. We are unable, however, to accede to this argument as the wording of the law is very specific.

In this view of the case the Rule is discharged with costs, hearing fee one gold *mohur*.

Rule discharged.

A. I. R. 1916 Calcutta 465

CHATTERJEA AND RICHARDSON, JJ.

Tarak Nath Roy Chowdhury and *another*—Plaintiffs—Appellants.

v.

Syama Charan Chowdhury and *another*—Defendants—Respondents.

Appeal No. 8 of 1913, decided on 30th June, 1916, from the Original Decree of Sub-Judge Rungpur, dated 30th September, 1912.

(a) Civil P. C. (5 of 1908), O. 21, Rr. 43, 54 and 64—Sale without attachment is irregular but not invalid.

The absence of an attachment in execution of a decree, though an irregularity, does not render the sale in execution absolutely void. 5 All. 86, diss. from. 36 Bom. 156, dist. 18 Cal. 188 and 21 All. 311, foll. 21 Cal. 66 (P. C.), ref. [P. 467, C. 2.]

(b) Limitation Act (9 of 1908), Art. 120—Scope—Where applies stated.

Article 120 of the Limitation Act applies to declaratory suits in respect of title to immovable property. 1 C. L. J. 73, ref. [P. 468, C. 1.]

(c) Transfer of Property Act (4 of 1882), S. 100—Reversioner joining widow in mortgage—On redemption he is entitled to contribution and has charge on property and can enforce it against alienee of life estates from widow.

A reversioner, who jointly with the widow mortgaged properties left by the deceased owner, is on redeeming the mortgage entitled to claim a rateable contribution of the mortgage-debt from the person who purchased the life-interest of the widow in one of those properties and has a charge upon that interest in respect of his claim for contribution, which can be enforced under S. 100 of the Transfer of Property Act. 28 All. 482, (P. C.) ref. [P. 470, C. 2.]

(d) Contribution—Principle of apportioning liability between life tenant and remainderman stated.

The principle for apportioning liability between a tenant for life and a remainderman or reversioner laid down. [P. 471, C. 1.]

Mohendra Nath Kai and *Hara Kumar Mitra*—for Appellants.

Sarat Chandra Roy Chowdhury and *Krishna Kamal Moitra*—for Respondents.

Judgment.—This appeal arises out of a suit for the recovery of possession of the property in dispute on a declaration that the defendant No. 1 has not acquired any title to it by purchase at a sale held in execution of a decree against the defendant No. 2, and in the alternative for a decree declaring that the plaintiffs would be entitled to possession of the property on the death of the defendant No. 2. There was also a claim for contribution on account of certain payments made by the plaintiff to save the property from being sold in execution of a mortgage decree, and for satisfaction of other debts.

The property in dispute, Lot Chauratta, along with other properties belonged to one Gobind Nath Ray Chowdhury who died in 1873, leaving his widow Drobamoyi (the defendant No. 2) and a son Gopendra Nath. The son died in 1882, and the defendant No. 2 adopted a son Sree Nath who died in 1884. Thereupon Drobamoyi adopted the plaintiff No. 1 Tarak Nath in 1884, but subsequently ignoring his adoption, set up one Jogendra Nath as the adopted son in 1886. In 1891, Tarak Nath brought a suit against Drobamoyi and Jogendra Nath in respect of all the properties left by Gobinda Nath, which

was compromised. By the compromise Tarak Nath was admitted to be the adopted son, he was to get a 6 annas share of the estate, and Jogendra Nath was to get the remaining 10 annas share, that in the event of Jogendra Nath dying unmarried his 10 annas share would devolve upon Tarak Nath and similarly on the latter dying unmarried his 6 annas share would devolve upon Jogendra Nath, but Drobamoyi was to remain in possession of the estate for her life, subject to the payment of certain debts, a certain sum of money to Tarak Nath as costs of litigation, and for building a house and an annuity to him for his life. It was agreed that Drobamoyi would execute mortgage-bonds jointly with Tarak Nath for raising money to pay off debts. It was further agreed that if Drobamoyi failed to pay any debt, and in consequence thereof the properties were put up to sale, it would be considered as a case of waste by Drobamoyi, and in such a case, Tarak Nath would in her life time get possession of the 6 annas share. On the 29th March, 1892, a decree was passed on the petition of compromise after it had been sanctioned on behalf of the minor Jogendra Nath by the Court. Jogendra Nath having subsequently died, the decree was amended by stating that Tarak Nath would be entitled to the 10-annas in the event of Jogendra Nath dying unmarried, and that the latter would be entitled to the 6-annas of Tarak Nath if he died unmarried—these terms having been omitted from the decree. On the 6th June, 1892, a mortgage-bond was executed in accordance with the terms of the compromise by Drobamoyi jointly with Tarak Nath in favour of Rai Dhanpat Singh Bahadur for Rs. 24,800, whereby 5 *zemindaris* including Lot Chauratta were mortgaged.

On the 6th April, 1896, Rani Mina Koer (the widow of Rai Dhanpat) obtained a preliminary decree upon the mortgage-bond against Drobamoyi and Tarak Nath. On the 29th September, 1896, Drobamoyi granted an *ijara pattah* for 20 years in favour of Rani Mina Koer in respect of the 5 *zemindaris* including Lot Chauratta.

It appears that before the litigation referred to above Drobamoyi took a *mokarari* lease of 10 *bighas* of land within the *zemindari* of the defendant No. 1, Syama Charan Ray Chowdhury, at an annual rent of Rs. 100. Syama Charan sued Drobamoyi and Tarak Nath for rent of the *mokarari*, and on the 11th February, 1897 obtained a decree for Rs. 519-10-0 against Drobamoyi alone. In execution of that decree Lot Chauratta, the value of which is about a lac of rupees, was sold and purchased by Syama Charan for Rs. 100 only on the 15th July, 1897, and the sale was confirmed on the 24th August, 1897.

Rani Mina Koer took out execution of her mortgage-decree and the sale in execution of the said decree was fixed for the 4th April, 1898 but was postponed to the 9th May. Thereupon Drobamoyi and Tarak Nath executed three mortgage bonds on the 18th April, 1898 in favour of Aziz Mahomed Saha and others for the total sum of Rs. 54,000. Each of the bonds was for Rs. 18,000, and one-third share of the 5 *zemindaris* was mortgaged in each of the bonds. On the 19th April, 1898, Rs. 44,109 was paid in full satisfaction of the mortgage-decree obtained by Rani Mina Koer.

Drobamoyi brought a suit for setting aside the sale of Lot Chauratta but the suit was dismissed on the 3rd May, 1900, on the ground that it was barred by the provisions of S. 244, Civil Procedure Code. She then made an application on the 18th August, 1900 for setting aside the sale. That application, which was made more than three years after the sale, was dismissed, *first*, on the ground that it was barred by limitation, and *secondly*, on the ground that although there were grave irregularities in publishing the sale, there was no substantial injury inasmuch as Lot Chauratta was subject to an usufructuary mortgage for Rs, 60,000 and the sale was merely of a life-interest, and the value of the interest purchased was, therefore, *nil*.

On the 16th September, 1903, Drobamoyi in consideration of Rs. 10,000 conveyed her interest in all the properties including Lot Chauratta to the plaintiff No. 1, and the plaintiff No. 1 sold a moiety of Lot Chauratta to the plaintiff No. 2 on the 13th July, 1906.

The present suit was instituted by the plaintiffs Nos. 1 and 2 on the 16th March 1908. The Court below dismissed the suit, and the plaintiffs have appealed to this Court.

It is contended on behalf of the appellants, *first*, that the interest which

Drobamoyi had in the property was not, having regard to the terms of the *solenama* decree, a life-interest, *secondly*, that even if it was life-interest and could be sold, the sale held in 1897, at which the defendant No. 1, Syama Charan, purchased, was a nullity and nothing, therefore, passed to him by the sale, *thirdly*, that the plaintiff No. 1's right to present possession accrued during the lifetime of Drobamoye, under the forfeiture clause contained in the *solenama* decree; *fourthly*, that even if the plaintiffs were not entitled to possession of the property during the lifetime of Drobamoyi, they were entitled to a declaration that the sale would not be binding upon them after her death, and *lastly*, that the plaintiff No. 1 was entitled to a decree for the amount paid by him to discharge the encumbrances for which Lot Chauratta was proportionately liable.

As regards the *first* contention, *viz.*, that under the compromise Drobamoyi did not take a life-estate but held the properties as a trustee, we think there is no force in it. In the suit brought by Tarak Nath, Drobamoyi in her written statement pleaded that she had at any rate a life-interest in the properties. In the petition of compromise it was stated that she shall remain in possession as she had been, of the 16-annas of the properties for her life as heir of her deceased son Gopendra Nath, and the decree passed upon the compromise expressly states that during her lifetime she shall remain in possession of the 16-annas properties as holder of a life-estate.

In subsequent transactions also the fact that she had a life-estate is distinctly admitted. In the mortgage-bond executed by Drobamoyi and Tarak Nath jointly in favour of Rai Dhanpat it is stated that Drobamoyi had a life-interest, and the same statement appears in the three mortgage-bonds executed by them jointly in favour of Aziz Mahomed Saha and others. Lastly, in the very conveyance taken by Tarak Nath himself from Drobamoyi it is stated that she had a life-interest. There can be no doubt, therefore, that she had a life-estate in the properties. The *first* contention must, therefore, be overruled.

The *second* contention is that it is competent to the plaintiffs to treat the sale which took place in 1897 as a nullity, in view of the finding in the execution case that no processes of attachment were levied upon the property. It appears from the judgment upon the application to set aside the sale that no process of attachment or sale was served, on or adjacent to the property sold, at all, that the value of Lot Chauratta was nearly one lac of rupees and was sold for only one hundred rupees. It was, however, held that Drobamoyi had mortgaged her entire interest in that estate for 20 years, of which only 3 or 4 years had passed, for a debt of Rs. 60,000 and as she had only a limited interest extending up to the time of her death the value of her interest may be said to be *nil*, and that, therefore, there was no substantial injury, and the application was accordingly dismissed. There was an appeal against the said order, and the Appellate Court confirmed it on the grounds that the application was barred by limitation, and that Drobamoyi's life-interest was mortgaged for Rs. 60,000.

It is contended that the Courts were mistaken in holding that there was a mortgage of Rs.60,000 upon the property, whereas there was in fact no such mortgage at all. But the dismissal of the application is binding upon Drobamoyi and the plaintiff as purchaser of Drobamoyi's interest is concluded by the said order of dismissal.

It is contended, however, that the sale was a nullity because no process of attachment was served at all. We have been referred to the case of *Mahadeo Dubey* v. *Bhola Nath Dichit* (1), in which it was held that a regular attachment is an essential preliminary to a sale in execution, but the case was considered by this Court in the case of *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein* (2) and was not followed, and the Allahabad Court itself did not follow it in a later case. See *Sheodhyan* v. *Bholanath* (3). In the case of *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein* (2), this Court held that although the absence of attachment is a material irregularity a sale, after it has been duly confirmed and a sale certificate granted to the purchaser, is not to be considered as a nullity merely by reason of the absence of any attachment. We were

(1) (1883) 5 All. 86.
(2) (1891) 18 Cal. 188.
(3) (1899) 21 All. 311.

also referred to the case of *Sorabji Coovarji* v. *Kala Raghunath* (4), but there the sale was attacked in the execution proceeding itself, and if the sale was void there was no necessity for taking such proceedings.

Having regard to the case of *Kishory Mohun Roy* v. *Mahomed Mujaffar Hussein* (2) referred to above and the principle of the decision of their Lordships of the Privy Council in *Tasadduk Rasul Khan* v. *Ahmad Husain* (5), it must be held that the absence of an attachment, though an irregularity, does not render the sale absolutely void.

The *third* contention is that there was a forfeiture of Drobamoyi's life-estate because she allowed the property to be attached under Rai Dhanpat's decree and there was an order for sale of the properties on the 16th February, 1898. But apart from the question whether the forfeiture clause could be enforced, it appears that it was waived. After the properties were proclaimed for sale and the forfeiture had been incurred, Tarak Nath waived it by joining with Drobamoyi in executing the mortgages to Aziz Mohamed Saha and others and later on more clearly by taking the conveyance from Drobamoyi herself, which conclusively show that the forfeiture was waived and she was treated as having a subsisting interest.

The *next* question is whether the plaintiffs are entitled to a decree declaring that the sale passed only the life-interest of Drobamoyi and that the plaintiffs would be entitled to possession of the property on the death of Drobamoyi.

The plaintiff stated in the 21st paragraph of the plaint that, as the defendant No. 1, Syama Charan, had after his purchase of the Chauratta got his name registered in the Collectorate under the Land Registration Act as the proprietor thereof and not as owner of the life-interest of Drobamoyi, he has acted to the prejudice of the plaintiff's reversionary right, and that there should be a declaratory decree to the effect that the defendant will have no right to possess the said property Lot Chauratta on the death of Drobamoyi.

Now the name of the defendant No. 1 was registered in the Collectorate on the 9th February, 1899, and the present suit was instituted on the 16th March, 1908, *i. e.*, more than 6 years after. There is no Article of the Limitation Act specifically applicable to a suit for declaration of title to immovable property, but the current of recent decisions is in favour of the applicability of Article 120 to declaratory suits in respect of title to immovable property. The authorities on the point were discussed in the case of *Mohabharat Saha* v. *Abdul Hamid* (6) and we agree with the view taken in that case.

If, however, there is a fresh invasion of the plaintiff's right, as in the foot-note case in *Robert Skinner* v. *Shanker Lal* (7) or in the case of a continuing wrong as in the case of *Brojendra Kishore Roy Chowdhury* v. *Bharat Chandra Roy* (*Brojendra Kishore Rai Chaudhuri* v. *Abdul Razac Chowdhuri*) (8), there is a fresh cause of action. The learned Pleader for the appellant contends that there was a fresh cause of action in this case. It is pointed out that the defendant No. 1, Syama Charan, has from the very first been attempting to make out a case that the *mokarari* lease for the rent of which Lot Chauratta was sold, (although it was granted to Drobamoyi alone) was a lease taken on behalf of the estate and the sale, therefore, was binding upon the estate. In 1896 Syama Charan brought a suit for rent against Drobamoyi as well as against Tarak Nath, though the suit was decreed against Drobamoyi alone. A similar suit was brought in 1906 against both of them, though it was dismissed against Tarak Nath.

It is accordingly contended that this attempt on the part of the defendant No. 1 to establish that the *mokarari* lease was taken for the estate, and that the decree in execution of which Lot Chauratta was sold was binding upon the estate (rent suit of 1906 being within 6 years of the present suit) constitutes a fresh cause of action. These suits, however, relate to the *mokarari* and there has been no fresh assertion of hostile title in respect of Lot Chauratta.

The plaintiffs did not in the plaint set up any fresh cause of action. The only

(4) (1912) 36 Bom. 156=12 I. C. 911.
(5) (1894) 20 I. A. 176=21 Cal. 66 (P.C.).
(6) (1905) 1 C. L. J. 73.
(7) (1909) 31 All. 10 N=1 I. C. 556.
(8) (1915) 31 I. C. 242.

cause of action set up was the registration of the name of Syama Charan in the Collectorate, which took place in 1899 about 9 years before this suit, and in the 24th paragraph of the plaint the cause of action is stated to have arisen on the 6th September, 1903 when Drobamoyi relinquished her life-interest to Tarak Nath. Under the circumstances we are unable to hold that there was a fresh cause of action for the suit.

Then it is pointed out on behalf of the respondents that there has been undue delay in bringing the suit and the Court should not grant a declaratory decree if there has been undue delay. The sale took place in 1897, the plaintiff No. 1 obtained the conveyance from Drobamoyi in 1903, and the suit was not instituted until 1903 and the delay has not been accounted for.

Then again although after the death of Jogendra Nath the compromise decree was amended by bringing it into conformity with the judgment by stating that if Jogendra Nath died unmarried, Tarak Nath shall get his 10-annas share, this Court in making the Rule absolute (for amending the decree) observed that it would have been desirable if the amendment could be made in the presence of the legal heirs of the deceased Jogendra Nath (in his natural family) and stated that it must be distinctly understood that such rectification of the decree would not affect the rights of the legal heirs of Jogendra Nath, if he has lett any heirs.

It is contended that although Jogendra Nath's heirs, if any, may not be necessary parttes they are proper parties. The object of a declaratory decree is to quiet title, and the Court should not make such a decree when it would not be conclusive.

In the circumstances it is unnecessary to remand the case to the Court below for decision of the question whether only the life-interest of Drobamoyi or the entire interest in Lot Chauratta passed by the sale which was left undecided by the Court below; as it held that the suit for a declaratory decree is barred by limitation and that all the proper parties are not before the Court.

The *last* question is whether the plaintiff No. 1, Tarak Nath, can claim contribution in respect of the sum paid by him by which Chauratta was freed from the mortgage.

As already stated Tarak Nath and Drobamoyi executed a mortgage for Rs. 24,800 (at 12 per cent. interest) in favour of Rai Dhanpat Singh on the 12th June, 1892, by which the five *zemindaris* including Lot Chauratta were mortgaged. A decree was obtained on the mortgage by Rani Mina Koer the widow of Rai Dhanpat, on the 4th April, 1896 for Rs. 39,234-0-6. In order to pay off the said decree by Tarak Nath and Drobamoyi on the 18th April, 1898 raised Rs. 54,000 by three mortgages executed in favour of three persons Aziz Mahomed, Abdur Rahim and Hajjutallah respectively, each of the mortgages being for Rs. 18,000, and a one-third share of the five *zemindaris* was given as security in each. Exhibit 13 (Extract of Register of Suits) shows that Rs. 44,109-9-0 was paid into Court by Tarak Nath and Drobamoyi and the decree-holder certified payment of the decretal amount, as appears from the order dated the 19th April, 1898. Lot Chauratta along with the other 4 *zemindaris* was thus released from the mortgage of Rai Dhanpat.

Tarak Nath obtained a conveyance from Drobamoyi in respect of her life-interest in the *zemindaris*, including Lot Chauratta on the 16th September, 1903 and it appears that in order to pay off the debts contracted by him along with Drobamoyi, he raised money by executing a conveyance in respect of an 8 annas share of 4 *zemindaris* (not including Lot Chauratta) on the 24th September, 1903 in favour of Raja Janki Ballav Sen for Rs. 77,000 and a mortgage in respect of the remaining shares for Rs. 80,000 on the 4th October, 1903. The three mortgage-bonds in favour of Aziz Mahomed and others dated the 19th April, 1898 were paid off by Tarak Nath with the money so raised, and the endorsements on the back of the bonds show payment by Tarak Nath alone.

Lot Chauratta when it was purchased by the defendant No. 1 on the 19th July, 1897, was jointly liable along with the other 4 *zemindaris* under the mortgage executed by Drobamoyi and Tarak Nath in favour of Rai Dhanpat on the 12th June, 1892, and there is no doubt that it was freed from that liability by the payment of Rs. 44,109-9-0 on the

19th April, 1898 by Tarak Nath and Drobamoyi.

That being so, it is contended on behalf of the appellant that Lot Chauratta is liable to contribute rateably to the debt secured by Dhanpat's mortgage under S. 82 of the Transfer of Property Act and the plaintiff No. 1 having redeemed that mortgage, he has, under S. 95 of the Transfer of Property Act, a charge on Lot Chauratta in proportion to the amount paid in redeeming the mortgage. On the other hand, it is contended on behalf of the respondent that Dhanpat's mortgage was paid not by Tarak Nath alone, but by him and Drobamoyi by executing three mortgages in favour of Aziz Mahomed and others, and it is only the latter mortgages that were paid off by Tarak Nath. It is further argued that Aziz Mahomed and others could not be created as assignees of Dhanpat's mortgage and there could be no subrogation through those mortgagees, *first*, because that mortgage had merged in a decree, *secondly*, there could be no subrogation in respect of portions of the properties piecemeal, there being three mortgages in each of which a one-third share of the properties was mortgaged and *lastly*, there was no agreement by them, either with the creditor or the debtor, that they would get the benefit of the payment and stand in the position of Dhanpat it is unnecessary to consider whether having regard to the fact that Dhanpat's mortgage was fully deemed, the three mortgagees Aziz Mahomed and others could not jointly claim subrogation, and whether an agreement could not be implied under the circumstances that they would be subrogated to the rights of Dhanpat. The plaintiff does not put his case on that basis. There is no question that Lot Chauratta along with 4 other *zemindaris* were jointly liable for Dhanpat's mortgage, and the defendant No. 1, Syama Charan, purchased the life-interest of Drabamoyi (it must for the present purpose be taken that he purchased only the life-interest) in Lot Chauratta at the auction-sale held in July 1897 subject to that liability. Tarak Nath and Drobamoyi raised money by mortgaging the five properties to Aziz Mahomed and others, but as the life-interest of Drobamoyi in Lot Chauratta had then passed to Syama Charan at the auction-sale, that life-interest could not be mortgaged. However, Tarak Nath and Drobamoyi did raise the money and paid off Dhanpat's mortgage and there was a right of contribution against Syama Charan in respect of the life-interest in Lot Chauratta purchased by him. That payment was made within twelve years of the suit. It is true that Dhanpat's mortgage was paid off by Tarak Nath jointly with Drobamoyi by raising money on mortgages in favour of Aziz Mahomed and others. But Tarak Nath, who subsequently acquired the interest of Drobamoyi, alone paid off the mortgage of Aziz Mahomed and others. Drobamoyi is a party to this suit. In these circumstances, we think that Tarak Nath is entitled to claim rateable contribution of the mortgage debt from Lot Chauratta.

Under S. 93 of the Transfer of Property Act as interpreted by the Judicial Committee in the case of *Ahmad Wali Khan* v. *Shamsh-ul-Johan Begam* (9)], Tarak Nath has charge on Lot Chauratta, which can be enforced under S. 100 of the Transfer of Property Act.

It is contended on behalf of the respondents that the prayers in the plaint do not show the precise nature of the claim in respect of the contribution, and *secondly*, that there is no prayer for any charge. So far as the first contention is concerned, it appears that in the 19th paragraph of the plaint the payment of Dhanpat's mortgage and the liability of the defendant No. 1 to pay the debt was set up, and in the (*gha*) and (*cha*) prayers the plaintiff claimed a decree in respect of the moneys rateably payable by the defendant No. 1. There is no express prayer for a charge, but there is the general prayer in the plaint and we think that relief can be granted upon the general prayer.

The Court below holds that there are no materials, *first*, for apportioning the mortgage-debt between Lot Chauratta and the other four *zemindaris* and *secondly*, for apportioning the liability between the life-interest of Drobamoyi and the interest which Tarak Nath would take after her death. It appears, however, that before the purchase of Lot Chauratta by Syama Charan, Drobamoyi had given an *ijara* of all the *zemindaris* to Rani Mina Koer at a certain lump sum rental and Syama Charan after his purchase

(9) (1906) 28 All. 482=33 I. A. 81=8 Sar. 918 (P.C.).

has been suing for the proportionate amount of rent in respect of Lot Chauratta and realising the proportionate rent for the last 18 years. That we think is some material for apportioning the liability between Lot Chauratta and the four *zemindaris*. The apportionment of liability between a tenant for life and a remainderman or the reversioner is rather a difficult matter. There being no case in our Courts in which the question has been raised, we think the principle upon which calculation is made in such cases in England and America should be adopted. As pointed out in the Tagore Lectures, 1876, page 370,

"Both in England and America the standard life tables have been adopted as the basis of calculation in such cases and the rule is settled that the present worth of an annuity equal to the annual interest running during the number of years which constitutes his expected life represents the sum which *A* (the tenant for life) is liable to pay *B* (the remainderman or the reversioner), being liable for the balance after substracting this sum from the mortgage-debt paid by *A* (tenant for life) to the mortgagee,"

and that,

"If the reversioner or remainderman redeems the mortgage, the rule would be the exact converse of what is stated here."

We think that for the ends of justice the case should be remanded to the Court below in order to allow the parties to adduce evidence on the question of valuation of Lot Chauratta and the other four *zemindaris* respectively, and also on the question of valuation of the life-interest of Drobamoyi and the interest which Tarak Nath would take after her death.

The Court below will apportion the mortgage-debt between Lot Chauratta and the other four *zemindaris*, and also apportion the liability between the life-interest of Drobamoyi payable by the defendant No. 1 and the interest which the plaintiff No. 1 would take after her death and pass a decree for the amount which the defendant No. 1 may be found liable to pay as purchaser of the life-interest of Drobamoyi in respect of Lot Chauratta, the amount being made a charge upon Lot Chauratta. It is to be distinctly understood, however, that the interest purchased by Syama Charan at the sale held on the 15th July, 1897, is taken to be the life-interest of Drobamoyi in Lot Chauratta only for the purpose of reteable contribution of the mortgage-debt in the present suit, and is not to be taken as in any way deciding the question whether the sale passed only the life-interest of Drobamoyi or the entire interest in Lot Chauratta, a question which has not been decided by the Court below or by us. That question is expressly left open.

Under the circumstances of the case, we direct each party to pay its costs in both Courts up to this stage. Costs with respect to the claim for contribution will abide the result.

V.B./R.K.

Appeal allowed; Case remanded.

A. I. R. 1916 Calcutta 471

CHATTERJEA AND BEACHCROFT, JJ.

Mohini Mohan Mozumdar Chowdhury —Opposite Party—Appellant.

v.

Surendra Chandra Dey—Petitioner—Respondent.

Appeal No. 37 of 1915, decided on 10th January, 1916, from the Order of Sub-Judge, Mymensingh, dated 29th October, 1914.

(a) Civil P. C. (5 of 1908), S. 47 (3)—Question as to genuineness of purchase of decree between purchaser, applying for execution on substitution of his name as decree-holder and judgment creditor of decree-holder, attaching decree and opposing application, comes under S. 47.

The question as to the genuineness of the purchase of a decree, arising between the purchaser who applied for execution on the substitution of his name as decree-holder and a judgment-creditor of the decree-holder who, having attached the decree, opposes the application, comes within the purview of S. 47, Clause (3), Civil Procedure Code, and as such its decision is appealable as a decree, even though the judgment-debtor does not take any part in the dispute. [P. 472, C. 2.]

(b) Civil P. C. (5 of 1908), S. 47, O. 21, R. 16—Application under O. 21, R. 16—S. 47 is still applicable.

The fact that an application was made under O. 21, R. 16 of the Civil Procedure Code does not prevent S. 47 of the Code, from being applied for the decision of a question falling within its scope. [P. 472, C. 2.]

(c) Civil P. C. (5 of 1908), S. 47—Sub-sections of S. 47 are independent of each other.

Semble.—The object of separately numbering the sub-Sections of S. 47, Civil Procedure Code, is to make the several sub-sections independent of each other. 11 C. W. N. 433, dist. [P. 472, C. 1.]

Kali Kinkar Chakrabarty—for Appellant.

Birendra Kumar Dey—for Respondent.

D. Chatterjee, J.—One Ram Kanai obtained a decree for money against the judgment-debtor. The respondent Surendra purchased this decree and applied to have his name substituted as a decree-holder and to execute the decree. The appellant Mohini, having a decree against Ramkanai, having attached the said decree of Ram Kanai and as an attaching creditor, opposed the application of the respondent on the allegation that the *kobala* was fraudulent and *benami*. The first Court allowed the objection. On appeal the District Judge has held the *kobala* to be good and valid and allowed the objection of the respondent. The attaching creditor appeals on the ground that no appeal lay to the District Judge. This would depend upon whether the case comes within the purview of S. 47, Clause 3 of the Code of Civil Procedure. The question is whether the applicant Surendra was a representative of the decree-holder and was as such entitled to execute the decree. This question would apparently come within S. 47, Clause 3, and if it does so come within that clause the appeal lay to the District Judge. It is contended, however, on the authority of the case of *Ram Chunder* v. *Mussammat Hamiran* (1), that in order that the case may be brought within the purview of S. 47, Clause 3, the dispute in question must be one in which the judgment-debtor was interested. In this case it appears that the judgment-debtor did not appear to oppose the application of either of the parties. The case referred to was decided upon the old S. 244, Civil Procedure Code. In that section there was no numbering of the several sub-sections and the clause as to representation was dependent upon the previous part of the section which refers to the dispute between the parties to the suit. In the present Code S. 47 has been divided into three sub-sections and the sub-sections are numbered separately. The object of that numbering seems to have been to make the several sub-sections independent of each other. In any case the three sub-sections can be read each by itself and if this is done, then Clause 3 provides for the decision of a question like that which was the subject-matter of the present dispute.

It is further contended that the application was made apparently under O. 21, R. 16 and if that was so there was no provision for any appeal to lie against the order that has been passed. Under the proviso to that rule, notice is to be served upon the transferor and the judgment-debtor and if the transferor, that is, the original decree-holder and the judgment-debtor have notice, then the case becomes one in which all the parties are represented. If all the parties are represented, the case may, very well, be treated as one in which the question arising for decision under S. 47 may be decided and taking it for granted that R. 16 was entirely applicable, still there was nothing to prevent S. 47 from being applied for the decision of the question as to who is the representative of the particular party to the proceeding. R. 16 of O. 21 provides that a decree shall not be executed until the Court has heard their objections (if any) to its execution, that is, the objection of the transferor and the judgment-debtor. Here a third person also comes in whose objection may not be within the purview of O. 21, R. 16. Here the third person is Mohini who is the attaching creditor of Ram Kanai. That question, however, can very well be determined under sub-S. 3 of S. 47. We think, therefore, that, on the whole, the decision is one which comes within sub-S. 3 of S. 47 and, is, therefore, appealable. As expressly stated in the section this decision is for the purpose of execution only.

In this view of the case we dismiss the appeal with costs, hearing fee two gold *mohurs*.

The Rule is discharged.

Beachcroft, J.—I agree.

V.B./R.K.

Rule discharged.

(1) (1907) 11 C. W. N. 433.

A. I. R. 1916 Calcutta 472

CHITTY AND WALMSLEY, JJ.

Bishessur Chuckerbutty and *another*—Petitioners.

v.

Emperor – Opposite Party.

Criminal Revision No. 235 of 1916, decided on the 17th March, 1916, against an Order of Dy. Magte, Faridpur, dated the 16th February, 1916.

(a) Criminal P. C. (5 of 1898), S. 144 Cl. (5)—Extension of time by successive order is not legal.

It is clearly improper for a Magistrate to extend the period of two months prescribed by Clause 5 of S. 144, Criminal Procedure Code, by passing successive orders under that section. 11 C. W. N. 79, ref. to. [P. 473, C. 2.]

(b) Criminal Procedure Code (5 of 1898), Ss. 107 and 144—Order under S. 144 proving sufficient—Procedure.

When one order under S. 144 does not prove sufficient for the purpose, the right procedure to adopt is to commence proceedings under S. 107, Criminal Procedure Code. [P. 473, C. 2.]

Monmotha Nath Mukerjee—for Petitioners.

Dasarathi Sanyal and *Hirendra Nath Ganguly*—for the Crown.

Judgment.—In this case a Rule was issued calling on the District Magistrate to show cause why the order of the Deputy Magistrate passed under S. 144, Criminal Procedure Code, should not be set aside on grounds Nos. 1 and 3 in the petition mentioned. It would have been more correct had it been based on grounds Nos. 2 and 3. In this case the dispute is with regard to rival *hats*. The petitioners at the close of last year had started a rival *hat* on grounds belonging to themselves, which the Magistrate thought was likely to lead to a breach of the peace. He accordingly passed an order under S. 144, Criminal Procedure Code, on 18th December restraining them from holding a *hat* at that spot. This order would have expired on 18th February, 1916. The petitioners moved this Court towards the end of January, and we rejected the petition on the ground that the order of the Magistrate was about to expire, and that there was, therefore, no reason for an interference by this Court. This was our chief, if not only, ground for declining to interfere on that occasion. Before that order expired, the Magistrate proceeded to pass orders under the same section with regard to the new *hat* - the site of which the petitioners had shifted to other lands of their own. This order was passed on 13th January, 1916 and expired a few days ago. We are asked to interfere with it on the ground that the Magistrate in this case is doing what this Court has held that a Magistrate should not do, namely, by successive orders under S. 144, Criminal Procedure Code, extending the period of two months which Clause (5) of that section prescribes. That the Magistrate has this object in view is clear from his orders in these cases. In passing the final order making the injunction absolute in this case on 16th February, 1916, he noted "put up after two months." It is obvious that the Magistrate thought that his order dated from 16th February, 1916, and that two months thereafter he might be in a position to pass a third order under this section. This is clearly improper. We need only refer to the case of *Satish Chandra Roy* v. *Emperor* (1). The Magistrate states that he has already commenced proceedings against both the parties under S. 107, Criminal Procedure Code. This is obviously the right procedure to adopt: but we are at a loss to understand why the Magistrate thinks that proceedings under that section will take such a long time before final orders can be passed. We see no reason why those proceedings should not be expedited, and orders passed immediately, so as to prevent any further difficulties in respect of these rival *hats*. We think that the present order now under consideration ought not to have been passed, and we accordingly make the Rule absolute and set it aside.

V.B./R.K.

Rule made absolute.

(1) (1907) 11 C. W. N. 79.

A. I. R. 1916 Calcutta 473

CHATTERJEE AND BEACHCROFT, JJ.

Sarat Chandra Pal—Defendant—Appellant.

v.

Benode Kumari Dassi—Plaintiff—Respondent.

Appeal No. 478 of 1914 and Rule No. 266 of 1915, decided on 2nd August, 1915, against the Order of Dist. Judge, 24, Parganas, dated 27th August, 1914.

(a) Probate and Administration Act (5 of 1881), S. 90—Order under S. 90 permitting administrator to sell property in presence of party objecting to sale is analogous to decree and is appealable.

Per *D. Chatterjee, J.*—An order made by a District Judge under S. 90 of the Probate and Administration Act, giving permission to an administrator to sell a property in the presence of the party who objects to the sale, is analogous to a decree and is, therefore, appealable. [P. 474, C. 2.]

(b) Probate and Administration Act (5 of 1881), S. 86—Every order under the Act by District Judge is appealable—Appeals are governed by procedure laid down in Civil P. C. (1908).

Per *Beachcroft, J.*—By virtue of S. 86 of the Probate and Administration Act, there can be an appeal against every order by a District Judge

under the Probate and Administration Act and the Procedure provided by the Civil Procedure Code for appeals should apply to such an appeal. 39 Cal. 563 ; 2 C. L. R. 589 ; 17 Cal. 48 ; 20 Cal. 245 ; 21 Cal. 539 and 15 I. C. 686 ; ref. to. [P. 475, C. 1.]

(c) Probate and Administration Act (5 of 1881), S. 90—Hindu widow applying, as administratrix to husband's estate, for permission to sell husband's property for satisfying debts—Reversioner willing to purchase property for proper value—Proper order to pass is to direct widow to sell property to reversioner for highest price offered.

Where a Hindu widow who had obtained Letters of Administration to her husband's estate applied for permission of the Probate Court to sell the dwelling house of the husband for the purpose of satisfying debts and the application was opposed by the reversioner, who was willing to purchase the property for its proper value:

Held, that the best order to make was to direct the widow to sell the property to the reversioner for the highest price which had been offered by intending purchasers and satisfy the debts out of the sale-proceeds. [P. 474, C. 2.]

Mohini Mohan Chatterjee and *Jyotish Chandra Sircar*--for Appellant.

Sarat Chandra Basak and *Abani Bhushan Mukerjee*—for Respondent.

D. Chatterjee, J.—The petitioner, who is a Hindu widow, obtained Letters of Administration to the estate of her deceased husband and applied for permission to sell the dwelling house for the purpose of satisfying debts. She was opposed by the reversioner, who expressed his willingness to pay all just debts and to give her suitable maintenance. She however did not agree as evidently there is some ill-feeling against the reversioner. The learned Judge has given her the permission under S. 90 of the Probate and Administration Act and the reversioner appeals. A preliminary objection is taken that there is no appeal.

S. 86 of the Act provides that every order made by a District Judge by virtue of the powers conferred by the Act upon him shall be appealable to the High Court under the rules contained in the Civil Procedure Code applicable to appeals. The order made by the lower Court is an order made under the powers conferred by S. 90. There is some difficulty, however, about the reference to the Civil Procedure Code. The Civil Procedure Code provides for appeals against decrees and specified orders. The order is not one of the specified orders, but it may be looked upon as a decree which is an adjudication of the rights of the parties which is final so far as the Court making it is concerned. Here the order decides the necessity for the sale in the presence of the reversioner, who is the only party interested in preventing the sale or impeaching it for want of legal necessity. This order may, therefore, be looked upon as one analogous to a decree and is, therefore, appealable. An order under S. 90 was held to be appealable in the case of *Uma Charan Das* v. *Muktakeshi Dasi* (1), though on another ground. The objection about the Civil Procedure Code was not made or considered in that case. The respondent relies on the case of *Kalimuddin* v. *Maharani* (2) as laying down a rule to the contrary. This latter case, however, was against an order under S. 79 making an assignment of an administration bond, an order which could have no resemblance to a decree. There is another view of the case that the rules referred to mean that the procedure in the appeals would be as in appeals under the Civil Procedure Code. This view, if literally interpreted, would let in appeals against interlocutory orders and I think it more in accordance with the spirit of the law and the practice of the Court to take the view I have above taken.

Then the question is whether the order is right. I think it is not. The reversioner is willing to purchase the property for its proper value. The petitioner says she contracted with a third party to sell the house for Rs. 3,000 and has subsequently by advertisement obtained Rs. 3,500 as the highest offer. I think the best order to make is that the petitioner do sell the house to the reversioner for Rs. 3,500 including the amount deposited by him. The debts found by the Commissioner be paid up and satisfied out of that sum. If any further debts are established in the presence of the reversioner the same will be paid out of the balance. The petitioner may be allowed for her maintenance up to date at the rate of Rs. 10 per mensem from the said sum and the ultimate balance may be invested by the District Judge and the interest paid to the petitioner during her life. What remains at her death by way of investment

(1) (1901) 28 Cal. 149.
(2) (1912) 39 Cal. 563=13 I. C. 690.

will belong to the person or persons who may be the reversioner or reversioners at that time. Each party to pay its own costs in both Courts. The appellant must make up his deposit of the value of Rs. 3,500 inclusive of the deposit already made within three weeks from this date and also a draft *kobala* and the costs of stamp and registration to be estimated by the *Nazir*. The respondent will execute the *kobala* within three weeks from the said deposit. The payments to creditors will be made on the completion of the registration. The amount payable to the respondent also will be paid out on the completion of the registration.

If the money is not put in as directed, the appeal will stand dismissed with costs, hearing fee three gold *mohurs*.

The Rule is discharged.

Beachcroft, J.—S. 86 of the Probate and Administration Act provides that every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals. This is the only section in the Act which gives a right of appeal or provides for the procedure on appeal, for S. 55, which, it was contended, made the Code of Civil Procedure applicable at all stages of the case, only refers to proceedings in the District Judge's Court. Reading the words of the section by themselves and without the influence of other considerations, I should consider that they meant that there could be an appeal against every order by a District Judge under the Act and that the procedure provided by the Code of Civil Procedure for appeals should apply to such an appeal. If the Legislature intended to allow appeals only in cases in which they are allowed by the Civil Procedure Code, it seems to have adopted a very clumsy method of expressing its intention, for taking that view the section might be paraphrased in this way: "there shall be a right of appeal in every case, but there shall not be an appeal in certain cases."

But the view which I have indicated is not the view which has been taken almost uniformly in this Court, as instanced by the cases of *Brojo Nath Pal* v. *Dasmony Dassee* (3), *Abhiram Dass* v. *Gopal Dass* (4), *Lucas* v. *Lucas* (5), *Khettramoni Dasi* v. *Syama Churn Kundu* (6), *Kalimuddin* v. *Maharai* (2) and *Lakhi Narain Shaw* v. *Dhanada Kumar Ghose* (7).

These cases decide that all the rules of the Civil Procedure Code regarding appeals apply to appeals under the Act. Unless then the order under consideration amounts to a decree it would not be appealable according to the view taken in the cases cited.

But against these cases there is a direct authority that an order under S. 90 of the Act is appealable: the case of *Uma Charan Das* v. *Muktakeshi Dasi* (1). It is true that in that case the objection to appeal was based on the meaning of the word "hereby" and no reference was made to the clause referring to the rules contained in the Code of Civil Procedure. But Maclean, C. J., speaks of S. 86 as allowing an appeal in every case without any qualification, and as the case is a direct authority that an order under S. 90 is appealable, we are bound to follow it, unless we are prepared to refer the question to a Full Bench for decision.

Whether, therefore, the order under S. 90 amounts to a decree or not, as to which I express no opinion, we are concluded by authority and it must be held that an appeal lies.

As regards the merits I agree in the order proposed by my learned brother.

V.B./R.K

Appeal allowed.

(3) (1878) 2 C. L. R. 589.
(4) (1890) 17 Cal. 48.
(5) (1893) 20 Cal. 245.
(6) (1894) 21 Cal. 539.
(7) (1912) 15 I. C. 686.

A. I. R. 1916 Calcutta 475

HOLMWOOD AND IMAM, JJ.

Charusila Dasi—Objector—Appellant.

v.

Jyotish Chandra Sirkar—Petitioner—Respondent.

Appeal No. 189 of 1914, decided on 18th February, 1916, against the Order of District Judge, Nadia, dated 17th February, 1914.

(a) Succession Certificate Act (7 of 1889), S. 3—Insurance money, except in so far as it became ascertained debt before debt of deceased is not included in Act.

An insurance policy is not contemplated by S. 3 of the Succession Certificate Act and the insurance money upon a policy of Life Assurance, excepting in so far as it became an ascertained debt before the death of the assured, is not included in the Act. [P. 476, C. 2.]

(b) Succession Certificate Act (7 of 1889), Ss. 3 and 4—Insurance money, payable after death of assured, is not debt due to deceased.

The money payable by an Insurance Company on a policy of Life Assurance after the death of an assured, which was during his life-time an entirely undetermined sum, is not a debt due to the deceased within the meaning of the Succession Certificate Act which can be included in a succession certificate.

(c) Succession Certificate Act (7 of 1889)—Act does not give general power of administration of estate to person taking succession certificate.

The Succession Certificate Act does not give a general power of administration of the estate of the deceased to the person who gets the succession certificate, it only empowers him to collect the debts which were existing in the life-time of the deceased and have accrued due prior to his death. [P. 476, C. 2.]

Amarendra Nath Bose—for Appellant.

Baranasibasi Mookerjee—for Respondent.

Judgment.—The question which arises in this appeal from order is one of considerable importance, and it is this:—Whether the nomination by a husband for an unascertained sum of money in insurance is a debt for which succession certificate can properly be issued to his heirs under Act VII of 1889. A good deal of argument has been addressed to the question whether such insurance money is part of the estate of the deceased. That it is part of the estate of the deceased is concluded by authority. A Bench of the Bombay Court in *Shankar Vishvanath Vagh* v. *Umabai* (1), a Bench of this Court in *Ishani Dasi* v. *Gopal Chandra Dey* (2) and the case of *Oriental Government Security Life Assurance Company Limited* v. *Vantidu Ammiraju* (3), all based upon the English decision in *Cleaver* v. *Mutual Reserve Fund Life Association* (4), clearly laid down that it does form part of the deceased's estate. It has also been argued for the respondent that the nomination does not operate as a personal transfer and that it creates no trust in favour of the nominee. This also may be conceded. It has also been pointed out that on the facts in *Oriental Government Security Life Assurance Company Limited* v. *Vantidu Ammiraju* (3), it was held that succession certificate can be given to the heirs for an ascertained sum of 2,000 (pounds) to be paid by the executors after the death of the deceased, as was laid down in *Cleaver* v. *Mutual Reserve Fund Life Association* (4). But this is not the case here. Here we have an unliquidated sum and the remarks of Mr. Justice Mookerjee in the Full Bench case of *Banchiram Majumdar* v. *Adyanath Bhattacharjee* (5), though they are *obiter*, may, we think, be applied to the question before us, which as far as we know is *res integra*. Mr. Justice Mookerjee points out that where the amount is not liquidated, as in the case of a suit for accounts, by the representative of the deceased partner against another partner, and in the case of rent not yet due, there is no existing debt and as was laid down in the case of *Jones* v. *Thompson* (6), it cannot, therefore, be described as a debt accruing due to the estate. That appears to us to be the governing factor in deciding whether a particular debt should or should not be the subject of succession certificate.

We may point out that an insurance policy is not contemplated by S. 3 of the Succession Certificate Act. We may also point out that the Act does not, as has erroneously been supposed in numerous cases we have seen from the *mofussil*, give any general power of administration of the estate of the deceased. It is confined and absolutely confined to the collection of debts which were existing in the life-time of the deceased and have accrued due prior to his death. This money which has since been ascertained to be the sum of Rs. 404 odd was during the life-time of thedeceased an entirely undetermined sum depending on the prompt payment of the premiums as they became due and upon the duration of the insured's life. It was not as in *Cleaver's* case (2) an ascertained sum to be paid on his death whenever that might occur. It was, therefore, not an existing debt at any time before his death; nor does it appear to us to be, strictly speaking, a debt at all, although it is a part of his estate. In the Succession Certificate Act, the nature of the debt is to be stated; as we have already pointed out, it does not appear that the Insurance money, excepting in so far as it became an ascertained debt before the death of the deceased, is

(1) (1913) 37 Bom. 471=19 I. C. 736.
(2) A. I. R. (1915) Cal. 9=25 I. C. 236.
(3) (1912) 35 Mad. 162=10 I. C. 263.
(4) (1892) 1 Q. B. 147=40 W. R. 230.
(5) (1909) 36 Cal. 936=3 I C. 492.
(6) (1858) 1 El. Bl. & El. 63.

included in that Act. We think that the proper order to pass in this case is that this sum of Rs. 404-7-11 should be excluded from the succession certificate, leaving it to the parties, if necessary, to obtain any other form of administration certificate contemplated by law.

The result is, that this appeal will be decreed, and the objection of Charusila Dasi will be upheld. The order of the lower Court is set aside in so far as it refers to the Policy No. 9048 in the Mutual Hindu Family Pension Fund, which will be excluded from the certificate granted to the petitioner.

The appellant is entitled to her costs in both Courts. We assess the hearing-fee in this Court at two gold *mohurs*.

V.B/R.K.

Appeal decreed.

A. I. R. 1916 Calcutta 477 (1)

CHITTY AND WALMSLEY, JJ.

Nishi Kanta Lahiri—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Misc. Appln. No. 43 of 1916, dated on 4th April, 1916, against an Order of Chief Presdy. Magte., Calcutta, dated 20th March, 1916.

Arms Act (11 of 1878), Ss. 19 and 20—Evidence indicating offence under S. 20—Magistrate ought to commit case to Sessions.

If in the trial of a case under the Indian Arms Act, the evidence recorded indicates an offence under S. 20 of the Act, the Magistrate ought to commit the case to the Sessions, leaving it to the latter Court to determine whether the evidence is to be believed. [P. 477, C. 2.]

Monmotha Nath Mukerjee and *Birendra Kumar De*—for Petitioner.

Camell and *Tarak Nath Sadhu*—for the Crown.

Judgment.—This is a Rule calling upon the Chief Presidency Magistrate to show cause why the case against the petitioner should not be committed to the Sessions, on the ground that the case falls within S. 20 of the Arms Act and that the Magistrate has, therefore, no jurisdiction to try it himself. We have heard the learned Deputy Legal Remembrancer who has shown cause on behalf of the Crown; but we must say that we fail to understand the attitude taken up. He has read us the evidence which has been recorded in this case. So far as the offence under S. 19-F is concerned, it rests mainly on the evidence of two Police Officers who are said to have found the ammunition in the possession of the petitioner. If that evidence is believed, it is abundantly clear that an offence under the first portion of S. 20 was also committed. It would be for the Court to determine whether that evidence is to be believed. But, so far as the point before us is concerned, it is clear that that evidence indicates an offence under S. 20 and we think that that being so, the case ought to be committed to the Sessions. We accordingly make the Rule absolute and direct that the Magistrate, after recording any further evidence that may be adduced, do commit the case to the Sessions.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 477 (2)

HOLMWOOD AND IMAM, JJ.

Sarat Chandra Roy—Plaintiff—Appellant.

v.

Secretary of State and *others*—Defendant—Respondents.

Appeal No. 2895 of 1913, decided on 6th January, 1916, from the Appellate Decree of Sub-Judge, Burdwan, dated 29th January, 1913.

(a) Civil P. C. (5 of 1908), S 100—Question whether certain resumed *chakran* lands are *chowkidari chakran* lands of one *mauza* or another is question of fact.

The question whether certain resumed *chakran* lands are the *chowkidari chakran* lands of one *mauza* or of another is a question of parcel or no parcel and as such is purely a question of fact. [P. 478, C. 1.]

(b) Bengal Village Chowkidari Act (6 of 1870), S. 61—Inquiry by Commissioner under Act—Person not impleaded is not entitled to notice—Report of Commissioner is final and conclusive against such person without notice.

A person who is not impleaded in the enquiry of the Commissioner under Act VI of 1870, B. C., is not entitled to any notice and under S. 61 of the Act, the report of the Commissioner is final and conclusive against such person without notice; although the absence of such notice would render the proceedings of the Commissioner of no effect against a person entitled to such notice. [P. 478, C. 2.]

Rash Behary Ghose and *Jotindra Nath Bose*—for Appellant.

Sajani Kanta Sinha—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff to have it declared that certain resumed *chakran* lands were *chowkidari chakran* lands of *Mauza* Bonpass of which he is the *patnidar*, and not the *chakran* lands of *Mauza* Haribati of which defendants Nos. 2 and 3 are the *patnidars*. The question stated in its simplest form would appear to be one of parcel or no parcel, and as such should be purely a question of fact: but the learned Doctor who appeared for the appellant raised points of law upon the construction of certain sections of the Chowkidari Act and upon the question of necessity for notice under S. 21 of Regulation VII of 1822.

It appears that in the year 1899 there was an enquiry made by a Commissioner, Mr. C. C. Mitra. with regard to the *chowkidari chakran* lands of *Mauza* Haribati. He found that the Roll Book of 1836 showed that there were 24 *bighas* 9 *cottas* and 8 *chattaks* of *chakran* lands in that *mauza*. But at the time of his enquiry the *chowkidars* of Haribati were in enjoyment of 26 *bighas* 4 *cottas* of *chakran* land. He accounted for it by saying that it was due to variation of standard measurement. He declared under S. 61 of the Chowikdari Act that this quantity of *ckakran* lands appertained to Haribati: they were assessed at an annual rent of Rs. 58-5-3 and the *zemindar* who is also the *zemindar* of *Mouza* Bonpass had agreed by silent acquiescence to take settlement at half of that rent. The matter went before the Collector. He accepted the declaration of the Commissioner and handed over the lands to the Maharaja of Burdwan, who in due course settled them with the *patnidar* of Haribati. In 1907 a second Commission was issued by the Government of Bengal, and from the original papers before us it would appear, though the matter is not quite clear, that the scope of this Commission was for the purpose of determining the status of certain *chakran* lands which had been left out in the previous enquiry, that in the course of this enquiry the second Commissioner examined the *thak* survey and found that it was there clearly stated that some of the plots which had been given by the first Commissioner to Haribati were actually in the ambit of *Mauza* Bonpass, and not only were in the ambit of *Mauza* Bonpass but that they were in the *chowkidari chakran chaks* of that *mauza*. He, however, declined to make any statutory declaration with regard to these plots, because the Collector had already dealt with them upon the report of the first Commissioner and he appears to have thought and rightly thought that they were outside the scope of his Commission.

The questions raised on behalf of appellant seem to us to be negatived by the facts which we have just set out. The first ground of appeal was that the first declaration of Mr. C. C. Mitra could not be used as evidence against the plaintiff because he had no notice of those proceedings. S. 60 of the Chowkidari Chakran Act, VI of 1870, B. C., lays down that in these *chowkidari chakran* enquiries the procedure shall be in accordance with Regulation VII of 1822, and it has been held in more than one case in this Court, of which we need only refer to the case of *Hiralal Mookerjee* v. *Premamoyee Debi* (1), where all the authorities are collected, that the absence of such notice would render the proceedings of the Commissioner of no effect against a person who was entitled to such notice and that the Civil Court would interfere, although but for such defect the order of the Commissioner would be final and conclusive. Now turning to S. 21 of the Regulation we find that the notice which is required is to secure the attendance of the defendant or the party otherwise impleaded and, as we have seen, in this enquiry before the first Commissioner the *patnidars* of Bonpass were in no way impleaded. It is quite possible that the lands in suit were at the time of the *thak* survey included in *Mauza* Bonpass and yet they may have been subsequently enjoyed by the *chowkidars* of Haribati. They were at the time of the first enquiry in the enjoyment of the *chowkidars* of Haribati and the Commissioner had no duty imposed upon him to give any notice to other *patnidars* who were in no way impleaded, so that we think that the report of the first Commissioner was really final and conclusive under S. 61.

The *next* ground taken was that it must be assumed that the proceedings of the first Commissioner had been quashed inasmuch as the Local Government issued

(1) (1905) 2 C. L. J. 306.

the second Commission in the year 1907. But as we have already seen, the proceedings seem to indicate that the second Commission was only issued to supply the omission in the first Commission and not to supersede anything which had been finally decided by that Commission and by the orders of the Collector based upon that Commission.

A *third* point which was raised was as to the effect of the words "final and conclusive", whether they mean incapable of revision by the executive authorities only or not open to question in a Court of Law. There is some conflict of judicial opinion upon this point, and we need only say that the remarks in the case we have cited are *obiter*, as has been pointed out by the learned Munsif. There have been more recent decisions in which the contrary has been held and in the view we have already taken of these proceedings the question does not really arise. No question of notice arises and as we have seen the second report in no way affected the first report, the question is purely an academical one.

The result is that the appeal must be dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 479

CHATTERJEE AND NEWBOULD, JJ.

Anadi Krishna Dutta and *others*—Defendants—Appellants.

v.

Priya Sankar Mujumdar and *others*—Plaintiffs—Respondents.

Appeal No. 396 of 1913, decided on 3rd July, 1916, against the Order of Sub-Judge, Faridpore, dated 4th June, 1913.

(a) Civil P. C. (5 of 1908), O. 23, R. 3—Allegation of adjustment must be enquired into and if found true decree in terms should be passed.

Where one party alleges and the other denies that a pending suit has been settled by a lawful agreement out of Court, the Court has power to decide the fact of such settlement and, if the settlement is established, to grant a decree in accordance therewith. 24 Cal. 908 (F. B.), ref. to. [P. 481, C. 1.]

(b) Civil P. C. (5 of 1908), O. 3, R. 3 and O. 23, R. 3—Compromise by special agent for conduct of suit unless specially authorised is not binding on principal.

From the fact that a party left the general conduct of the litigation to certain persons as his agents, it cannot be inferred that he is bound to accept any terms of compromise that those persons may arrange. The implied authority of such persons extends only to their acting on behalf of the party so long as the litigation proceeds in the ordinary way, but they cannot consent to a decree on arranged terms without special authority. 12 C. W. N. 195, ref. to. [P. 482, C. 1.]

D. N. Mitter, *Baikuntha Nath Mitter* and *Manindra Nath Banerjee*—for Appellants.

D. N. Chakravarty and *Surendra Kumar Bose*—for Respondents.

Newbould, J.—This is an appeal against an order passed by the Subordinate Judge of Faridpore under O. 23, R. 3 of the Code of Civil Procedure, an order recording a petition of compromise. The plaintiffs in the suit in which this order was passed asked for a declaration that certain lands, described in the plaint by the numbers of the dags in the settlement map, appertained to *char darai*, of which they claimed to be entitled to a nine-annas odd share. They also asked for recovery of possession and mesne profits. There were originally 16 defendants but defendant No. 16 died during the pendency of the suit and his three minor sons were substituted for him. All these defendants except defendants Nos. 3, 9 and 12 contested the suit. The plaintiffs' right to the share claimed was not disputed. Ten issues were framed on the pleadings of the parties, but we are not concerned with these and they have not been included in the paper-book. It is sufficient here to state that the important point in dispute between the parties was the boundary of *char darai*. The suit was instituted on the 13th May, 1910. Issues were framed on the 30th July, 1910 and on the 23rd November, 1910, a commission for local investigation was issued to Babu Jatindra Mohan Banerji, Civil Court Amin. Owing to the lands being under water most of the year and on account of the time taken to substitute the heirs of defendant No. 16, the Amin did not commence work before the 20th January, 1912, when he was directed by the Court to start work as soon as possible. After this the parties began to discuss terms of compromise. According to Babu Priya Sankar Majumdar the plaintiff No. 1, the son of Keshab Chandra Lahiri defendant No. 8 came with a proposal for compromise in *Magh* 1318. This plaintiff expressed his willingness to compromise

and arranged for a conference at which representatives of the plaintiffs and of the three different sets of defendants were present. The plaintiffs were represented by Nagendra Nath Banerjee, manager of plaintiff No. 1. The Sagar Kandi Datta Babus defendants Nos. 1—7 were represented by Amin Ram Chandra Tarafdar and Sasadhar Sanyal, the Lahiri Babus defendants Nos. 8—13 represented by Tara Nath Ray, and the Parasadanga Babus defendants Nos. 14—16 (*kha*) were represented by Hem Chandra Majumdar. Apparently nothing was then settled. The parties filed a petition in Court on February 15th, asking that the Amin's work might be stopped as they were going to compromise. After allowing a ten days' adjournment the Court refused to stop the Amin's work any longer and this probably caused negotiations to be temporarily suspended. The Amin submitted his final report on the 12th August, 1912. In the following month Hem Chandra Majumdar and Tara Nath Ray went to plaintiff No. 1 and again proposed a compromise in accordance with the delineations in the Civil Court Amin's map. The plaintiff No. 1 refused to consent to this and asked them to bring their employees to him and to see whether they could come to terms on the basis of the settlement map. During the Christmas holidays of 1912, Hem Chandra Majumdar and Tara Nath Ray again came to the first plaintiff and discussed terms of compromise with him but went away without giving any final word. After this terms of compromise were discussed by the servants of the parties to the suit. Petitions for time to enable the parties to compromise were filed in Court on the 3rd December, 1912, 20th January, 4th February, 3rd and 10th March, 1913. Of these petitions, only that of the 3rd March contains any mention of terms of compromise. It is there stated that it had been settled that the boundaries of the disputed *char darai* will be settled according to the Dearah Survey boundary line of 1868-69 as depicted in the map prepared at the recent Settlement survey and that settlement had not been arrived at in certain other matters. A few days after the third March Nagendra Nath Banerjee manager of plaintiff No. 1, Priya Shankar Majumdar, came to his master at his Calcutta residence and told him that they were all willing to compromise on the basis of the settlement map. Priya Sankar then sent two telegrams, one to Ranajit Lahiri, defendant No. 13, and the other to the manager of the Parasadanga Estate. Ranajit Lahiri only replied and his telegram Exhibit 4 was in the following terms:

"We gave Tara Nath our terms if you agree compromise to be filed otherwise Taranath to take further instructions, Ranajit."

The date of this telegram is the 8th March. On the 9th March, there was a meeting of some of the Pleaders and the servants of the parties to discuss terms of compromise. The discussion took place at the *basha* of Hriday Nath Chakravarty, Pleader for the plaintiffs. Prosanna Kumar Roy, Pleader for the Parasadanga and Lahiri defendants, and Tara Nath Ray, an Amin who was employed by all the defendants, were present on behalf of the defendants. Nagendra Nath Banerjee, the plaintiffs' manager, Hriday Nath and Jogesh Chandra Chakravarty, plaintiffs' Pleaders, Peary Banerjee *muktear* and other servants of the plaintiffs were present on the plaintiffs' side. According to the plaintiffs' case everything then was settled except the sum of money to be paid by the defendants to the plaintiffs. About this the Pleader Prosanna Kumar Roy took instructions by telegraph from the defendant Ranajit Lahiri and obtained his consent to increase the amount Rs. 2,200 previously settled to Rs. 2,500. On the 10th March, Hem Chandra Majumdar, who was looking after the case on behalf of the Parasadanga defendants, was informed of the terms that had been settled the previous night and consented to the application that was made to the Court for a further adjournment for seven days, "for writing out the *solenama* and for the signature of the parties." On the night of the 10th March, 1913, there was another meeting at Hriday Nath Chakravarty's *basha* and a draft of the *solenama* was prepared in the presence of Tara Nath Ray and Hem Chandra Majumdar. This draft was shewn to the defendants' Pleader Prosanna Kumar Roy on the 11th or 12th March and he made some additions and alterations. A fair copy of the petition of compromise was prepared and also two *vakalatnamas* embodying the terms of the settlement. The *vakalatnama* prepared for the plaintiffs was signed by them on the

15th March, 1913. The *vakalatnama* prepared for the defendants was not signed by them. On the 17th March, the date fixed for the hearing of the suit, both parties filed petitions in Court. The plaintiffs filed the petition of compromise that had been prepared and asked that, as the defendants would not sign it though they had agreed to it, the suit might be decreed according to its terms after taking evidence. The defendants' petition was filed, we are told, before that of the plaintiffs but the point is immaterial. In it the defendants accused their agent Tara Nath Ray of acting beyond his powers and of having made misrepresentation to them when settling the terms of compromise. They objected to the statement in the petition of the 3rd March that they agreed to accept the boundary line depicted in the Settlement map, but said they had no objection to the suit being decreed for the share claimed by the plaintiffs according to the boundary line shown in the case map prepared by the Civil Court Amin. The Court then proceeded to take evidence on the additional issue No. 11 only

"Whether a lawful compromise has been effected between the parties subsequent to the institution of the suit."

He granted a decree against the major defendants in the terms of the draft petition of compromise filed by the plaintiffs. The suit against the minor defendants has been postponed pending the decision of this appeal.

There can now be no doubt that when one party alleges and the other denies that a suit has been settled by a lawful agreement out of Court, the Court has power to decide whether there has been such a settlement and, if this question of fact is decided in the affirmative, to grant a decree in accordance with the agreement. The Full Bench decision of this Court to this effect in the case of *Brojadurladh Sinha* v. *Ramanath Ghose* (1) has been now given effect to by the alterations made from the language of S. 375 of the Civil Procedure Code of 1882 in O. 23, R. 3 of the Code of 1908. On the question of fact whether a lawful compromise had been effected between the parties to the suit, we are unable to agree with the learned Subordinate Judge. So far as the facts as to the negotiations for the compromise are concerned, we think he has taken a correct view of the evidence and that where there is any difference between the stories told by the plaintiffs and defendants' witnesses, the evidence of the former is to be preferred. But where the lower Court has erred is in holding that the persons who were negotiating the terms of the compromise had power to bind the actual parties to the suit to accept the draft compromise prepared by them. His reference to the case of *Tara Chand Samanta* v. *Chundra Sekhar Banerjee* (2), as supporting his decision, shows that he has not appreciated this point. In that case the Pleaders who effected the compromise were authorised to do so on their *vakalatnama*. In the present case none of the persons who took part in the negotiations were authorised to effect a compromise that was binding on the parties to the suit. The *vakalatnamas* of the Lahiri and Datta defendants contained no power to compromise. The Parasadanga Shaha Chowdhry defendants filed two separate *vakalatnamas*, one executed by the defendants Nos. 15 and 16 which contained no power to compromise and another executed a month later by the same two defendants and also by defendant No. 14. This last empowers the Pleader accepting it "to file all sorts of *solenamas*. etc." This *vakalatnama* was accepted by the Pleader Prosanna Kumar Roy on the 29th July, 1910, and it has not been suggested that this *vakalatnama* rendered his approval of the draft petition of compromise binding on all the defendants. It must be remembered that he was not the retained Pleader of the Datta defendants. From the history given above of the negotiations with a view to compromise, it is clear that they never passed from the stage of negotiations to that of a finally settled compromise. The parties who took the principal part in these negotiations on the defendants' side were Ranajit Chandra Lahiri defendant No. 13, Tara Nath Ray who worked as Amin for all the defendants and was the principal agent on behalf of all the defendants to look after their interests in Court during this suit, Hem Chandra Majumdar *naib* of the Parasadanga defendants and Prosanna Kumar Roy, the Pleader of the Lahiri and Parasadanga defendants.

(1) (1897) 24 Cal. 908 (F. B.).

(2) (1908) 12 C. W. N. 195.

Though all the defendants appear to have been content to leave the general conduct of the litigation to these persons, it cannot be inferred from this that they were bound to accept any terms of compromise that these persons might arrange. They had implied authority to act on behalf of all the defendants so long as the litigations proceeded in the ordinary way. But they could not consent to a decree against the defendants on arranged terms without special authority. This was recognised by the negotiating parties, as they arranged not only for a petition of compromise but also for special *vakalatnamas* embodying the terms of this compromise. This shows that the terms arranged required the consent of the actual parties to the suit before they could be regarded as finally settled. Though we are not inclined to accept the reason given by Ranajit Chandra Lahiri for the failure of the compromise at the last moment, the fact remains that some of the defendants had the option of accepting or refusing the terms settled and were not bound to give any reason for their refusal. The terms settled were that all the plaintiffs and all the defendants should be bound by the compromise. Consequently if any of the defendants refused to accept the terms Ranajit Chandra Lahiri also would no longer be bound. There is considerable force in the contention urged on behalf of the appellants that apart from the facts in dispute they are not bound to accept the compromise, because it is incomplete on account of there being minors among both the plaintiffs and defendants. So far as the minor defendants are concerned they are expressly excluded from the compromise decree that has been passed and the suit as against them remains pending. As regards the minor plaintiffs the consent of the Court was not taken to their joining in the compromise and they will be able, if they so wish, to have it set aside as against them when they come of age. The consequence is that even if the terms settled are held to be binding on all the major defendants, as held by the lower Courts, the decree passed is not in accordance with those terms since it does not finally settle this litigation between all the parties to the suit.

We accordingly decree this appeal and reverse the order of the lower Court passed under O. 23, R. 3 of the Code of Civil Procedure. The decree passed in the terms of the petition of compromise is set aside and the suit will proceed against all the defendants. As we find that the appellants have misrepresented important facts we order the parties to bear their own costs in this appeal.

D. Chatterjee, J.—I agree.

V.B./R.K.

Appeal allowed.

A. I R. 1916 Calcutta 482

RICHARDSON AND ROE, JJ.

Shiba Durga Debi—Judgment-debtor—Appellant.

v.

Gopi Mohan Shaha and *others*—Decree-holders—Respondents.

Appeal No. 183 of 1915, decided on 10th December, 1915, against the Order of Offg. Dist. Judge, Backergunge, dated 11th February, 1915.

(a) Civil P. C. (1908), S. 48, (a), (b)—Two decrees, preliminary and final, in suit—Latter is complement of former—Two together must be taken to be single and indivisible decree.

Where there are two decrees in a suit, a preliminary decree and a final decree or decree absolute, the final decree is the complement of the preliminary decree, and for the purpose of Clause (*a*) of sub-S. (1) of S. 48, Civil Procedure Code, the two together must be taken to be a single and indivisible decree, the date of which is the date of the final decree or decree absolute.

[P. 483, C. 2.]

Gunada Charan Sen, Sarat Chandra Dutt and *Jyotish Chandra Guha*—for Appellants.

A. K. Fazlul Huq—for Respondents.

Judgment.—This is an appeal from the order of the learned District Judge, dated the 11th February, 1915, by which he dismissed an appeal from the order of the learned Subordinate Judge, dated the 17th June, 1914. The matter arises out of a proceeding taken in execution of a decree upon a mortgage and the point involved is one of limitation.

It appears that on the 10th March, 1896, a decree was made by consent providing for the payment of the amount due by the judgment-debtor in instalments. The condition was annexed that if default were made in the payment of two consecutive instalments, the decree-holder (the respondent before us) should be at liberty "to realise the entire amount due on

account of all the *kists* past and future by serving proclamation of sale and by selling at auction the mortgaged properties mentioned in the present decree." Then there is this provision :

"And if the plaintiff's dues are not fully satisfied by the price fetched by the sale, the plaintiff shall be entitled to realise the balance by a proceeding against the defendant's other movable and immovable properties left by the deceased debtor Golak Chandra Mahanty. The properties mentioned in the plaint remain fully mortgaged and liable for the decretal amount."

For the translation of the concluding protion of the decree from which we have quoted, we are indebted to the learned Pleader for the appellant. Neither the decree itself in its entirety nor the decree absolute to which we are about to refer has been placed before us. Apparently the judgment-debtor failed to pay any of the instalments as they fell due. The first default occurred at the end of the year 1896, and the next following default was in April 1897. On the 24th March, 1900 the decree-holders obtained the decree absolute and subsequently thereto they brought the mortgaged properties to sale in the ordinary course of execution. The last sale took place, as we are informed, in the year 1906. Then, in March 1912, within twelve years of the decree absolute, the decree-holder applied for the sale of the properties of the judgment-debtor other than those covered by the mortgage ; in other words, he sought to enforce the personal remedy for which provision had been made in the decree of the 10th March, 1896. The judgment-debtor filed an objection to this application on the ground that it was barred by limitation under S. 48 of the Code of Civil Procedure, 1908. The Courts below have decided the question in the decree-holder's favour and the judgment-debtor has appealed.

The arguments urged on the appellant's behalf by the learned Pleader are to the following effect. As to Clause (*a*) of sub-S. (1) of S. 48, Civil Procedure Code, it is said that if limitation is to be computed from the date of the decree sought to be executed, the decree to which we ought to look for this purpose is the decree of the 10th March, 1896 and not the decree absolute of the 24th March, 1900. As to Clause (*b*) of sub-S. (1) of S. 48, the contention is that the limitation should run, at the latest, from the time when default was made in paying two consecutive instalments, *i.e.*, from April, 1897. If these contentions are correct, the decree-holder's application is barred whichever of the two clauses is applied. In the view we take, however, Clause (*b*) need not be considered. It has no application to the present case, because the decree-holder is not seeking to enforce his remedy in respect of the default in paying the instalments but in respect of the fact that the proceeds of the sales of the mortgaged properties were not sufficient to meet his claim.

In regard to Clause (*a*) the appeal fails, in our opinion, on this ground that when there are two decrees in a suit as here, a preliminary decree and a final decree or decree absolute, it was not possible to treat them as separate and distinct decrees. The final decree is the complement of the preliminary decree, and for the purpose of Clause (*a*) of sub-S. (1) of S. 48, the two together must be taken to be a single and indivisible decree, the date of which is the date of the final decree or decree absolute, or possibly it may be more correct to say that it is the final decree which makes the preliminary decree operative and effectual and renders it enforceable in execution. In that view it is the final decree which is executed. We do not stop to consider whether it was necessary to obtain a decree absolute in this case in addition to the consent decree of the 10th March, 1896. A decree absolute was in fact made and must now be assumed to have been properly made. Its precise terms are not before us and on the materials which are before us the decree which has been put in execution must be taken to be the preliminary decree read with the final decree. It is idle to say that the personal remedy which the decree-holder is seeking to enforce is to be found in the preliminary decree. The personal remedy was not available till after the mortgaged properties had been sold under the decree absolute.

The learned Pleader has invited our attention to the case of *Jnanendra Nath Bose* v. *Khulna Loan Co., Limited* (1). The point however, that was there decided is not the point before us now. We have referred to the paper-book, and we find that the application for execution in that

(1) A.I.R. (1915) Cal. 8=24 I.C. 35.

case was made more than 12 years after the date of the final decree. That case, therefore, does not help us. On the other hand, the learned Pleader for the decree-holder respondent has referred us to other cases which support the view we take. It was said in the case of *Ajudhya Persad* v. *Buldeo Singh* (2) that until the decree absolute is made there is in fact no decree capable of execution, and this observation was repeated in *Hatem Ali Khundkar* v. *Abdul Gaffur Khan* (3).

The result is that the appeal must be dismissed with costs. We assess the hearing fee at five gold *mohurs*.

V.B./R.K.

Appeal dismissed.

(2) (1894) 21 Cal. 818.
(3) (1904) 8 C. W. N. 102.

A. I. R. 1916 Calcutta 484 (1)

CHITTY AND WALMSLEY, JJ.

Bharat Chander Galui and *others*—Plaintiffs—Appellants.

v.

Pramotha Nath Roy and *others*—Defendants—Respondents.

Appeal No. 359 of 1914, decided on 12th April, 1916, from the Appellate Decree of Offg. Sub-Judge, Hooghly, dated 8th January, 1914.

Landlord and Tenant—Non-transferable occupancy holding—Purchasers of moiety in execution sale depositing amount of subsequent rent decree—Withdrawal of deposit by landlord—Landlord held not estopped from disputting purchasers' title.

The plaintiffs, purchasers of a moiety of a non-transferable holding in execution of a mortgage-decree deposited in Court the amount of a subsequent rent-decree obtained by the landlord against the recorded tenants, to prevent its sale in execution. The deposit was withdrawn by the landlord:

Held, that in the absence of anything in the making of that deposit which would bring to the landlord's notice the fact of the plaintiffs' interest, the landlord was not estopped from disputing plaintiffs' right. [P. 484, C. 2.]

Mohini Mohan Chakrabutty for *Abinash Chander Chakrabutty* – for Appellants.

Monmotho Nath Roy—for Respondents.

Judgment.—The only point of law arising in this appeal is whether the learned Subordinate Judge was right in holding that the landlords were not estopped from disputing the plaintiffs' interest in the holding. Plaintiffs' title is based on the purchase of a moiety of a holding from defendant No. 10. In two subsequent rent suits brought by the landlords, defendants Nos. 1 to 7, against the recorded tenants, the property was put up for sale in execution. In the sale which took place in 1904 the plaintiffs deposited the money to save the sale and that deposit was withdrawn by the landlords. The question is, whether there was anything in the making of that deposit which would bring to the landlords' notice the fact that the plaintiffs were interested in the holding and were claiming such interest. It is now conceded by the learned Pleader for the plaintiffs-appellants that all that appeared on that occasion was the plaintiffs' names in the *challan*. There was no suggestion then made that the plaintiffs were interested in the property. The learned Pleader informs us that there was a document which would imply such an assertion, but that that was not proved in either of the Courts below. It cannot, therefore, be taken into consideration in second appeal. That being the case, the point is concluded by the finding of fact arrived at by the learned Subordinate Judge. The appeal is accordingly dismissed with costs.

V. B./R. K.

Appeal dismissed.

A. I. R. 1916 Calcutta 484 (2)

SHARFUDDIN AND TEUNON, JJ.

Rameshwar Pershad Singh Bahadur—Plaintiff—Appellant.

v.

Nauhku Mod and *others*—Defendants—Respondents.

Appeal Nos. 259 and 269 to 284 of 1914, decided on 24th January, 1916, from the Appellate Orders of Sub-Judge, Monghyr, dated 14th April, 1914.

Landlord and Tenant—Rent—Suit for—Defendant setting up title of third person to receive rent—Third person is not necessary party.

When in suit for rent, the tenant defendants set up the title of third person to the rent, such third person is not a necessary party to the proceeding. [P. 485, C. 1.]

Jogendra Chandra Ghose and *Kulwant Sahay*—for Appellant.

Jogesh Chandra Roy and *Soresh Chandra Sinha*—for Respondents.

Judgment.—These 17 appeals are appeals in suits for rent. In 16 of the appeals it appears that the amount claimed did not exceed Rs. 100 and it is, therefore, conceded that under the provisions of S. 153 of the Bengal Tenancy Act, no second appeal lies.

It has been suggested to us that in these cases we should treat the appeals as applications under S. 115, Civil Procedure Code. But we are not prepared to take this course in these cases, as it appears to us that the plaintiff-appellant has or had other remedies.

These sixteen appeals (Miscellaneous Appeals Nos. 259 and 270 to 284 of 1914) are, therefore, dismissed. We make no order as to costs.

In the remaining Appeal No. 269 of 1914 the amount claimed exceeds Rs. 100 and, therefore, a second appeal lies.

The appeal is against an order of the Subordinate Judge of Monghyr, by which he remands the suit for retrial with the direction that one Chandi Pershad, whose title to rent had been set up by the tenant defendants, should be made a party to the suit

As the law now stands, it is well settled that when in suits for rent the tenant defendants set up the title of a third person, such third person is no necessary party to the proceeding. The order of remand, in our opinion, is clearly wrong.

We set aside the Subordinate Judge's order and remand the case to him so that he may re-hear the appeal before him and dispose of it according to law.

Costs will abide the result.

V.B./R.K.

Order set aside ; Case Remanded.

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NEWBOULD, J.

Basanta Kumar Sarvagya and *others*—Plaintiffs—Appellants.

v.

Jogendra Nath Dutta and *others*—Defendants—Respondents.

Appeal No. 1037 of 1912, decided on 11th April, 1916, from the Appellate Decree of Dist. Judge, Backergunge, dated 31st January, 1912.

(a) Transfer of Property Act (4 of 1882), S. 60—Mortgagee can sue some mortgagors for their proportionate share and release one mortgagor—But he must be impleaded.

It is open to a mortgagee, apart from the exception to S. 60 of the Transfer of Property Act, to abandon part of his claim releasing one of the mortgagors and sue on the mortgage-bond to recover their proportionate share of the mortgage-money from the other mortgagors, and it is immaterial whether he releases gratuitously or otherwise. But it is necessary that the released mortgagor should be joined as a party so that the owners of the equity of redemption may be fully represented. 30 Cal. 755 ; 2 C. L. J. 202 ; 33 Cal. 613 ; 11 C. W. N. 403 and 12 C. W. N. 911, foll. 2 All. 906. dist. 28 All. 174, ref. to. [P. 486, C. 1 & 2.]

(b) Transfer of Property Act (4 of 1882), Ss. 60 and 67—Fresh mortgage on same security by mortgagor released from previous mortgage does not affect claim against remaining mortgagors for proportionate share.

The execution of a fresh mortgage by the released mortgagor on the same security does not affect the plaintiff's right of suit as against the mortgagors not released on the original mortgage. The fresh mortgage is a separate transaction and does not infringe the restriction on a mortgagor's powers, that he cannot release so as to increase the burden on the mortgagors. 6 C. L. J. 46, ref. to. [P. 486, C. 2.]

Jogesh Chandra Roy and *Prokas Chandra Mozumdar*—for Appellants.

Nilkanta Ghosh for *Chandra Kanta Ghosh*—for Respondents.

Judgment.—This appeal arises out of a suit on a mortgage-bond. Ram Nara Singha, the father of defendants Nos. 1 and 2, and Ramdhan, the husband of defendant No. 3 jointly executed a mortgage-bond in favour of Baikuntha Sarvagya, the predecessor of the plaintiffs, for a loan of Rs. 500. By this bond the two mortgagors hypothecated the properties set out in the schedule to the plaint, of which each owned an eight-anna share. The bond was executed on the 4th *Bhadro* 1304 B. S. and stipulated for interest at the rate of 13 annas 4 pies per cent. per mensem compound interest with yearly rests. The plaintiff alleged that Rs. 146 was realized by him on different dates and that on an account being made upon the 22nd *Bhadro* 1317 B. S. the sum of Rs. 1,138 was found due by the defendants. The defendant No. 3 admitted liability on her husband's account for half this amount. The plaintiffs gave her a remission of some of the amount due and released her from liability under the mortgage-bond in suit on her executing a fresh mortgage-bond for Rs. 450 hypothecating her 8 anna-share in the property mentioned in the schedule to the plaint. The plaintiffs now sue to recover Rs. 659 with interest from defendants Nos. 1 and 2. They have joined

defendant No. 3 as a party to the suit and also claimed in the alternative a decree against the 16 annas of the property under mortgage, including in the claim the amount of Rs. 450 admitted by defendant No. 3 to be due from her.

Both the lower Courts have dismissed the suit, holding that it is not maintainable in its present form on the ground that the mortgage contract is indivisible.

The suit has been contested by defendants Nos. 1 and 2 who are minors represented by their guardian and mother, Lakshmi Priya Dutt. Before the first Court an attempt was made to prove that she was present at the making up of accounts but this was found not to have been proved. Before the lower Appellate Court this finding does not appear to have been questioned. There it was contended that the mortgagee had the right to split up the contract as the case fell within the exception to S. 60 of the Transfer of Property Act. I think the lower Appellate Court was right in holding that the provisions of that exception are not applicable to the facts of the present suit. According to the plaintiff's case he has not acquired the share of defendant No. 3 as mortgagor, since before taking the fresh mortgage of her interest in the property originally mortgaged he released it from its liability under the original mortgage. Assuming that the second mortgage was an acquisition, he did not "acquire in whole or in part the share of the mortgagor."

But I cannot agree with the learned District Judge in rejecting the second contention raised on behalf of the plaintiffs-appellants, that the suit is maintainable, apart from the exception to S. 60 of the Transfer of Property Act, on the ground that it is open to a mortgagee to abandon part of his claim releasing one of the mortgagors and to sue to recover their proportionate share of the mortgage-money from the other mortgagors. This principle is supported by the authority of *Hari Kissen Bhagat* v. *Veliat Hossein* (1), a ruling that has been frequently followed by this Court in *Surjiram Marwari* v. *Barhamdeo Persad* (2), *Imam Ali* v. *Baij Nath Ram Sahu* (3), *Gangadas Bhattar* v. *Jogendra Nath Mitter* (4) and *Basir-ud-din Biswas* v. *Debendro Nath Biswas* (5). The learned District Judge has distinguished this case on the ground that the mortgagees-plaintiffs have not abandoned their claim against defendant No. 3 as they have obtained a fresh bond from her, mortgaging anew her share of the property. But the mortgagees have abandoned their claim against this defendant under the mortgage-bond on which they sue, and that is all that matters. The fresh mortgage is a separate transaction and does not infringe the restriction on a mortgagee's powers, that he cannot release so as to increase the burden on the other mortgagors. In the present case there is no dispute that the two mortgagors were equally interested in the mortgage-debt and the mortgaged property, and the claim of half the debt from the defendants Nos. 1 and 2 does not increase their burden. This appears to be the only limit to a mortgagee's power of release and subject to this it is immaterial whether he releases gratuitously or otherwise. [Vide *Hakim Lal* v. *Ram Lal* (6)].

On behalf of the respondents reliance is placed on the decision of the Allahabad High Court in the case of *Chandika Singh* v. *Pokhar Singh* (7), the case on which the Munsif based his judgment. The facts of that case appear at first sight to closely resemble the facts of the present case But there is one important distinction and that is that the mortgagor who had been released had not been joined as a party, as defendant No. 3 has been in the present suit. While discussing this ruling in the Full Bench decision of the same High Court, *Sheo Tahal Ojha* v. *Sheodan Rai* (8), Banerjee, J., remarked at page 180 : "What is required is that the suit should be so framed that complete justice may be done, and that the owners of the equity of redemption are fully represented." At an earlier part of his judgment the same learned Judge dissented from the general proposition that appeared to have been laid down in *Chandika Singh's* case (7) that a mortgagee is not justified in exempting the share of a released mortgagor from the

(1) (1903) 30 Cal. 755.
(2) (1905) 2 C. L. J. 202.
(3) (1906) 33 Cal. 613.
(4) (1907) 11 C. W. N. 403.
(5) (1908) 12 C. W. N. 911.
(6) (1907) 6 C. L. J. 46.
(7) (1878-80) 2 All 906.
(8) (1906) 28 All. 174 (F. B.).

foreclosure proceedings and in directing his claim against the property of the other mortgagors alone. He then went on to remark: " If one of the mortgagors makes part payment, it is a payment which goes towards the reduction of the whole debt, and when credit is given for it by the mortgagee it is immaterial whether it is treated as payment made by an individual mortgagor or as a general payment towards the mortgage. In the present suit the plaintiff-mortgagee has in his claim given credit for all sums which he alleges to have received on account of the mortgage. . . . . and I do not think that his claim offends against any principles of equity and justice." These remarks fully apply to the facts of the present case. All persons interested are parties to the suit and it would be contrary to the principles of equity and justice to allow the contending defendants to evade payment of their just dues by the help of a technical plea. This plea, however, is not, as the lower Courts have held, good in law and the suit should not have been dismissed by them. This issue of maintainability was the only issue argued before the lower Courts and there is no other reason suggested why the plaintiffs' claim should not be decreed in full. I accordingly allow this appeal, set aside the decrees of both the lower Courts, and decree the plaintiffs' suit with costs in all Courts. Let a mortgage-decree be prepared in terms of the prayers in the plaint, giving six months' time for payment of the money.

V.B./R.K.

Appeal allowed.

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CHATTERJEA AND RICHARDSON, JJ.

Abdul Hamid —Plaintiff—Appellant.

v.

Abdul Miji and *others*—Defendants—Respondents.

Appeal Nos. 3863 of 1913, decided on 27th January, 1916, from the Appellate Decree of Dist-Judge, Noakhali, dated 30th April, 1913.

Bengal Tenancy Act (8 of 1885), S. 67—*Kabuliyat* creating tenancy executed prior to Act fixing rate of interest—Rate varied by *solehnamah* after passing of Act—Held no new contract of tenancy was created—Deed—Construction.

An original *kabuliyat* creating a tenancy executed prior to the passing of the Bengal Tenancy Act provided for interest at the rate of 6¼ per cent. per mensem on overdue instalments, but after the passing of the Act there was a *solehnamah* between the landlord and the tenants by which a sum of Rs. 38 was agreed to be the rent after deducting the *abwab* Rs. 4-9-0 from the original rent of Rs. 42-9-0 (including the *abwab*) fixed by the *kabuliyat*, and a deduction was also made in the rent in respect of a portion of the land which was in the possession of the landlord The *solehnamah*, so far as the question of interest was concerned, expressly stated that in case of default of payment of any instalment, the tenants shall pay interest at the rate stipulated in the *kabuliyat* and that all other stipulations made in the *kabuliyat* except those in respect of *abwab* shall remain in force:

Held, that by the *solehnamah* there was only a variation of some of the terms of the old *kabuliyat* but that no new contract of tenancy was created; and that, therefore, the tenants remained liable to pay interest at the rate stipulated in the *kabuliyat*. [P. 489, C. 1.]

Held, also, that if the *solehnamah* had created any new contract of tenancy, the tenants would not have been liable to pay interest at more than the rate mentioned in S. 67 of the Bengal Tenancy Act. [P. 488, C. 2.]

Romesh Chandra Sen—for Appellant.

Ram Dayal Dey—for Respondents.

Judgment.—This appeal arises out of a suit for rent and the only question involved in this appeal is, what is the rate of interest which the plaintiff is, entitled to get upon overdue instalments of rent from the defendants who are tenants under the plaintiff.

The original *kabuliyat* by which the tenancy was created is of the year 1879 and it provided for interest at the rate of 6¼ per cent. per mensem. There was, however, a *solehnamah* between the parties in the year 1907, and the lower Appellate Court, differing from the Court of first instance, has held that the *solehnamah* created a new contract of tenancy. If there was any contract after the passing of the Bengal Tenaney Act defendants are not liable to pay interest at more than the rate mentioned in S. 67 of the Bengal Tenancy Act. So the question is whether by the *solehnamah* the parties entered into a new contract of tenancy. We think, upon a consideration of the terms of the compromise, that there was only a variation of some of the terms of the tenancy. The original rent was Rs. 42-9-0; which included certain *abwabs* amounting to Rs. 4-9-0; by the compromise, the parties agreed that Rs. 38 was to be the rent for the holding (after deducting Rs. 4-9-0, the *abwabs*) and a deduction was made in the rent in respect of a portion of the

land which was in the possession of the landlord by virtue of purchase and another portion of which the landlord was in possession from before in *osat raiyati* right. There was thus a distribution of the rent in respect of the lands in possession of the landlord and of the tenants, respectively. The learned District Judge has held that the landlord could not put the tenants in possession of the land. No such case, however, was set up in the pleadings, nor is there any evidence on the record to justify the finding. The statements contained in the petition of compromise in respect of the lands in the possession of the plaintiff do not show that the landlord had dispossessed the tenants or could not put them in possession of any lands in *raiyati* right, but only relates to lands held in *osat raiyati* right. The compromise petition, so far as the question of interest is concerned, expressly stated that in case of default of payment of any instalment, they, the tenants, shall pay interest at $6\frac{1}{4}$ per cent. per mensem in accordance with the *kabuliyat* and in a subsequent part of the compromise petition it is stated that all other stipulations made in the *kabuliyat*, dated the 21st *Falgoon* 1286, except those in respect of *abwabs* shall remain in force. We are of opinion upon a consideration of all the terms that there was only a variation of some of the terms of the old *kabuliyat* and that with respect to the other terms including the rate of interest, there was no new contract.

That being so, the decree of the lower Appellate Court is modified in so far as the question of the rate of interest is concerned and the plaintiff will get interest at the rate $6\frac{1}{4}$ per cent. per mensem as decreed by the Court of first instance.

We make no order as to the costs of this appeal.

V.B./R.K.

Decree modified.

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Full Bench.

SANDERSON, C.J., WOODROFFE, MOOKERJEE, CHITTY AND CHATTERJEA, JJ.

Chutterput Singh —Defendant—Judgment-debtor—Appellant.

v.

Sait Sumari Mal and *others*—Plaintiffs and Judgment-creditors—Respondents.

Civil Ref. No. 75 of 1915, decided on 8th May 1916, from the Original Order of Chaudhuri, Judge, dated 2nd August, 1915.

(a) Limitation Act (9 of 1908), Art. 183—Requirements for revivor of decree stated—Court must declare it enforceable—Order issuing certificate of execution does not constitute revivor—Such application though on form prescribed by S. 235, Old Code does not make it an execution application nor the order a "revivor."

To constitute a revivor of a decree within the meaning of Article 183 of the Limitation Act, there must be, expressly or by implication, a declaration by a duly qualified Court or person that the decree is still capable of execution and the decree holder is entitled to enforce it. 4 I.C. 402, appr. [P. 491, C. 1 & P. 494, C. 1.]

An application under Ss. 223 and 224, Civil Procedure Code, 1882, for the transmission of a certified copy of a decree, taken with an order thereon that the application should be granted, does not constitute a revivor of the decree within the meaning of Art. 183 of the Limitation Act. 26 All. 361; 4 A.L.J. 405 and 24 Cal. 244, not appr. [P. 491, C. 2 & P. 492, C. 1 & 2.]

The fact that the application was written upon a form which is applicable to an application under S. 235, Civil Procedure Code, 1882, does not make it an applicatien in execution nor constitutes the order thereon a 'revivor.'

[P. 491, C. 1.]

(b) Limitation Act (9 of 1908), Art. 183—Notice issued on Judgment-debtor for transmission of decree along with order of transmission does operate as "revivor"—Ss. 248 and 249 of Old Code have no relation to application for transmission of decree.

Ss. 248 and 249, Civil Procedure Code, 1882, have no relation to an application for transmission of a copy of a decree under S. 223 of the Code. Therefore, a notice issued in the first instance upon the judgment-debtor on an application for transmission taken with the final order for transmission cannot operate as a 'revivor' within the meaning of Article 183 of the Limitation Act. [P. 491, C. 2 & P. 492, C. 1.]

(c) Civil P. C. (14 of 1882), S. 249—Registrar of High Court has no power to pass order under S. 249.

Per *Sanderson*, C. *J.*—The Registrar of the High Court has no jurisdiction to adjudicate upon any matter, such as limitation, with reference to the question whether a decree is capable of execution; such a question has to be decided by the Court itself under S. 249, Civil Procedure Code of 1882.

(d) Calcutta High Court Rules, R. 370—R. 370 is inconsistent with scheme of Code of 1882.

Rule 370 of the High Court Rules making it incumbent on the Registrar to issue notice to the judgment-debtor on an application for transmission of a decree, may or may not have been consistent with the Civil Procedure Code of 1859, which was in force at the date when it was passed, but it is not consistent with the scheme of the Code of 1882, which leaves it to the

Court to which the decree is transmitted to determine whether the decree is capable of execution or not. The rule must be read as modified by the Code of 1882. [P. 492, C. 1.]

(e) Limitation Act (9 of 1908), Arts. 182 and 183—Decree on original side—Its revivor under Art. 183, is not same as under Cls. 5 and 6 of Art. 182.

With regard to a decree on the original side of the High Court, the word "revivor" in Article 183 of the Limitation Act does not mean the same thing as one or more of the matters which are mentioned in Article 182, sub-Clauses 5 and 6. [P. 492, C. 2.]

(f) Limitation Act (9 of 1908), Art. 183—Per *Woodroffe, J.*—Order for transmission of decree is not execution application though application for it is.

Per *Woodroffe, J.*—An order for transmission of a copy of a decree is not, as such, an order on an application for execution, though it is an order on an application in execution. [P. 492, C. 2.]

(g) Calcutta High Court Rules, R. 370—Registrar can issue notice of transmission of decree but cannot determine whether it is barred by time—Registrar's order in absence of contention is not judicial order necessary for revivor under Art. 183 of Act (9 of 1908).

Even if the Registrar of the High Court has power to issue, as a '*quasi*-judicial act', notice under S. 248, Civil Procedure Code, on an application for transmission of a decree, he has no power to determine judicially that the decree is alive if the debtor should contest the point. The judge must do that, and the fact that the debtor does not appear on the notice cannot give an order passed by the Registrar that judicial character which is necessary for an order operating as a revivor. [P. 493, C. 1.]

(h) Civil P. C. (5 of 1908), O. 21, Rr. 22 and 23—(Per *Mookerjee, J.*)—Mere notice of transmission of decree does not, but order of transfer does operate as revivor—Limitation Act (9 of 1908), Art. 183.

Per *Mookerjee, J.*—An order for execution of a decree under the procedure laid down in Ss. 248 and 249, Civil Procedure Code of 1882 (Rr. 22 and 23 of O. 21, Civil Procedure Code, 1908), after the issue of a notice upon the judgment-debtor, operates as a revivor, but the mere issue of the notice under S. 248 does not by itself produce that consequence. [P. 494, C. 1.]

(i) Civil P. C. (5 of 1908), O. 21, Rr. 22 and 23—Application for transfer of decree is not execution of application.

An application for transfer of a decree is in no sense an application for execution. 16 Cal. 744; 11 I. C. 216 and 34 All. 396, ref. to. [P. 494, C. 2.]

(j) Civil P. C. (14 of 1882), Ss. 223, 248 and 249—Application under S. 223—Notice under S. 248 is not proper—Such notice does not constitute revivor—Registrar cannot pass order under S. 249 to revive a decree.

Upon an application for transmission of a decree under S. 223, Civil procedure Code, 1882, a notice under S. 248 cannot properly be issued; such notice, if in fact issued, cannot by itself operate as a revivor of the decree and the Registrar cannot in law make such a determination under S. 249 as would operate to revive the decree. [P. 495, C. 2.]

Jackson, M. N. Basu and *A. P. Bose*—for Appellants.

S. P. Sinha, B. L. Mitter and *H. Majumdar*—for Respondents.

Sanderson, C. J.—This is an appeal by the defendant against the decision of the learned judge, by which he refused to set aside an attachment effected at the instance of the plaintiffs on the defendant's property, 147, Cotton Street, in Calcutta. The question which was referred to the decision of the Full Bench was, whether the application of the first of June 1908 and the order of the 30th June, 1908 constituted a revivor within the meaning of Art. 183 of the First Schedule to the Indian Limitation Act of 1908.

The material facts and dates were as follows:—On the 21st May, 1896—The plaintiffs obtained a decree in the High Court for the payment of money against the defendant.

2nd September, 1896—An application was made for the transmission of certified copy of the decree to the Purnea Court.

15th May, 1899—Application for execution by arrest and imprisonment of the defendant was made; the former application having been returned unexecuted.

12th February, 1900—An order on the lastmentioned application was made—returnable on the 12th March, 1900.

12th March, 1900—The time was extended for three months.

1st June, 1908—An application was made in the High Court for the transmission of a copy of the decree to Murshidabad for the attachment of property.

30th June, 1908—Order for transmission was made.

17th July, 1908—Copy of the decree was transmitted.

18th January, 1915—Application was made for execution by attachment of 147, Cotton Street.

10th June, 1915—Order was made for execution.

19th July, 1915—Notice of application by the defendant to set aside the attachment was issued.

2nd August, 1915—The application was heard and refused, and it is from the order of 2nd August, 1915 that the defendant appealed.

The point, relied upon in the Court below by the defendant, was that the decree of 21st May, 1896, in the execution whereof the attachment was made, was barred by the above-mentioned Statute of Limitation. On behalf of the plaintiffs it was urged that by reason of the application of 15th May, 1899 and the orders of 12th February, 1900 and 30th June, 1908 the decree was kept alive and was, therefore, enforceable by execution.

The clause which is applicable to this matter is Article 183 of the First Schedule of Act IX of 1908. The first column describes the application as follows :

"To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, or an order of His Majesty in Council."

The second column prescribes the period of limitation *viz.*, 12 years. The third column specifies the time from which the period of limitation, begins to run as follows :

"When a right to enforce the judgment, decree or order accrues to some person capable of releasing the right."

It is clear that if the matter stopped there the decree would not be enforceable, for it was made on the 21st May, 1896 and the application for execution, which is now material, was not made until the 18th January, 1915. But there is a proviso contained in Article 183 which runs as follows :—

"Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be,"

and it is in respect of this proviso that the question which has been referred to the Full Bench arises.

It is not denied that the order which was made on the 12th February, 1900 for the execution of the decree by the arrest of the defendant constituted a "revivor" within the meaning of the clause ; but it is said on behalf of the defendant that more than 12 years has elapsed since such revivor and that the decree is no longer enforceable. On the other hand, the plaintiffs allege that the application of the first June 1908 and the order of 30th June, 1908 constituted a revivor within the meaning of the clause and consequently that the decree is still capable of being enforced, inasmuch as the application was made on the 18th January, 1915, a date within the period of 12 years, counting such period from June 1908. It is necessary, thererore, to consider in the first instance what was the nature of the application of the 1st June, 1908 and the proceedings in connection therewith. The particulars of the application are shown by the entry in the last column of the form on which the application was made as follows :—

"By transmission of certified copy of the said decree together with a certificate of non-satisfaction to the Court of the District Judge of Murshidabad within whose jurisdiction the defendant has property and by attachment and sale of which the plaintiff's claim may be satisfied. The defendant has no property within the jurisdiction of this Hon'ble Court whereby the decree can be satisfied."

This was obviously an application for transmission of a copy of the decree under Ss. 223 and 224 of the Civil Procedure Code of 1882, the Code which was in force at the date of the application. The particulars of the application show that it was intended to bring it within Clause (*b*) of S. 223, and the procedure which the Court was asked to make use of was that provided by S. 224 of the Act.

The application, however, was made upon a form which was applicable to an application under S. 235 of the Act, 1882, which deals with an application for execution and which sets out the particulars which must be included in a tabular form, which the applicant or some other person acquainted with the facts must verify.

Upon the application being made, an order was made by the Registrar that notice under S. 248 should issue. Notice was thereupon served upon the defendant calling upon him to show cause why the decree should not be executed against him.

On the 30th June, 1908 the following order was made by the Registrar :

"Upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed,"

and in consequence of this order a copy of the decree with a certificate of

non-satisfaction was transmitted to the Murshidabad Court.

It was argued first that the order was in itself a "revivor" within the meaning of Article 183 of the Schedule of the Limitation Act.

The test of what constitutes such a "revivor" is in my judgment correctly laid down by Mookerjee, J., in *Srimati Kamini Debi* v. *Aghore Nath Mookerjee* (1) as follows:—

> "The essence of the matter is that to constitute a revivor of the decree there must be, expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it."

and I think it must necessarily be implied that such determination must be by a Court or person duly qualified to make it.

The question, therefore, arises whether by the above-mentioned order there was such an express or implied determination in this case. In my judgment the substance and not the form of the matter must be looked at and considered from that point of view; the application was for the transmission of a certified copy of the decree together with a certificate of non-satisfaction and no more and the order made in substance was that the application should be granted. The actual words of the order were, "let execution issue as prayed." These words necessitate a reference to the application which, as already stated, was not an application for execution, but for the transmission of a certified copy of the decree. It was said during the argument that the application had to be made on the form above mentioned, as there was no other form provided. To my mind the use of a particular form cannot affect the matter when once it is established that the application was not for execution, but merely for transmission of a copy of the decree. All that happened in reality was an application to the Registrar for transmission of the copy of the decree, a direction by him that notice of such application should be given to the judgment-debtor, and on his non-appearance an order that the copy of the decree should be transmitted in accordance with the application. Under these circumstances, in my judgment, there was no determination that the decree was still capable of execution, and the order of the 30th June, 1908 did not constitute a revivor within the meaning of Article 183.

It was further argued, however, that the notice issued under the directions of the Registrar and the order of 30th June, 1908 taken together constituted a "revivor." It was urged that the notice to show cause was contemplated by Article 183 as a revivor in the same way as under Article 182 and that such notice and the order had the same effect as the procedure of *scire facias*.

It is true that the direction given by the Registrar was that notice under S. 248 should issue, and it has also been held that the procedure embodied in Ss. 248 and 249 is analogous to the procedure of *scire facias* and that such procedure, when properly and rightly used, would constitute a rivivor, see *Jogendra Chundra Roy* v. *Siam Das* (2); but in my judgment Ss. 248 and 249 were not applicable to the matter in question. These sections deal with an application for the execution of a decree and provide for notice being given to the party against whom execution is applied for, and if he does not appear, or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

They have no relation, in my opinion, to an application for the transmission of a copy of the decree under S. 223, which may be ordered according to the words of the section "on the application of the decree-holder." The notice, therefore, which was issued under S. 248 was inapplicable to the proceedings in question. But it was urged by the learned Advocate-General that if the Court has in fact sent notice to the debtor and has in fact adjudicated upon the matter, something has been done to show that the decree is capable of execution.

I think it would be unreasonable so to hold when, having regard to the facts of the case, it is plain that the Registrar did not adjudicate upon the question whether the decree was capable of execution, but merely ordered a copy of the decree to be transmitted to the Murshidabad Court, with a certificate of non-satisfaction. Further, even assuming that the notice was rightly sent and in accordance with the provisions of the

(1) (1909) 4 I. C. 402.

(2) (1909) 36 Cal. 543=1 I. C. 168.

Act by the Registrar, it should be pointed out that the Registrar would have no jurisdiction to adjudicate upon any matter, such as limitation, with reference to the question whether the decree was capable of execution. Such a question would, in my judgment, have to be determined by the Court itself under S. 249 of the Civil Procedure Code.

It is true that by S. 637 of the Civil Procedure Code any non-judicial or *quasi*-judicial act which the Code requires to be done by a Judge, may be done by the Registrar, and the Court may by rule declare what shall be deemed to be non-judicial or *quasi*-judicial acts within the meaning of the section. R. 515-A, which came into force on 1st September, 1905, provided that certain applications therein specified should be made to the Registrar or Master, and that all acts done by the Registrar or Master under this rule should be deemed to be *quasi*-judicial. Number 30 under the said rule refers to applications for order for execution of a decree or order for arrest. attachment, sale or otherwise, with power to order issue of notice under section 248, Civil Procedure Code, where such notice is necessary. But it is clear that the Registrar was not thereby clothed with authority to decide such a question as arises in this case, *viz.*, whether the decree was barred by the Statute of Limitation.

It was argued, however, that R. 370 of the rules then in force, which are set out in Mr. Belchamber's book, showed that it was incumbent upon the Registrar to issue the notice. This rule came into force on the 1st April, 1878, judging from the note attached to R. 345 in Mr. Belchamber's book and, therefore, before the 1882 Code. It may or may not have been consistent with the Code which was in force at the date when it was passed, but in my judgment it was not consistent with the scheme of the Code of 1882. Under that Act the application for a transmission of the copy of the decree to another Court under S. 223, was a procedure under which the question, whether the decree was capable of execution, was intended to be left to the Court to which the copy of the decree was transmitted : a procedure different in its essentials from the procedure provided for an application for execution dealt with in subsequent sections of the Act. In any event I think it is safe to say that these rules must be read as modified by the Civil Procedure Code of 1882 under which the application in this case was made, and in my judgment the notice issued and order made under the above-mentioned circumstances did not operate as a revivor within the meaning of Article 183 of the Limitation Act, Schedule I.

It is necessary to notice a further argument by the learned Advocate-General, *viz.*, that with regard to a decree on the Original Side the word " revivor " in Article 183 meant the same thing as one or more of the matters which are mentioned in Article 182, sub-Clauses 5 and 6.

With this I cannot agree. I think the fact that the word " revivor " is used in Article 183, instead of the different matters specified in Article 182 being set out again or referred to in Article 183 as might have been done, shows that something different to such matters was intended. Further, the conditions dealt with by the two clauses are essentially different and the periods of limitation vary materially.

For the above-mentioned reasons, in my judgment, the answer to the question referred to us should be that the application of the 1st June and the order of the 30th June do not constitute a revivor within Article 183. The result will be that the appeal will be allowed, that the order of the learned Judge will be set aside, and that the attachment effected on the property of the defendant, *viz.*, 147, Cotton Street, will also be set aside. The defendant will have the costs of the application in the Court below and of this appeal.

Woodroffe, J.—The Advocate-Ceneral accepts the definition of the revivor as a decision holding that the decree is still capable of execution. He admits that an application for transmission of decree is not a revivor. It is further conceded that even an order for transmission might be regarded as a ministerial act and not as a revivor. In my opinion, an order for transmission as such is not an order on an application for execution, though it is an order on an application in execution. It is a proceeding taken with a view to further action by way of execution elsewhere, on which action, unless previously determined, the question of the right to execute the decree is decided. It is, however, argued that in the present

case there was something more, *viz.*, the issue of a notice under S. 248 and an order for issue of execution. According to the Code a notice under S. 248 does not issue on an application for transmission under S. 223. But assuming that this was done under R. 370 of the old rules, the question arises whether that rule which would seem to have been passed under the Act of 1859 was of force under the Code of 1882. But even if it was, this does not assist the creditor. For if the Registrar had power to issue as a "*quasi*-judicial act" notice under S. 248, he had no power to determine judicially that the decree was alive had the debtor contested the point, the Judge must have done that and the fact that the debtor did not appear on the notice, cannot give the order passed that judicial character which is necessary for an order operating as revivor. It is to be observed that the order passed was, "let execution issue as prayed." The last two words make the order operative as one for transmission of the decree; for this was what was asked. In any case it cannot be said that the Registrar either could or did decide that the decree was capable of execution. The proceedings taken did not, in my opinion, operate as a revivor within the meaning of Article 183 of the Limitation Act. The decree was transmitted to Murshidabad and so far as appears from the proceedings before us, nothing was done on the order and nothing was attempted to be done in execution until nearly seven years later. I would, therefore, answer the question referred to us in the negative, and I agree in the order passed.

Mookerjee, J.—The facts material for the determination of the question of law referred to the Full Bench for decision are not set out in the order of reference and may be briefly recited here.

On the 21st May, 1896, the respondents obtained an *ex parte* decree for money against the appellant on the Original Side of this Court. After intermediate proceedings, which need not be described in detail at this stage, the decree- holders, on the 18th January, 1915, made the present application of the decree by attachment of premises 147, Cotton Street, in this City. The judgment-debtor objected that the application was barred by limitation under Article 183 of the Schedule to the Indian Limitation Act, 1908, which was in force at the date of the application and governed it on the principle that the law of limitation applicable to a proceeding is, unless there is a distinct provision to the contrary, the law in force at the date of the proceeding, *Lala Soni Ram* v. *Kanhaiya Lal* (3). The objection was overruled by Mr. Justice Chaudhuri on the 2nd August, 1915 and the propriety of this decision is in question before us.

It is plain that the application for execution is *prima facie* barred under Article 183, which requires an application to enforce a decree of a Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, to be made within twelve years from the date when a present right to enforce the decree accrues to some person capable of releasing the right. As the application for execution, with which we are here concerned, was made on the 18th January, 1915 in respect of a decree dated the 21st May, 1896, the decree-holders seek to escape the bar of limitation by reliance upon that portion of the proviso to Article 183 which lays down that when the decree has been revived, the prescribed period of twelve years shall be computed from the date of such revivor. It is thus incumbent upon the decree-holders to establish that the decree was revived within twelve years from the 21st May, 1896, and that since the date of such revivor, twelve years had not elapsed on the 18th January, 1915. To substantiate the position, they rely on an application made by them on the 1st June, 1908, and the order passed thereupon on the 30th June, 1908; the combined effect of the application and the order was, it is argued, to revive the decree within the meaning of the proviso to Article 183. This view is supported by the decision in *Suja Hossein* v. *Manohur Das* (4), though a contrary view had been accepted when that case was heard in the first instance, *Suja Hossein* v. *Manohur Das* (5). The contention of the decree-holders also receives some support from the decisions in *Umrao Singh* v. *Lachmi Narain* (6) and *Beni Madho* v. *Shiva*

(3) (1913) 35 All. 227 = 19 I. C. 291 = 40 I. A. 74 (P. C).
(4) (1897) 24 Cal. 244.
(5) (1895) 22 Cal. 921.
(6) (1904) 26 All. 361.

Narain (7). The correctness of these decisions has, however, been impugned before us on behalf of fhe judgment-debtor.

There is no definition of the term "revivor" in the Indian Limitation Acts of 1859, 1871, 1877 and 1908. But the historical review contained in the judgments in the cases of *Ashootosh* v. *Doorga Churn Chatterjee* (8), *Futteh Narain Chowdhry* v. *Chundrabati Choudhrain* (9) and *Jogendra Chundra* v. *Syam Das* (2) shows beyond doubt that the procedure for revivor of judgment on the Original Side of this Court was substantially analogous to the write of *scire facias* under the Common Law (R. 195 of the rules of 1851 on the Plea Side of the Supreme Court). That procedure was subsequently embodied in Ss. 248 and 249 of the Civil Procedure Code of 1882, and later on reproduced as O. 21, Rr. 22 and 23 of the Code of 1908. Under these provisions, where an application for execution is made, a notice is required to issue to the person against whom execution is applied for, if more than one year has elapsed from the date of the decree. The notice calls upon him to show cause why the decree should not be executed against him. If he does not appear or does not show cause to the satisfaction of the Court, the Court orders the decree to be executed. The order for be execution thus made operates as a revivor; but the mere issue of the notice does not by itself produce that consequence, *Srimati Monohar Das* v. *Futteh Chand* (10). This fully justifies the rule enunciated in *Kamini Debi* v. *Aghore Nath Mookerjee* (1), namely, that to constitute a revivor of a decree, there must be expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. It is of vital importance to add that such determination must be made with jurisdiction and by a competent Tribunal. Tested in the light of this principle, what is the true position of the decree-holders in the case before us? On the 1st June, 1908, they applied for transmission of the decree from the Original Side of this Court to the district of Murshidabad, on the allegation that the judgment-debtor had no property within the local limits of the Ordinary Original Jurisdiction of this Court, while he had property within the jurisdiction of the other Court. The application, though made obviously under S. 223, Clause (*b*) of the Code of 1882, was described as one under S. 235 for execution of the decree; this was indisputably misleading, and if we look to the substance of the matter, as we must do, we cannot attribute to the application a character it did not really possess: what is essential in matters of this description is the substance and not the mere form. The Master recorded the following order on the application on the 1st June, 1908:

"Let notice issue under S. 248 (a)."

This clearly was not in conformity with the Code, which contemplates the issue of a notice under S. 248 on the basis of, not an application for transfer of a decree under S. 223, but an actual application for execution under S. 235. The scheme of the Code in this respect will be found fully analysed in the case of *Sripatt Charn Chowdhury* v. *R. Belchambers* (11), and need not be reproduced here. The substance of the position is that the group of Ss. (A) from 223 to 229-B in Chapter XIX deal with the Courts by which decrees may be executed, while the group of Ss. (B) from 230 to 238 deal with applications for execution. These sections indicate that an application for transfer of a decree is in no sense an application for execution [*Nilmony Singh Deo* v. *Biressur Banerjee* (12), *Chatterput Singh* v. *Daya Chand Marwari* (13) and *Bohra Khetpal* v. *Kuar Tikam Singh* (14), which dissents from *Ram Sahai* v. *Nanni* (15)]. It is not necessary for us to consider whether, as indicated in *Bhabani Charan Dutt* v. *Pratap Chandra Ghosh* (16), an application for transmission of a decree may not be deemed an application to take a step in aid of execution; nor is it necessary to discuss whether, as indicated in *Husein Ahmad Kaka* v. *Saju Mahamad Sahid* (17),

(7) (1907) 4 A. L. J. 405.
(8) (1881) 6 Cal. 504.
(9) (1893) 20 Cal. 551.
(10) (1903) 30 Cal. 979.
(11) (1910) 8 I.C. 22.
(12) (1889) 16 Cal. 744.
(13) (1911) 11 I.C. 216.
(14) (1912) 34 All. 396=14 I.C. 172.
(15) (1886) A.W.N. 137.
(16) (1904) 8 C.W.N. 575.
(17) (1891) 15 Bom. 28.

a Court may not decide the question of limitation even before transmission of the decree, or, whether, as ruled in *Srihary Mundul* v. *Murari Chowdhry* (18), even after transmission, the Original Court may not, under S. 239 of the Code of 1882, decide the question of limitation when execution has been stayed in the Court to which the decree has been transferred. For the purpose of the present case, it is sufficient to hold that S. 230 makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution, while the explanation to S. 248 shows that the notice required by that section must, where the decree has been transmitted, be issued by the Court to which the decree has been sent for execution. Consequently, the issue of the notice in this case under S. 248, on the basis of the application for transmission of the decree, was not in conformity with the Code of 1882 which was in force at the time. It is said, however, that the action taken by the Master was in accord with the rules framed by the Court when the Code of 1859 was in force, *Raja Sreenath Roy* v. *Romesh Chandra Acharya Chaudhuri* (19). It is needless to investigate whether the rules, when first framed, were consistent with the Code of 1859; for even if they were, it is plain that after 1882, they could be deemed operative only in so far as they were consistent with the Code of 1882, *Baijnath* v. *Ahmed Musaji Saleji* (20). It is significant that the rules framed after the Code of 1908 have been made consistent with that Code, and a notice under O. 21, R. 22, is no longer required to be issued upon an application for transmission under S. 39. We next pass on to the order made by the Master on the 30th June, 1908, on return of affidavit of service of the notice under S. 248:

"Upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed."

The language of the concluding portion of this order is significant; what was prayed was transmission of the decree, and what was actually done pursuant to this order of the Master was, not the issue of any process of execution, but only a transmission of the decree on the 17th July, 1908. Here again if we look to the substance of the matter, as we must do, we find that there was in reality no determination by the Master that the decree was still capable of execution. It is further plain that the Master had no authority to make such a determination; for S. 249 requires that the Court should consider the objection, if any, and determine whether the decree should or should not be executed. This is clearly a judicial act which cannot be delegated to a Master under S. 637 of the Code of 1882, and it is worthy of note that although R. 515 (A) invests the Master with power to order issue of a notice under S. 248, it does not authorise him to give a decision under S. 249. It is, I think, incontestable that there was not in this case an order under S. 249 by the Master, and that, if there was, the order must be treated as made without jurisdiction. My conclusion consequently is that upon the application for transmission of the decree under S. 223 a notice under S. 48 could not properly be issued, that such notice, though issued, did not by itself operate as revivor of the decree, and that there was not in fact and could not in law be such a determination by the Master under S. 249 as would operate to revive the decree.

It is not necessary to examine in detail the contention that Article 183 should be construed in the light of Article 182 and that whatever is sufficient to keep alive a decree for the purposes of Article 182 should be deemed sufficient for the purposes of Article 183. There is, in my opinion, no basis whatever for this contention; the scheme and scope of the two Articles are radically distinct, and no useful purpose would be served by an endeavour to amalgamate them or to interpret the one by reference to the other.

On these grounds, I agree that this appeal must be allowed with costs throughout, the order of Chaudhuri, J., set aside and the attachment cancelled.

Chitty, J.—I agree for the reasons given by the learned Chief Justice that the question referred to us should be answered in the negative. I have nothing further to add.

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(18) (1886) 13 Cal. 257.
(19) (1908) 12 C. W. N. 897.
(20) (1913) 40 Cal. 210=18 I. C. 978.

N. R. Chatterjea, J.—I am also of the same opinion.

V.B./R.K.

Appeal allowed.

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CHAUDHURI AND NEWBOULD, JJ.

Pratab Chandra Mondal and *others*—Plaintiffs—Appellants.

v.

Mohendra Lal Mondal and *others*—Defendants—Respondents.

Appeal No. 1686 of 1912, decided on 11th February, 1916, from the Appellate Decree of Dist. Judge, Birbhoom, dated 8th March, 1912.

(a) Bengal Tenancy Act, (8 of 1885), S. 3—Status of tenant—Determination of—Document creating tenancy showing its nature clearly—Subsequent conduct and dealing of tenant need not be considered.

In determining the status of a tenant under the Bengal Tenancy Act, if the inception of the tenancy is clear and the document creating the tenancy shows what it is, subsequent conduct or dealings of the tenant need not be considered. It is only when no clear conclusion can be arrived at from the document that subsequent conduct or dealings are necessary to consider.

[P. 497, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), S. 3—Entire village comprising of 500 bighas let out—Several persons residing—Document not clear—Held tenancy was under tenure.

An entire village comprising about 500 *bighas*, where persons were residing, was let out to a tenant and the document creating the tenancy did not clearly show whether the tenancy was a *raiyati* holding or a tenure.

Held, that under the circumstances the tenancy was an under tenure. [P. 497, C. 2.]

Dwarka Nath Chakrabarty and *Mohini Mohan Chakrabartty*—for Appellants.

Broja Lal Chakrabarty and *Harendra Nath Ganguly*—for Respondents.

Judgment.—Plaintiffs Nos. 1 to 3 are purchasers from one Piru Manjhi and plaintiff No. 4 is a purchaser from the other plaintiffs. The purchase of the former was on the 21st *Falgoon*, 1305. Defendants Nos. 1 to 3 are purchasers from one Indra Dass. The other defendants are settlement-holders. They are in possession. The defendants' purchase was on the 28th *Aswin*, 1302. Indra Dass was admittedly a tenure-holder directly under the proprietors. The whole question involved depends upon the ascertainment of Piru Majhi's right. If he was a tenure-holder, the plaintiffs should succeed. If he was an under-*raiyat* or even an occupancy *raiyat* the suit should fail.

Piru's title-deed, Exhibit D, is a *Kabuliyat* of 1292 executed in favour of Indra Dass. It appears from the *kabuliyat* that the whole of Mauza Ranjannagore was let out to Piru excepting the *jote* of Bakaranata Bagdi. The area appears to be about 500 *bighas*. The learned Subordinate Judge found that there were some Santhal and Bhuia residents at Ranjannagore before Piru took settlement and Piru was himself a resident of Ranjannagore when he executed the *kabuliyat*. The document is headed as *korfa jami jamar kabuliyat patra*. It is clear from the document that the interest whatever it was to be heritable. There is not a word in the whole of the document that the land was let out for purposes of cultivation. There is a passage in the document which has been translated thus—"I shall attend to the several duties appertaining to the Police." It appears that Bakranata long prior to the date of this document had obtained a lease from the proprietors, then represented by the Court of Wards, which accounts for the exclusion of his *jote*. The learned Subordinate Judge came to the conclusion that Piru's right under the deed was that of an under-tenure-holder. The learned District Judge has held in appeal that Piru's tenancy was a *raiyati* holding and not a tenure on the following grounds: That the word "*korfa*" although it means "under" or "subordinate" the settlement created was not the interest of a tenure-holder, because (1) the plaint alleged that the word "*korfa*" had been used in the *pattah* erroneously, advantage having been taken of Piru's ignorance who was not in fact a "*korfadar.*" (2) In Piru's sale-deed to the plaintiffs Nos. 1 to 3, Indra Dass' interest is described as "*madhya satwa*," intermediate interest or tenure, but that Indra Dass' interest was certainly not intermediate or a middleman's interest. (3) That in various subsequent documents Piru's interest has been recited as "*prajai satwa*" and that in particular plaintiff No. 1 in a deposition so late as the 24th May 1904 stated that Piru's interest was a transferable occupancy right. He, therefore, infers that the plaintiffs have purchased only an occupancy holding. In discussing the

question as to what the tenancy was at its inception, he says he has arrived at the above conclusion, that was a *raiyati* tenancy, by a process of exclusion from the documents above mentioned. He further says that "by consideration of the positive side of the question", he arrives at the same conclusion. He finds that the object of taking the land was to bring it under cultivation not by establishing tenants on it, but by members of his family and that Piru "was a man of the cultivating class and that the persons who were sought to be proved as tenants were all his relations, and the inference was more in favour of his having taken their assistance as members of a family in bringing the land under cultivation than of his having settled them as tenants within the meaning of the Bengal Tenancy Act" It is not disputed that the law relating to the matter as it stands at present, is that if the inception of the tenancy is clear, and the document creating the tenancy shows what it is, subsequent conduct or dealings need not be considered. It is only when no clear conclusions can be arrived at from the document that subsequent conduct or dealings are necessary to consider. The learned Vakil who has very ably supported the judgment of the District Judge, submits that although there is nothing in the document expressly stating that the settlement was for the purpose of cultivation, yet such an inference is to be drawn from the fact that Piru's occupation is described in it as that of a cultivator. The expression, however, in the document is that his occupation was "*chash-adi*" cultivation, etc. He next submits that although an inference may be drawn from the document that the settlement is heritable, yet there are no express words making it heritable. *Thirdly*, that the clause about the Police service has not been happily translated as according to him, it really means that he is to assist the *zemindar* in rendering Police service.

Then he relies upon the following clause in the document, arguing that it cannot refer to a permanent tenure: "If there be any increase in the '*bira* and *kadar*' I shall add the amount over the rent and pay accordingly." He translates the expression "*bira*" as succession of crops and "*kadar*" as rates. The appellants have translated it as meaning area and rates. The clause appears to mean "if there is improvement and the value of the land increases, I will pay more," but this clause does not in our view affect the general import and intendment of the document, namely, that it created a heritable under-tenure.

It appears that the learned Judge has wholly overlooked the fact found by the Subordinate Judge that there were Santhal and Bhuia residents in the *mauza* before Piru took settlement and that Piru himself was a resident. He does not say he was a cultivator, but a man of the cultivating class. He established *bustees* and tenants, and tenants were there before him. The document according to us shows that an under-tenure was created. If it was merely a *raiyati* settlement, as now argued, there would be no meaning in the expression "*korfa.*" The learned Vakil says that it is to be understood in the sense that the tenant was "under or subordinate" to the grantor, as he was to pay rent to him. This seems to us to be a misapplication of the word. It is not used ordinarily in that sense. The tenure is clearly heritable and the clause about the Police service supports the conclusion that a permanent under-tenure was created. The presumption arising out of the area settled is no doubt rebuttable, but we do not see that it has been rebutted. An entire village where persons were residing was settled. Subsequent admissions or statements made by Piru or the plaintiffs do not in our view affect the question. We know that transferable occupancy rights are often more highly valued by the tenants than under-tenures. We, therefore, confirm the decision of the learned Subordinate Judge and decree this appeal with costs.

V.B./R.K.

Appeal decreed.

A. I. R. 1916 Calcutta 497

SANDERSON, C. J. AND MOOKERJEE, J.

Panchkori Ghosh — Plaintiff —Appellant.

v.

Hari Das Jati and *another* — Defendants— Respondents.

Letters Patent Appeal No. 52 of 1911,

decided on 9th May, 1916, against the Decree of Coxe, J., dated 22nd February, 1911.

(a) Bengal Tenancy Act (8 of 1885), Ss. 170 and 171—Rent decree against tenant—Order for sale—Deposit by fictitious mortgagee—Suit for recovery of deposited amount—Held plaintiff was not person having "interest voidable under sale"—Claim was not enforceable either under S. 69 or 70, Contract Act (1872).

Defendants' holding having been advertised for sale in execution of a rent-decree against them, plaintiff deposited the decree amount into Court under S. 171 of the Bengal Tenancy Act, alleging that he was mortgagee in respect of the property and was, therefore, interested in preventing the sale. The defendants objected that the alleged mortgage was a forgery and that plaintiff had no 'interest voidable on the sale' within the meaning of S. 171. The Court, however, accepted the payment as the plaintiff was a mortgagee on the face of his deed of mortgage, reserving to parties the right to fight out the other questions in a separate suit. The plaintiff then sued on his mortgage and the suit was dismissed on the ground that the mortgage document was a concocted one. In the present action for recovery of the money deposited in Court:

Held, (1) that the plaintiff was not a person having an 'interest voidable under the sale' within the meaning of S. 171 of the Bengal Tenancy Act and should not have been allowed to make the deposit; [P. 499, C. 1.]

(2) that the claim was not enforceable either under S. 69 or S. 70 of the Contract Act. [P. 499, C. 2.]

(b) Contract Act (9 of 1872), S. 70—To entitle person to claim benefit of S. 70, payment must have been lawfully made.

To entitle a person to claim the benefit of S. 70 of the Contract Act, the payment must have been *lawfully* made, that is, by a person having a lawful interest in making it and not some interest from the point of view of the payer. 2 C. L. J. 311, foll. [P. 499, C. 1.]

(c) Contract Act (9 of 1872), S. 70—Person enjoying benefit of non-gratuitous act—Obligation to repay must be express or implied.

The obligation to repay by a person enjoying the benefit of a non-gratuitous act under S. 70 of the Contract Act should not be determined by nice consideration of what is fair or proper according to the highest morality. The obligation must be either express or implied, and does not arise from the fact that the person who is asked to repay was benefited by the payment, especially when he entered a protest against the payment at the earliest opportunity. 2 I. A. 131 (P. C.), ref. to. [P. 499, C. 2.]

Baidya Nath Dutt and *Tarakeswar Pal Chowdhuri*—for Appellant.

Bepin Behari Ghose (Sr.)—for Respondents

Sanderson, C. J.—In this case there has been an appeal from the judgment of Mr. Justice Coxe by the plaintiff, and the circumstances of this case are to my mind somewhat extraordinary. It appears that on the 4th August, 1904, there was alleged to have been made a mortgage by the defendants in this case in favour of the plaintiff of certain property, which need not be more specifically described. After that mortgage the *zemindars* brought an action against the defendants for rent and obtained a decree, and were proposing to sell the defendants' interest for the purpose of realizing their decree. Subsequently on the 17th of January, 1907, the plaintiff made a deposit of Rs. 284 in the Court in which the decree by the *zemindars* had been obtained, and it is for the recovery of that amount that the present suit was brought. The deposit was made under somewhat peculiar circumstances. As has been pointed out by my learned brother, Mr. Justice Mookerjee, it was made in the first instance by the plaintiff *ex parte*; then the defendants appeared upon the scene, and objected to the plaintiff making that deposit on the ground, as they alleged, that the plaintiff had no interest in the property, that he was not a mortgagee and that he ought not to have been allowed to make the deposit; and a note which was made on the record is as follows:

"As the third party appears on the face of the document to be a mortgagee the amount deposited by him may go to satisfy this decree. As to whether the document is really forged or not or as to whether the third party is really entitled to deposit the money or his deposit amounts to a voluntary payment are questions which would be decided in a regular suit between the judgment-debtor and the third party and cannot be looked into in this execution case."

Therefore, it is obvious to my mind that the defendants, upon this deposit being brought to their notice, put in an objection upon the ground that the plaintiffs' alleged mortgage was not a mortgage at all, but that in fact it was a forged document and that the plaintiff had not paid any money to the defendants in respect of the document.

Now, the first question that arises upon that is, whether in those circumstances the plaintiff can be said to be a person who comes within S. 170, paragraph (3) of the Bengal Tenancy Act, which runs as follows:

"The judgment-debtor, or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section."

Now it appears that when the matter of the validity of the mortgage came to be

investigated by the Court in a mortgage suit which the plaintiff brought in 1907, it turned out that the first Court held that it was not satisfied that the defendants had ever executed the mortgage at all and that it was quite satisfied that the plaintiff had not made any payment in respect of the alleged mortgage and the second Court, to whose decision of course we must have most regard as far as the facts are concerned, held that that document was a concocted document. Under those circumstances, and having regard to those facts, the plaintiff being simply a holder of a document which the Court has found to be a concocted document, and he being a person who had advanced no money to the defendants, is it possible for us to say that "he is a person having any interest voidable on the sale?" In my judgment it is sufficient only to state the facts to show that it is not possible for us to say that he is such a person, and, therefore, he ought not to have been allowed to make the deposit under the procedure provided by S. 170 or S. 171 of the Bengal Tenancy Act.

Then it is said that the plaintiff comes within either S. 69 or S. 70 or perhaps both of the Contract Act of 1872. In order to come within S. 69, the plaintiff must show that he is a person who is interested in the payment of the money which another was bound to pay: or if he is to come within S. 70 he must be a person who lawfully paid for the defendant not intending to do so gratuitously and that the defendants has enjoyed the benefit of such payment. In my judgment, having regard to the facts which I have stated, he does not come within either.

The test as regards the meaning of the word "lawfully" was laid down by my learned brother, Mr. Justice Mookerjee, in the case of *Raja Bikunto Nath Dey Bahadur* v. *Udoy Chand Maiti* (1):—

"The word 'lawfully' in S. 70 of the Contract Act is not merely a surplusage. It must be considered in each individual case, whether the person, who made the payment, *had any interest* in *making it*; if not, the payment cannot be said to have been made lawfully."

I expect my learned brother would agree with me, when I say he meant "had any *lawful* interest in making it", because having regard to the judgment which was delivered in the mortgage suit, it seems to me that the plaintiff in this case had a very considerable interest in making this payment; for his scheme seems to have been that he had bought adjoining land, and he hoped that if he could get the Court to hold that the forged mortgage was a valid mortgage and then when the *zemindar* brought a suit for rent, and the tenant was not able to pay the rent, he could step in on the basis of his mortgage and might thereby obtain possession of the adjoining land and might get that which he desired to obtain thereby he certainly had an *interest* from his own point of view in making the payment. But in my judgment it must mean *lawful* interest: and having regard to the facts which I have stated, I do not think that the plaintiff had such an interest. This is quite sufficient for the decision with regard to S. 69, at which the learned Judge has arrived. I do not think that the plaintiff was interested in the payment of money within the meaning of S. 69, nor was the payment 'lawful' within the meaning of S. 70.

Stress is laid upon the fact that the defendants having had the *benefit* of the payment, they are liable. I am not sure how the matter stands in that respect. But assuming for the sake of argument that they have benefited by the payment, I think that is not sufficient to bring the case within the meaning of S. 70, because it is pointed out by the Privy Council in the case of *Ram Tuhul Singh* v. *Biseswar Lal Sahoo* (2), the passage to which I wish to refer being at page 143 that—

"Even if this were true, it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay." How can it be said in this case that there was either an express or implied obligation to repay when the defendants, at the first opportunity after it was brought to their knowledge that this deposit was made by the plaintiff went to the Court to protest against the making of the deposit

(1) (1905) 2 C. L. J. 311.

(2) (1874-75) 2 I. A. 131=23 W. R. 305 (P.C.).

on the ground that plaintiff had no interest to make the deposit, and that the mortgage was a forged mortgage? Having regard to those facts it is impossible to say that this payment was made upon the implied undertaking to repay.

On these grounds I think that Mr. Justice Coxe's judgment was correct, and this appeal ought to be dismissed with costs.

Mookerjee, J.—I entirely agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 500 (1)

CHATTERJEE AND BEACHCROFT, JJ.

Upendra Mohansaha Chowdhary and *others*—Creditors—Appellants.

v.

Brindaban Behari Saha Promanik—Petitioner in Insolvency—Respondent.

Appeal No. 478 of 1913, decided on 4th February, 1916, against the Decree of Dist. Judge, Mymensingh, dated 21st July, 1913.

Provincial Insolvency Act (3 of 1907), S. 36—Certain transfers reported by Receiver to be void—Proper course is to issue notice upon transferees to show cause why transfer should not be annulled under S. 36—Case should not be sent for inquiry, to lower Court.

A District Judge, on the report of a Receiver that certain transfers made by an insolvent are void under S. 36 of the Provincial Insolvency Act, has no jurisdiction to send the case for inquiry to a Munsif. The proper order to make on such report is to issue notice upon the transferees to show cause why the transfer should not be annulled under S. 36. [P. 500, C. 2.]

Manmotha Nath Mukherjee—for Appellants.

Satish Chandra Chowdhury—for Respondent.

D. Chatterjee, J.—This appeal arises out of an application under S. 36 of the Provincial Insolvency Act made by some creditors of the insolvent, on the allegation that the insolvent had within two years of the insolvency order made a fraudulent transfer of his property. Upon notice to the transferees the learned Judge held that the proper persons to make an application under S. 36 is the Receiver only and that, therefore, the creditors must move the Receiver to make an application. Subsequently he received a report from the Receiver supporting the application of the appellants and also making an allegation against the insolvent. He then sent the case down to the Munsif of Tangail for an enquiry. Upon perusal of the report of the Munsif, he ordered regarding the properties mentioned in 5*a* and 5*b* of the report to call upon all persons interested in the case to show cause why the said properties should not be included in the list of assets of the insolvent and sold by the Receiver. In the *first* place, we do not see under what law reference was made to the Munsif. The further order that was made upon the receipt of the report is also not quite accurate. The order should have been in accordance with the terms of S. 36, why the transfer should not be annulled. Now as the case has proceeded to that stage and the learned Judge has, upon the report of the Receiver, made an order purporting to be under S. 36, we direct that he shall proceed with the case after issuing fresh notice upon the transferees to show cause why the transfer should not be annulled under S. 36 of the Provincial Insolvency Act and upon hearing such cause as may be shown, he will pass the necessary order under S. 36. The case having proceeded so far, it is not necessary to make any further remark upon the procedure followed. We direct that the appeal be disposed of in accordance with this judgment and the record be sent back to the District Judge.

We make no order as to costs in this Court.

Beachcroft, J.—I agree.

V.B./R.K.

Record sent back.

A. I. R. 1916 Calcutta 500 (2)

FLETCHER AND RICHARDSON, JJ.

Pormeshwar Dubey and *others*—Defendants—Appellants.

v.

Gobind Dubey and *others*—Plaintiffs—Respondents.

Appeal No. 48 of 1913, decided on 30th July, 1915 from the Original Decree of Sub-Judge, First Court, Muzafferpore, dated 31st January, 1913.

(a) Hindu Law—Partition—Suit for—*Mitakshara* family—Previous partition alleged by defendant—He must prove it.

In a suit for partition by a member of a *Mitakshara* family, the onus is upon the defendant, contesting the suit on the allegation that there has been a previous partition, to prove such partition. [P. 502, C. 1.]

(b) Hindu Law—Partition—Suit for—*Mitakshara* family—Only account *Karta* is liable for is as to existing state of property divisible.

In an ordinary suit for partition of joint family property in the absence of fraud or other improper conduct, the only account the *karta* is liable for is as to the existing state of the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. 9 W. R. 483; 13 W. R. 75 (F. B.); 5 Bom. 589; 17 Bom. 271; 22 Mad. 470 (P. C.); 28 Bom. 201 and 32 Mad. 271, ref. to. [P. 502, C. 2.]

(c) Hindu Law—Partition—Suit for—Statement of *Karta* as to what property consists of is not conclusive—Enquiry must be ordered by Court.

The statement of the *karta* as to what the family property consists of, is not conclusive. Enquiries usual in partition suits must be directed by the Court to discover what in fact the property consists of irrespective of what the *karta* says it to be in a suit for partition by a member of a joint Hindu family. [P. 503, C. 1.]

Rash Behary Ghosh and *Gour Chandra Pal*—for Appellants.

Dwarkanath Mitter, *Baikuntha Nath Mitter*, *Shivanandan Ray* and *Baidyanath Narayan Singh*—for Respondents.

Fletcher, J.—This is an appeal by the defendants against the judgment of the learned Subordinate Judge of Muzafferpore, dated the 31st of January, 1913.

The plaintiffs brought the present suit for partition. The defence was that a partition took place between the parties in the year 1305.

The learned Judge found that there was no such partition. The defendants called a considerable body of evidence to prove the story set up by them. The learned Judge, however, remarked

"The story of division and separation in 1305 is, therefore, a myth . . . I entirely disbelieve the witnesses examined by the defendants and find that there was no partition in 1305."

The defendants have asked us to dissent from this finding of fact by the learned Judge. In the first place it seems highly improbable that the partition, if there had been one, could have taken place as long ago as the year 1305. No reason is given why a partition, should have taken place at that date. There is no document from which it could be inferred that a partition took place as long ago as the year 1305. The story set up by the plaintiffs that the plaintiff No. 1 separated in mess from the defendants in 1309 has been accepted by the Judge and so far as I could gather from the learned Vakil of the defendants-appellants, he only faintly challenged the fact that the separation in mess took place in 1309. But he asked us to use the separation in mess in 1309 as proof or at any rate very strong evidence of a partition. The case of the defendants is not, however that there was a partition in 1309 and they must stand or fall by the case they put forward in their oral evidence. The defendants have kept back the books of account. These books would be of the greatest value if they had been produced. Take for instance the question as to the expenses of marrying the daughters of the plaintiff No. 1. The case of the defendants was that the plaintiff No. 1 had raised a loan to marry his third daughter. The answer of the plaintiff No. 1 was that it was true that he borrowed money to marry his third daughter, but that his other two daughters were married at the expense of the family in 1305 and 1309. This, if true, shows that there could not have been a partition in 1305. The defendants by the production of the books of account could easily have shown whether or not the statement of the plaintiff No. 1 was correct.

Then the defendants produced certain *sheahas* in order to prove that the plaintiffs were in receipt of their share of the rents and profits from 1305. There can be little doubt that the learned Judge arrived at a correct conclusion when he found that these papers were fabricated.

Then again it is admitted that after the date of the alleged partition the plaintiff No. 1 and the defendants have brought suits jointly to recover rent in arrear. Further it is not shown that any portion of moneys that have been realised under any of these decrees was made over to the plaintiffs. The learned Judge also points out that the family clearly had a money-lending business and it is not alleged that the amounts due by debtors were partitioned.

The forms of the road-cess returns do not support the partition alleged by the defendants. The matters relied on by the defendants are first the separation in mess. No doubt this is a matter for consideration but it is not conclusive. Further the separation appears to have taken place in 1309. Then the lease to the Dholi Factory and the mortgage

to Mackenzie have been relied on. And also the application for registration by the plaintiff No. 1 for registration of his share in *Mauza* Sardimal. The lease and mortgage do, no doubt, suggest that the plaintiff No. 1 had a separate share but in neither of these documents is it stated that there had been a partition between the parties.

With reference in the separate registration of the name of the plaintiff No. 1 under the provisions of the Land Registration Act, Sir Rash Behary Ghosh who appeared for the appellants very frankly informed us that we ought not to place too much stress on this matter, as he said it was matter within his own experience that in many cases of families governed by the *Mitakshara* Law applications were made for registration of distinct shares when admittedly there had been no partition. The appellants also rely on the opening of a separate account for payment of Government Revenue by the plaintiff No. 1 with reference to certain of the *mauzas*. But this was only done after the defendants Nos. 1 and 2 had applied to have separate accounts opened in their names. Upon the whole I cannot find that on the documentary evidence the learned Judge ought to have believed the witnesses for the defendants who spoke to the actual partition in 1305. The onus of proving the partition was clearly on the defendants and I am not prepared to dissent from the finding of the learned Judge that they have failed to prove the partition alleged. The point, however, that was chiefly in debate befofe us was as to the form of account to be ordered against the *karta*. The learned Judge has ordered the defendant No. 1 to render account from the year 1283 corresponding with the year 1876, that is, the date when the defendant No. 1 became *karta*. The plaintiff No. 1 attained majority in the year 1889 or 1890. The question is, therefore, what is the usual form of account to direct against the *karta* of a Hindu joint family on a partition. The cases are not very numerous on this matter and are not easy to reconcile. The family we are dealing with is governed by the *Mitakshara* Law. The earliest authority is a decision of Phear, J., in *Chuckun Lall Singh* v. *Poran Chunder Singh* (1). This decision was explained by a Full Bench of this Court in *Obhoy Chunder Roy* v. *Pearee Mohun Gooho* (2). But as I read the decision of the Full Bench the decision of Phear, J., was not overruled. In the case of *Konerrav* v. *Gurrav* (3). Melvill, J., observed :

"the ordinary rule, no doubt, is that the members of an undivided Hindu family, when making a partition, are entitled, not to an account of past transactions, but to a division of the family property actually existing at the date of the partition."

In the case of *Damodardas Maneklal* v. *Uttamram Maneklal* (4), Sargent, C. J., commented on this decision. His view was that the form of the account depended on the circumstances of each particular case. The learned Chief Justice seems, moreover, to have considered that Melvill, J., had laid down that the members of the family were bound to accept the *karta's* statement as to what the property consisted of. But Melvill, J., was dealing with the form of the account not with the evidence the *karta* should give to vouch or justify the account. In the case of *Raja Setrucherla Ramabhadra* v. *Raja Setrucherla Virabhadra Suryanarayana* (5), the Judicial Committee of the Privy Council appear to have assumed that in a partition the *karta* usually would only be liable to account as to the existing state of the property. In the case of *Narayan* v. *Nathaji* (6) Chandavarker, J., remarked.

"If we allowed it, we should be acting contrary to the principle of law that in a partition suit no co-parcener has any right to an account of past transactions."

A similar view was adopted in the Madras High Court in the case of *Balakrishna Aiyar* v. *Muthusami Iyer* (7). The result of these authorities, I think, is that in an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the *karta* is liable for is as to the existing state of the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters.

But, of course, this does not mean that the parties are bound to accept the statement

(1) (1868) 9 W. R. 483.

(2) (1870) 13 W. R. 75 (F. B.).
(3) (1880-81) 5 Bom. 589.
(4) (1893) 17 Bom. 271.
(5) (1899) 22 Mad. 470=26 I. A. 167 (P. C.).
(6) (1904) 28 Bom. 201.
(7) (1909) 32 Mad. 271=3 I. C. 878.

of the *karta* as to what the properties consist of. That would not be an account at all. The *karta* is the accountable party and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property (not what the *karta* says it) now consists of.

The decree of the lower Court must be varied by ordering an account of the existing state of joint property *in lieu* of that ordered by the learned Judge.

The plaintiff No. 1 admits that he has received certain moneys forming a portion of the joint estate. The plaintiff No. 1 must account for these moneys.

Subject to these remarks the judgment of the learned Judge in the Court below must be affirmed and the appeal dismissed. There will be no order as to the costs of the appeal to this Court.

Richardson, J. – I am of the same opinion. As to the form of accounts the order which we propose to make is supported by the case of *Sookhmoy Chunder Dass* v. *Srimati Monohurri Dasi* (8).

V.B./R.K.

Appeal dismissed; Decree modified.

(8) (1884-85) 12 I.A. 103 (P.C.).

A. I. R. 1916 Calcutta 503

CHATTERJEE AND MULLICK, JJ.

Jogendra Nath Dey and *others*—Plaintiffs—Appellants.

v.

Gour Singh Mura—Defendant—Respondent.

Second Appeal No. 1775 of 1913, decided on 2nd September, 1915, against the Decree of Dist. Judge, Manbhoom, dated 8th March, 1913.

(a) Chota Nagpur Tenancy Act (6 of 1908), Ss. 81, 83 and 87—Suit for arrears of rent decreed before operation of Act—Execution applied for after Act—Proceedings are governed by provision of Act—Act 10 of 1859.

Where a suit for arrears of rent was brought and a decree was obtained under Act X of 1859, and the execution of the decree was applied for after the Chota Nagpur Tenancy Act came into force:

Held, that the execution proceedings must be governed by the provisions of the Chota Nagpur Tenancy Act, as the suit having terminated with the decree, the application for execution although an application in the suit, was a separate proceeding. [P. 504, C. 1.]

(b) Chota Nagpur Tenancy Act (6 of 1908), Ss. 83 and 87—Settlement proceedings—Decision of dispute whether tenant is *mundari khuntkatidar*—Settlement Officer has jurisdiction to record tenant as *mundari khuntkatidar*.

A Settlement Officer has jurisdiction to record a tenant as *mundari khuntkatidar* in a settlement proceeding under the Chota Nagpur Tenancy Act on deciding a dispute under S. 83 of the Act between the tenant who claimed to be a *mundari khuntkati* tenant and the landlord who said he was not although there was no suit between the parties under S. 87 which the Settlement Officer was called upon to decide. [P. 504, C. 1 & 2.]

Bepin Behari Ghosh – for Appellants.

Mohendra Nath Roy and *Abani Bhusan Mukerjee* for Respondents.

D Chatterjee, J.—The ancestor of the plaintiffs purchased *Mauza* Urma in execution of a rent-decree in 1880. The defendant held some lands in the *mauza* and in 1905 he gave a *kabuliyat* to the plaintiffs in respect of 23 plots of land at a consolidated rate of rent. He fell into arrears and on the 21st of December, 1909, the plaintiffs brought a suit for rent under Act X of 1859 and obtained a decree. In the meantime on the 22nd December, 1909 the Chota Nagpur Tenancy Act was applied to the District of Manbhoom. Execution was taken out of the rent-decree obtained by the plaintiffs and the holding of the defendant was sold on the 1st of August, 1910, and purchased by the plaintiffs, who took delivery of possession from the Court in February, 1911. In the meantime settlement proceedings were going on under a notification made in September, 1909 (evidently under Chapter X of the Bengal Tenancy Act which then applied). The Chota Nagpur Tenancy Act having been applied from December 1909, the settlement operations were continued under this Act and the plaintiffs applied for the record of their names as owners by purchase of these 23 plots of land. The defendant set up a *mundari khuntkati* right and the Settlement Officer held in his favour and recorded him as the *mundari khuntkatidar* in March 1911, and the Record of Rights was finally published on the 17th November, 1911.

The plaintiffs brought this suit in September, 1911 for declaration of title to and recovery of possession of the said 23 plots. The Court of first instance gave a decree to the plaintiffs, holding that the entry in the Record of Rights was without jurisdiction. The lower Appellate Court has reversed the decree of the first Court, holding that the lands were really the *mundari khuntkati* lands of

the defendant, that the Settlement Officer had perfect jurisdiction to make the entry that he did make and that as these rights are not transferable the plaintiffs have acquired no right to the lands.

The rent suit of the plaintiffs was brought under Act X of 1859 and the decree was obtained under that Act. The execution of the decree was evidently applied for after the new Act came into operation. The execution proceedings must, therefore, be governed by the new Act, *Deb Narain Dutt* v. *Narendra Krishna* (1). The new Act could not certainly affect pending proceedings and it did not affect the suit: but the suit terminated with the decree and the application for execution, although an application in the suit, was a separate proceeding. That seems to be the result of the Full Bench case. Now under this Act, S. 250 (1), a *mundari khuntkati* property is not saleable either by private sale or in execution. The property in this case has been found to be a *mundari khuntkatidari* property first by the Settlement Officer and later by the lower Appellate Court, which relies upon the Record of Rights as conclusive evidence under S. 256. It is contended, however, that the Settlement Officer's order is without jurisdiction and the Record of Rights is, therefore, a nullity. Under S. 81 the Settlement Officer had to record (*a*) the name of the tenant or occupant, (*b*) whether the tenant was a tenure-holder, *khuntkatidar*, etc. Now the defendant was no doubt the occupant of the land at the time as found by the Courts below and the Settlement Officer was bound to record his name as the person in occupation. Being in occupation he claimed to be a *mundari khuntkati* tenant and the landlord said he was not. There was a dispute under S. 83 and the Settlement Officer decided in favour of the defendant. The Settlement Officer was competent to decide a suit under S. 87 as to whether the relationship of landlord and tenant existed or whether the land was held rent-free. There was no such suit in this case, but the provision for such a suit implies that the Settlement Officer has to decide such questions in making his record. I am not, therefore, prepared to say that the Settlement Officer had no jurisdiction to record the defendant as a *mundari khuntkati* tenant. If the property was of this description, it was not saleable and the sale that was held was ineffectual to pass any title.

As the Chota Nagpur Tenancy Act was extended to Manbhoom before the plaintiffs acquired any right by purchase, they cannot complain that any vested right of theirs has been interfered with. In this view of the case I would dismiss the appeal. The defendent is responsible for not taking the objection of his *mundari* right in proper time and I think each party should bear his own costs in all Courts.

Mullick, J.—I agree.

V.B./R.K.

Appael dismissed

(1) (1889) 16 Cal. 267.

A. I. R. 1916 Calcutta 504

HOLMWOOD AND IMAM, JJ.

Muhammad Abdul Qadir—Defendant—Appellant.

v.

Jnan Chandra Pal—Plaintiff—Respondent.

Appeal No. 229 of 1913, decided on 21st January, 1916, from the Original Decree of Special Land Acquisition Judge, dated 8th March, 1913.

(a) Civil P. C. (1908), S. 11—Matters directly and substantially in issue—Question depends on whether parties and Court have dealt with matter as there was relief claimed in respect of it.

The question what was "the matter directly and substantially in issue" in a previous suit depends on whether the parties to the suit and the Court have dealt with the matter as if there was a relief claimed in respect of that matter also, that is to say, though the matter was in the first instance brought in issue as ancillary or incidental to the matter in respect of which relief was claimed, it was dealt with and decided as if it formed a direct and principal issue in the suit. [P. 505, C. 2.]

(b) Civil P. C. (5 of 1903), S. 11—Incidental finding not on question directly and substantially in issue is not *res judicata*.

An incidental finding as to the boundary of a plot of land not on a question directly and substantially in issue in a previous suit, is not *res judicata* as regards the question of title to that strip in a subsequent suit between the same parties. 2 C. L. J. 540, ref. to. [P. 505, C. 2.]

Zahid—for Appellant.

D. N. Bagchi and *Purna Chandra Roy*—for Respondent.

Judgment.—This is an appeal from a decision of the Special Land Acquisition Judge on a reference from the Collector. The reference has not been printed and we do not really know what it was. This omission and the extraordinary manner in which the documents of the contesting parties have been intermingled in the paper-book and statements vitiated by the omission of negatives in printing have caused us much difficulty in disposing of the appeal; a difficulty which has not been rendered lighter by the order in which the learned Counsel elected to argue the appeal. Among the points that arise in the appeal are a question of *res judicata* and one of adverse possession. The first, which is a bar at the outset, was not argued until the whole record had been placed before us and the appeal argued on the question of title. The second, which is the only point in the case that has any real substance in it, was not brought forward till the very end of the argument on the second day.

The question in dispute appears to be a claim to one and a half *cottahs* of land in Sealdah by two rival claimants, of whom the appellant is claimant No. 1. The learned Judge has found that the title is and has been all along with claimant No. 2, the respondent Jnan Chandra Pal. He has incidentally found that no question of adverse possession arises as the land was lying waste. He, therefore, decided that Jnan Chandra Pal, claimant No. 2, was entitled to retain the compensation money for the acquisition of 14 *cottahs* 5 *gundas* 2 *cowries* and 6 *dams* of the plots in dispute, while his co-sharer in title not having made any claim to the balance the Collector's award giving it to claimant No. 1 would be undisturbed. Against this claimant No. 1 has appealed and his learned Counsel has formulated two questions for our consideration in the first instance. The first is that the appellant will be able to show that Manik Lal Dhar has no title and that he was never in possession and the second point is that the appellant was in possession both by adverse possession and by purchase. The agreement addressed to us was chiefly on the question of title, and we are, after going through all the documents and facts set before us, able to agree with the learned Judge in the Court below that there can be no doubt as to the title of Manik Lal Dhar to the land in dispute and as to the fact that this title had passed to Jnan Chandra Pal by foreclosure of a mortgage of the land made by Manik Lal of his whole holding of some two *bighas* odd in Survey No. 123.

Against this in the last resort two curious objections have been taken by the learned Counsel, *first*, that the title to the whole strip of No. 123 south of the tank and its extension up to the canal road having been agitated before Mr. Roe in a suit between the parties in 1909 about another plot (*c*) that appears to be in No. 124 and not in No. 123 at all, the finding of Mr. Roe that the southern boundary of Manik Lal's holding excluded the whole strip between the tank, with *pacca* wall to the east and to the north the burial ground and mosque to the south, would operate as *res judicata* inasmuch as the plot now in dispute was included in that strip. The point of law was formulated by reference to the principle that the matter directly and substantially in issue and not the subject-matter of the suit constitutes the test of *res judicata* and the case of *Sitanath Midda* v. *Basudeb Midda* (1) was relied on. But this could only be argued by begging the question, what is the matter directly and substantially in issue, and this has been laid down in numerous decisions of their Lordships of the Judicial Committee to depend on whether the parties to the suit and the Court have dealt with the matter as if there was a relief claimed in respect of that matter also, that is to say, though the matter was in the first instance brought in issue as ancillary or incidental to the matter in respect of which the relief is claimed it is dealt with and decided as if it formed a direct and principal issue in the suit. We have not got the plaint and written statement in that case. Nor does the question appear to have been raised in the lower Court, but from the issues framed and the judgment it is clear that the incidental finding as to the boundary was not (on *sic*) a question directly and substantially in issue, and furthermore as far as the facts are concerned it is still open to us to come to a finding upon them. The finding on the boundaries was based upon an erroneous view of the partition

(1) (1905) 2 C. L. J. 540.

proceedings in 1901 which were not *inter partes* and upon a further erroneous view of the relation of Jnan Chandra Pal in the case as representing the estate of Manik Lal Dhar. He can in no sense be said to hold the land from Manik Lal Dhar. There is, therefore, no possible ground for applying the doctrine of *res judicata*.

The *second* point was that by partition Manik Lal Dhar, the mortgagor, substituted other security for the original security, which included the strip of land of which the plot in dispute forms a part, and omitting this strip altogether partitioned two blocks of the tank which formed part of Nos. 124 and 28 and were not in his estate at all. The case of *Hakim Lal* v. *Ram Lal* (2) was cited for the proposition that a mortgagee is bound by a substituted security. Of course this ruling to which one of us was a party has no bearing on the case of a change in the *corpus* of the estate ; and the substitution shown in the partition proceedings between Manik Lal Dhar and his minor co-sharer in 1901 is, as was found by Mr. Beachcroft in 1907, very suspicious and undoubtedly done in collusion with the owners of Nos. 28 and 124 who were claimant No. 1's vendors. It is perfectly clear that until 1901 the title to the whole of No. 123 was vested in Manik Lal Dhar; and Jnan Chandra Pal having never been a party to any of Manik Lal Dhar's dealings with the appellant's vendor or to the partition proceedings his title was never affected. In this view of the case the question of adverse possession does not really arise. The claim of the respondent was made in 1912 and there is no evidence of any possession by the predecessors of appellant prior to 1901.

We may briefly glance at the oral evidence given by the appellant. The municipal clerk of the Assessment Department shows, as the learned Judge has found, that Abdul Kadir never asserted any claim to Municipal premises No. 33 in which the land in dispute is situated until the year 1906. Before that Jnan Chandra Pal alone had been registered. Abdul Kadir, the claimant No. 1, himself admitted on oath in 1908 that he had no interest in No. 123 in which the plot in dispute is admittedly situated. The oral evidence of Asadulla is, in our opinion, unworthy of credit. The land he sold was the land he got from Abdul Khansamah in No. 123. For the first time in a document of 1897 the east boundary was fraudulently extended up to the canal road and this has given rise to all the subsequent troubles and to the loss of plot (A), to which the respondent was unable to establish his title before Mr. Beachcroft. Still even in these two documents, though the southern boundary is defective, nothing that previously passed as No. 123 is excluded. An examination of the facts and history of the case clearly exposes the clandestine understanding between the appellant and his predecessor and Manik Lal Dhar to defeat the just right of the latter's mortgagee. We see no reason to interfere with the decision of the learned Judge, which is affirmed and the appeal is dismissed with costs.

There is a cross-objection as to the small residue of the co-sharer. We find that the respondent has no *locus standi* to contest this matter. The title is found with a third party who is not a party to the proceedings and the possession is with the appellant. The decision of the claim to this small sum of money will in no way affect the title of the real owner if he is not the appellant. The cross-objection is also dismissed with proportionate costs.

V.B./R.K.

Both appeal and Cross-objection dismissed.

(2) (1907) 6 C. L. J. 46.

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TEUNON AND SMITHER, JJ.

Sarat Chandra Basu—Plaintiff—Petitioner.

v.

(*Sreemati*) *Swarnomoye Ghose* and *others*—Defendants—Opposite Parties.

Civil Rule No. 1080 of 1915, decided on 22nd August, 1916, against the Order of Sub-Judge, Faridpur, in Misc. Appl. No. 117 of 1914.

Court-Fees Act (7 of 1870), S. 7, (4) (c)—Suit for declaration and perpetual injunction about certain land included in defendant's *miras patta* —Value for jurisdiction is value of land in suit and not all included in *miras patta* though effect of decree against defendant would annul *patta*.

For the purpose of jurisdiction, a suit for declaration of title to land in plaintiff's possession and for a perpetual injunction against the defendant, who resists the plaintiff's claim on the strength of a *miras patta* which includes the

land, is to be valued at the market value of the land actually in suit (and not at the market value of the whole area comprised in the *miras patta*, although the decision of the suit in the plaintiff's favour would have the effect of setting aside the *miras patta* as a whole).

Asita Ranjan Ghose—for Petitioner.

Sarat Chandra Basak, Chandra Sekher Sen and *Manmotha Nath Roy*—for Opposite Parties.

Judgment.—In the suit out of which this Rule arises the plaintiff, as the owner in possession, sued for declaration of title, damages in respect of certain acts of trespass and an injunction. He valued the reliefs sought at Rs. 160, namely Rs. 95 in respect of the injunction and Rs. 65 by way of damages.

Both Courts below have held that the valuation of the suit should be the market value of the land to which it relates and as they have found this value to be Rs. 4,000, they have held that the suit is not triable in the Court of the Munsif.

It appears that the plaintiff's immediate predecessor was a lady. According to the plaintiff she had a limited interest, while the defendants apparently resist plaintiff's claim on the strength of a *miras patta* executed by her.

Both the Courts below appear to have supposed that the decision in this suit would have the effect of setting aside the *miras patta* as a whole and in valuing the suit, have, therefore, taken the value of the whole area comprised in the *patta*, while the suit in fact relates to but a small portion thereof. The plaintiff who is the petitioner before us contends that for the purpose of jurisdiction he has correctly valued the suit in accordance with the provisions of the Court Fees Act, S. 4, paragraph IV, Clauses (*c*) and (*d*), and in support of his contention cites the case reported as *Hari Shankar Dutt* v. *Kali Kumar Patru* (1) also the cases reported as *Ganesh Bhagat* v. *Sarada Prasad Mukerjee* (2) and *Phul Kumari* v. *Ghanshyam Misra* (3).

In support of the view taken by the Courts below the opposite parties have cited a number of cases, of which the case of *Musammat Bibi Umatul Batul* v. *Mussammat Nanji Koer* (4) may be taken as an example.

It is difficult to reconcile the two sets of authorities, but it is unnecessary in the present case to do so or to say which, in our opinion, should be followed. Here the land actually in a suit has not been valued and there is no reason to suppose that the value thereof exceeds Rs. 1,000.

We, therefore, set aside the order of the Munsif and of the Subordinate Judge now in question and return the plaint to the Munsif to be admitted, and the suit heard and determined on the merits.

The Rule is accordingly made absolute. The costs, hearing-fee two gold *mohurs*, to be costs in the case.

V.B./R.K.

Rule made absolute.

(1) (1905) 32 Cal. 734.
(2) (1915) 42 Cal. 370=30 I. C. 111.
(3) (1908) 35 Cal. 202=35 I. A. 22 (P.C.).
(4) (1907) 11 C. W. N. 705.

A. I. R. 1916 Calcutta 507

MOOKERJEE AND CHATTERJEA, JJ.

Chatterjee Brahmin—Plaintiff Appellant.

v.

Durgadutt Agarwalla and *others*—Defendants—Respondents.

Appeal No. 18 of 1914, decided on 23rd August, 1915, from the Original Decree of Sub-Judge, Dibrugarh, dated 24th September, 1913.

(a) Civil P. C. (5 of 1908), O. 9, R. 5—Summons to defendant returned unserved—Court should not proceed with trial of suit.

Under O. 9, R. 5, Civil Procedure Code, the Court should not proceed with the trial of a suit when summons to a defendant has been returned unserved. The position, in substance, is the same as if no summons had ever been issued. A decree passed against such defendant without giving him notice of the suit is in no sense an *ex parte* decree, and it is liable to be set aside. [P. 509, C. 1.]

(b) Civil P. C. (5 of 1908), O. 9, R. 5—Defendant not served with summons—Decree passed—Order discharging decree—Effect—Suit revives for re-trial.

The effect of an order discharging a decree on the ground that it was passed without service of summons on a defendant is that the entire decree is discharged and the suit revived for re-trial. 2 Cal. 184 (P. C.); 51 W. R. 140; 6 Cal. 687 and 9 Cal. 810, foll.; 10 Bom. 338 and 6 I. C. 13, diss. from. [P. 509, C. 2.]

(c) Principal and Agent—Power of attorney—Construction of—Agent held not empowered to compromise suits.

Where a power-of-attorney authorized the agent to manage the business of the principal, to continue, institute, prosecute, defend or oppose all the suits that were or might be brought by or against the principal in respect of his business and property: [P. 509, C. 2.]

Held, that no power was conferred on the agent to compromise a suit by or against his principal.

Bhupendra Kumar Ghose—for Appellant.

Nanda Lal Banerjee—for Respondents.

Mookerjee, J.—This is an appeal by the plaintiff in a suit to set aside what has been described as an *ex parte* decree. The circumstances under which the decree in question was obtained against the plaintiff are beyond controversy. The first three defendants had a six-annas share in a partnership business under a deed, dated the 21st April, 1909, while the plaintiff and the 4th defendant who are relatives had each a five-annas share. On the 24th May, 1912, the first three defendants, who were, at the time, infants, instituted a suit against the plaintiff and the fourth defendant for dissolution of partnership, for adjustment of accounts, for appointment of a Receiver and for other incidental reliefs. The claim was valued at Rs. 22,000. At that time the plaintiff, who was then the second defendant, was stated on the face of the plaint to be resident beyond the limits of British India, namely, at Somaser in Rajputana. The fourth defendant, who was the first defendant in that suit was a resident of the place where the suit was instituted. On the day the plaint was filed, an application was made by the then plaintiffs for the issue of a warrant for arrest of the then first defendant and a warrant for attachment, before judgment, of all the partnership assets. The Subordinate Judge directed the issue of the warrants, ordered summonses to issue, and fixed the 10th June, 1912, for the trial of the suit. The warrants of arrest and attachment were issued forthwith. The summons upon the second defendant, which was issued on the day following, reached the Political Agent at Rajputana on or about the 1st June, 1912, and was returned by him to the Court with the remark that it was impossible to serve the summons upon the defendant in time, as the date fixed for hearing the case was too close at hand; at the same time a request was made by him that a more distant date might be fixed; the date suggested was six weeks from the 1st June. Before the summons so returned had reached the Court of the Subordinate Judge, the proceedings had, however, been pushed on on behalf of the plaintiffs with extreme rapidity. We find it noted in the order-sheet that on the 27th May, that is, within three days of the institution of the suit, the first defendant had been arrested, and had received intimation from the Court that unless he furnished security for Rs. 15,000, he would be forthwith sent to the Civil Jail. On the 30th May, we find that the suit had been compromised. The first defendant had paid to the plaintiffs Rs. 13,000 and had agreed to pay Rs. 5,800 in specified instalments. A decree was made on these terms and the first defendant was released from arrest. Whether a decree obtained by consent under the circumstances described would be operative against the person who had consented thereto, is a question which does not directly arise for consideration in the present appeal; but we have to determine whether such decree is binding upon the other defendant to the suit who was absent in Rajputana.

It appears from the petition of compromise that the first defendant entered into the settlement both for himself and his absent partner. He professed to represent his partner on the basis of a power-of-attorney to which reference will presently be made. The decree, however, does not mention the petition of compromise, and does not even recite that it was made by consent; but it directs both the defendants to pay the plaintiffs the sum of Rs. 5,800 with costs by six monthly instalments on the dates specified, subject to the proviso that if default was made in the payment of a single instalment, the plaintiffs would be at liberty to enforce the entire decree by execution. The decree, consequently, on the face of it binds both the then defendants. The plaintiff was thus driven to institute this suit on the 8th October, 1912 to set aside this decree. His contention is that he is not bound by this decree; *first*, because he was in essence not a party to the suit and the Court had no jurisdiction to make a decree against him; and *secondly*, because his partner had no authority to bind him by a compromise. In our opinion, these contentions are well founded and must prevail.

As regards the *first* ground, it is plain that this is in no sense a case of an *ex parte* decree. The Code contemplates service of summons upon the party sought to be made liable. That summons may be duly served or may not be duly served. But the Code does not contemplate the contingency which has happened in this

case. The plaintiffs took out summons upon the second defendant in the suit. The summons was sent, as stated, to the Political Agent at Rajputana. No attempt was made by him, rightly or wrongly, to serve the defendant, but the summons was returned to the Court. The position in substance is the same as if no summons had ever been issued for service on the defendant. Under these circumstances a decree made against the defendant cannot possibly bind him.

O. 9, R. 5 of the Civil Procedure Code clearly contemplates that where the summons has been returned unserved, the plaintiff must within a year from the prescribed date apply for the issue of a fresh summons; if he fails to do so, the suit is liable to be dismissed. The Code obviously does not contemplate the trial of a suit when the summons has been returned unserved. It is obviously just that a man should have notice of any legal proceeding that may be taken against him and a full and fair opportunity to make his defence. As has been well said, the law never acts by stealth, it condemns no one unheard, so that a personal judgment rendered against a defendant without notice to him or an appearance by him is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him.

As regards the *second* ground, it is equally plain that the decree cannot be sustained. An extract from the power-of-attorney, dated the 22nd June, 1909, is on the record. Thereby the plaintiff authorised his partner to manage the partnership business, to continue, institute, prosecute, defend or oppose, as the case might be, all the suits that were or might be brought by or against the executant in respect of his business and property. On behalf of the plaintiffs-respondents no endeavour has been made to support the view that the compromise of suit can by any stretch of language be included within any of the terms of the power-of-attorney. It is plain beyond controversy that the partner of the plaintiff had no authority to bind him by the compromise.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed. The decree in Suit No. 10 of 1912, is set aside, not only in so far as the plaintiff is concerned but also with regard to the fourth defendant, because the decree, on the face of it, is indivisible and cannot be set aside in part. The question arises, in these circumstances, what is the effect of our order upon the prior suit. The effect is obviously to discharge the entire decree in that suit and to revive it for re-trial: *Khajooroonissa* v. *Rowshan Jehan* (1), *Neale* v. *Gordon Lennox* (2), *Bibe Solomon* v. *Abdool Azeez* (3), *Sharat Chunder Ghose* v. *Kartik Chunder Mitter* (4), *Sarbesh Chandra* v. *Hari Dayal Singh* (5) and *Raj Kumar Roy* v. *Hara Krishna* (6), though there are expressions to the contrary effect in *Bhimaji Govind* v. *Rakmabai* (7) and *Kshetra Mohan* v. *Man Gobinda Pal* (8). As the then second defendant was not served, he will have to be served, unless he chooses to enter appearance voluntarily. The appellant is entitled to his costs both here and in the Court below; but although the appeal is valued at Rs 18,000, we assess the hearing-fee in this Court at five gold *mohurs*, as the arguments for the respondents have not been unduly protracted.

V.B./R.K.

Appeal allowed; Re-trial ordered.

(1) (1876-77) 2 Cal. 184=3 I. A. 291=26 W. R. 36 (P. C.).
(2) (1902) A. C. 465=71 L. J. Q. B. 939=51 W. R. 140.
(3) (1881) 6 Cal. 687.
(4) (1883) 9 Cal. 810.
(5) (1910) 5 I. C. 236.
(6) (1911) 10 I. C. 355.
(7) (1886) 10 Bom. 338.
(8) (1881) 6 I. C. 13.

A. I. R. 1916 Calcutta 509

CHATTERJEE AND BEACHCROFT, JJ.

Ahammad Ali and *others*—Defendants—Appellants.

v.

Bisseswar Mukhoti and *others*—Plaintiffs and Proforma Defendants—Respondents.

Appeal No. 453 of 1914, decided on 29th February, 1916, from the Appellate Decree of Sub-Judge, Barisal, dated 24th November, 1913.

Bengal Tenancy Act (8 of 1885), Ss. 52 and 188—Suit by co-sharer landlord for additional rent—Maintainability of.

A suit by a co-sharer landlord against tenants, to which suit the other co-sharers are made parties, for rent and additional rent for his share of the excess area, under S. 52 of the Bengal Tenancy Act, on the basis of a *kabuliyat* dated prior to the Act, which clearly gives the different co-sharers right to bring suits either jointly or separately for their shares and also for payment of rent to them either jointly or separately, is maintainable. A. I. R. (1914) Cal. 141 ; 17 Cal. 695 ; 25 Cal. 917 ; 38 Cal. 270 (P. C.); 3 C. W. N. 225 and 7 C. W. N. 670, ref. to. [P. 510, C. 1.]

Gunada Charan Sen—for Appellants.

Sarat Chandra Bysack—for Respondents.

Judgment.—The suit out of which this appeal arises, was brought by a co-sharer landlord for rent and also for additional rent, under a *kabuliyat* dated prior to the Bengal Tenancy Act. The co-sharer landlords were made parties and the prayer was to have rent, enhanced at the rate agreed upon in the *kabuliyat* for the land as found by measurement under Chapter X of the Bengal Tenancy Act. One of the pleas of the defendant was that the suit was not maintainable by the plaintiff alone by reason of the provisions of S. 188 of the Bengal Tenancy Act. The first Court gave effect to this plea and dismissed the suit. The Court of Appeal below, however, has upset the decree of the first Court and decreed the suit, holding that the suit was maintainable. The point raised in second appeal before us is whether the suit as framed is maintainable and the case has been argued threadbare by the learned Vakils who appeared for the parties and we are very much obliged to them for the light they have thrown upon the points. It appears, however, at the outset that the *kabuliyat*, which is the basis of the suit in this case, was not only dated prior to the Bengal Tenancy Act, but it makes a clear provision for the different co-sharers being entitled to bring suits either jointly or separately for their shares and also for payment of rent either jointly or separately. If the rate of rent is fixed by a contract and if the measurement contemplated has been made, nothing more is to be done than to make an arithmetical calculation of the rent that should be allocated to the area found. We do not think that the landlords or the tenants are under the necessity of calling in the aid of the provisions of S. 52 of the Bengal Tenancy Act. The contract is complete in itself and if the contract is complete in itself and the provisions of S. 52 of the Bengal Tenancy Act are not required for helping either of the parties, then whether S. 188 of the Bengal Tenancy Act does or does not apply to a case under S. 52, the present suit is free from the difficulties that might arise in those matters and is to be tried on the basis of the contract. A large number of cases, some with diverging opinions, have been referred to. The only case that has some semblance of being in support of the appellant is the case of *Darik Dhakari* v *Aswini Kunwar Nag* (1). That was, however, a case upon a *kabuliyat* subsequent to the Bengal Tenancy Act and was distinguished from a prior case in the judgment of that very case on that ground. That case may also be distinguished on the ground that the *kabuliyat* did not say what was to be assessed for any additional lands found on measurement. It is not necessary, therefore, to consider that case at any length. All that we need say is that so far as this case is concerned, we do not feel much pressed by it. The other cases which were relied upon are also distinguishable. The case of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2) was a case both under S. 30 and S. 52 of the Bengal Tenancy Act, so that at least as to the case under S. 30, S. 188 was applicable. Besides it was not a case based upon any contract between the parties. Then the case of *Baidya Nath De Sarkar* v. *Ilim* (3) on the face of it does seem to favour the contention of the appellant and upon reading the judgment we find that the learned Judges who decided that case construed the *kabuliyat* in that case as making no provision for the assessment of increased rent as asked for by the plaintiffs. Then reference was made to the case of *Jatindra Nath* v. *Prasanna Kumar Banerji* (4). But that was a case under S. 30 of the Bengal Tenancy Act and we are unable to read any part of that case helping the appellant in his argument in this case. The cases of *Dintarini Dasi* v. *Broughton* (5) and of *Gobind Chandra Pal* v. *Hamidulla Bhuian* (6) do seem to support the

(1) A. I. R. (1914) Cal. 141 = 20 I. C. 659.
(2) (1890) 17 Cal. 695.
(3) (1898) 25 Cal. 917.
(4) (1911) 38 Cal. 270 = 8 I. C. 842 (P. C.)
(5) (1899) 3 C. W. N. 225.
(6) (1903) 7 C. W. N. 670.

contention of the respondents and we think that apart from any of these considerations, the case as framed is maintainable by the plaintiff on the contract and in this view of the case we dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 511

SHARFUDDIN AND TEUNON, JJ.

Anandram—Decree-holder—Appellant.

v.

Nityananda Barham and *others*—Judgment-debtors—Respondents.

Appeal No. 291 of 1915, decided on 31st January, 1916, from the Original Order of Sub-Judge, Bhagalpore, dated 16th June, 1915.

(a) Civil P. C. (5 of 1908), O. 20, R. 7—Decree must bear same date as that of order making it.

A decree has to bear the same date as that of the order making it, and not the date on which it is signed by the Court. [P. 512, C. 2.]

(b) Decree—Execution—Service of notice to judgment-debtor not made in accordance with law—Erroneous order for execution of decree is not although unreversed binding on him.

An erroneous order for execution of a decree passed after notice to the judgment-debtor cannot, although unreversed, be treated as valid against him where the service of the notice has not been made in accordance with law and there is nothing to show that the judgment-debtor became aware of the execution proceeding. 8 Cal. 51 (P. C.), dist.

[P. 512, C. 2 & P. 513, C. 1.]

(c) Decree—Execution—Service of notice—Service by affixing copy on door without diligent search for judgment-debtor is not in accordance with law.

A service of a notice by affixing a copy on the entrance door of the house of a judgment-debtor without making a diligent search for him is not a service in accordance with law. [P. 513, C. 1.]

(d) Limitation Act (9 of 1908), Sch. I, Art. 182—Cl. (4)—Execution of decree barred—Subsequent amendment of decree does not give fresh start of limitation.

An amendment of a decree after its execution has been barred by limitation, cannot give a fresh start to limitation from the date of the amendment under Article 182, Clause (4) of the First Schedule of the Limitation Act, 1908.

[P. 513, C. 1.]

Rash Behari Ghose and *Naresh Chandra Sinha*—for Appellant.

Mohendra Nath Roy and *Sarat Chandra Mukherjee*—for Respondent.

Sharfuddin, J.—This is an appeal by the decree-holders against the order of the Subordinate Judge of Bhagalpur, dated the 16th June, 1915. The facts necessary for the purposes of this appeal are these :—

The decree-holders obtained a mortgage-decree on the 8th September 1902 against one *Raja* Thakur Barham. The amount of the money due was Rs. 2,96,369-5-0, but after the mortgage-decree was made absolute, the mortgage properties were sold for Rs. 2,93,405 and were purchased by the decree-holders. There was, therefore, a balance of Rs. 2,964-5-0 due to the decree-holders.

The decree-holders made an application on the 25th May, 1905 for a decree under S. 90 of the Transfer of Property Act in respect of the above balance. On a notice being issued to the judgment-debtor, *Raja* Thakur Barham, he filed an objection and the 4th November, 1905 was fixed for the objection to be heard. It appears, however, that the objection was not taken up on the date fixed and nobody took any notice of the objection till the 2nd July, 1909, when the decree-holders made an application praying that orders might be passed upon their previous application.

It appears that by the time when the application on the 2nd of July, 1909 was put in, *Raja* Thakur Barham, the judgment-debtor, died, and the necessary notices were, therefore, issued against his representatives, namely, Jai Barham and Gajai Braham.

The Court on receiving the return of the services of the notices passed an order on the 26th September, 1909 for a decree to be drawn up under S. 90 of the Transfer of Property Act.

The application put in by the decree-holders on the 2nd July, 1909 had prayed for a decree under S. 90 against the assets left by the deceased *Raja* Thakur Barham in the possession of his heirs, Jai Barham and Gajai Barham.

The decree under S. 90 of the Transfer of Property Act, bears no date but at the end of the decree we find the following :

" Given under my hand and the seal of the Court this day the————————of October, 1909.

" *Signed* PARESH CHANDRA BANERJEE, Subordinate Judge.

6-10-1909."

In the body of the decree we find it stated that a sum of Rs. 638-6-0 as principal with interest up to the 5th day of

October, 1909 had been left in arrears. This decree was originally described as a decree between the plaintiffs, decree-holders, and *Raja* Thakur Barham and others, defendants.

On the 30th September, 1912 two of the decree-holders filed the first application for execution of the decree under S. 90. It was prayed that as Gajai Barham, one of the two representatives of the *Raja* had died, his two minor sons should be substituted in his place and it was further prayed that the execution should be issued against Jai Barham for self and as guardian to two minor sons of Gajai Barham and also against one Jai Kissen Barham as heirs of the *Raja*. Notices were ordered to be issued and after the return of the services of the notices the execution case was dismissed on the 20th January, 1913. but it appears that no order was passed about substituting the names of the two minor sons in place of Gajai Barham.

On the 17th March, 1914, an application was filed on behalf of the decree-holders stating that through some mistake in the office the name of Jai Barham and Gajai Barham had not been mentioned in the decree and it was prayed that the decree might be amended by removing the name of *Raja* Thakur Barham and substituting in its place the names of Jai Barham and Gajai. The Court ordered the mistake to be corrected and correction was made on the 25th of March, 1914. The application for execution now in question was then made by one of the decree-holders, as the other decree-holders, were dead.

This execution was objected to by the judgment-bebtor on amongst other grounds that one of the decree-holders being dead, the execution could not proceed until the representatives of the deceased decree-holders were brought on the record and that the decree had become barred by limitation.

On the above facts the Subordinate Judge held that the application in question for execution was barred by limitation and hence the present appeal by the decree-holders.

The grounds taken in the appeal before us are these :—

1. That the decree as it stood before the amendment was incapable of execution as being against a dead man and that, therefore, limitation would begin to run from the date of amendment and the present application having been within three years from the date of amendment, the execution is not barred.

2. That if the time ran from the date of the decree under S. 90 of the Transfer of Property Act it would run from the 5th October, 1909, up to which date interest was calculated in the decree.

In the lower Court seven issues were framed but for the purposes of the present appeal we are concerned only with the 5th issue, which is to the effect "whether the execution was barred by limitation?"

The decree under S. 90 of the Transfer of Property Act was passed on the 26th September, 1909 although signed on the 6th October, 1909. There can be no doubt that the decree has to bear the same date as that of the order. Although the decree was signed on the 6th of October, 1909, the date of the order being the 26th September, 1909, the decree should be treated as having been made on the 26th September, 1909. The first application for execution was made on the 30th September, 1912. Obviously, therefore, the application was barred. On behalf of the appellant reliance has been placed on the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), where it was held that

> "Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if, an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid."

In this reported case it appears that the judgment-debtor, so far from appealing against the order of attachment, acknowledged its validity and presented a petition by which he prayed to stay the attachment.

In the present case, however, the report of the peon states that he made enquiries as to the defendants but not having found them in their houses, on the identification of the identifier he stuck up the notices on the entrance doors of the houses. O. 5, R. 19, provides that in case where the return has not been verified the Court should examine the serving officer on oath with regard to his proceedings. In the present case the return was not verified nor was the peon examined

(1) (1882) 8 Cal. 51 = 8 I. A. 123 (P.C.).

Further the report itself shows that no diligent search was made for the judgment-debtor: the service of notice was, therefore, not in accordance with the law, and there is nothing to show that the judgment-debtors became aware of the proceedings. I am, therefore, of opinion that the reported case cannot be of any help to the decree-holders.

The next point urged on behalf of the appellants decree-holders, is that the decree having been amended on the 21st March, 1914, limitation should be counted from that date under Clause 4, Art. 182 of the Limitation Act. The Clause 4 of the above Article provides that limitation begins to run from the date of amendment where a decree has been amended, namely, three years from the date of amendment, but the question is whether on the 21st March, 1914, there was any decree having legal effect. The decree under S. 90 is dated 26th September, 1909 and the first application for execution was made on the 30th of September, 1912, that is, more than three years after the date of the decree; that application, therefore, was barred.

We have to see whether this application can be saved from limitation by any conduct of the judgment-debtors. We find that the notices to the judgment-debtors were not legally served nor does it appear that the judgment-debtors were even aware of this execution petition. I am of opinion that there was no decree having any legal effect on the date of amendment. It has been contended that the decree was incapable of execution because the judgment-debtors were stated to be the deceased *Raja* Thakur Barham and others In this connection reliance has been placed by the appellants on the case of *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (2) and *Mahamaya Prasad Singh* v. *Abdul Hamid* (3). In these two reported cases the decree had become incapable of execution. In the present case, however, the decree was in fact passed not against any deceased person but against the representatives of that deceased person. Though through some mistake in the office the name of the deceased was inserted in the decree and after the name of the deceased the other judgment-debtors were described by the word "others", this was a clerical mistake of the office. The amendment was made on the 21st March, 1914 and on the 25th March, 1914, the last application for execution of the decree under S. 90 of the Transfer of Property Act was put in by the decree-holders. In their first application for execution it is clearly stated that Thakur Barham died on the 7th September, 1905, and that Jai Barham and Gajai Barham are his heirs, that these latter are in possession of the assets of Thakur Barham and that the decree under S. 90 was passed against the two latter, and that after the passing of that decree Gajai Barham died leaving him surviving two minor sons, and these minors are in possession of the estate left by Gajai Barham, deceased, and it was prayed in that petition that the name of Gajai Barham should be struck off and the names of his minor sons be entered as judgment-debtors through the guardianship of Jai Barham. It is clear, therefore, that the decree-holders knew who their judgment-debtors were and they wanted an execution not against any person deceased but against his living representatives. If any amendment was necessary the decree-holders should have had it made before the 26th September, 1912.

For the above reasons I am of opinion that all the grounds urged on behalf of the appellants fail and the appeal is, therefore, dismissed with costs.

Teunon, J.—I agree.

V.B./R.K.

Appeal dismissed.

(2) (1895) 17 All. 39.
(3) A. I. R. (1914) Cal. 36=21 I. C. 615.

A. I. R. 1916 Calcutta 513

RICHARDSON AND SMITHER, JJ.

Jadu Kanta Sarma and *another*—Petitioners—Appellants.

v.

Hema Kanta Goswami—Opposite Party—Respondent.

Appeal No. 555 of 1915, decided on 23rd August, 1916, against the Order of Sub-Judge, Darang, dated 17th September, 1915.

Civil P. C., (5 of 1908), O. 41, R. 14 and O. 9, R. 13—Notice of appeal not giving date—*Ex parte* decision in appeal must be set aside.

Where notice of an appeal served on the respondent did not specify the date of hearing, and

the appeal was decided *ex parte* for the respondent's default of appearance.

Held, that the order should be set aside and the appeal re-heard.] [P. 514, C. 1.]

Hemendra Kumar Das—for Appellants.

N.C. Bardolai—for Respondent.

Judgment.—This is an appeal from an order, dated the 17th September, 1915, made by the Subordinate Judge of Tezpur. By this order, the learned Subordinate Judge refused to set aside an *ex parte* decree which he had made upon an appeal preferred by the opposite party. It appears that in the notices of the appeal served upon the two petitioners the date on which the appeal was to be heard, was not specified. R. 14 of O. 41, requires that the date fixed for the hearing of an appeal should be specified in the notice served on the respondents.

In our opinion, the learned Subordinate (Judge) was wrong in refusing to set aside the *ex parte* decree and re-hear the appeal. We must accordingly set aside the order appealed from and direct that the appeal be re-heard in due course of law. The costs, including the hearing fee, which we assess at one gold *mohur*, will abide the result.

V.B./R.K.

Appeal allowed ; Case remanded.

A. I. R. 1916 Calcutta 514

MOOKERJEE AND NEWBOULD, JJ.

Satish Chandra Sinha—Appellant

v.

Ananda Gopal Das and *others*—Defendants—Respondents.

Appeal No. 360 of 1913, decided on 13th March, 1916, from the Original Decree of Sub-Judge, Burdwan, dated 17th July, 1913.

(a) Land Acquisition Act (1 of 1894), Ss. 18 and 30—Collector can make reference after paying compensation to one of claimants.

A Land Acquisition Collector, has jurisdiction to make the reference under S. 30 of the Land Acquisition Act to the Civil Court after paying the compensation to one of the claimants. [P. 515, C. 1.]

(b) Land Acquisition Act (1 of 1894), Ss. 18 and 30—Reference by Collector after payment of compensation to one of claimants—Civil Court holding other party entitled to compensation—Amount of compensation should be decreed against party to whom it has been paid.

Where a Land Acquisition Collector, after having paid the compensation to one of the parties, made reference to the Civil Court which held that the other party was entitled to the compensation and not the party to whom compensation had been paid by the Collector :

Held, that the Court should have decreed the amount of compensation not against Government, who were not a party to the proceedings, but against the party to whom compensation had been paid by the Collector. [P. 515, C. 2.]

Upendra Nath Chatterjee and *Gurudas Sinha*—for Appellant.

Jogesh Chandra Roy and *Asitaranjan Ghose*—for Respondents.

Judgment.—This appeal arises out of a dispute about the apportionment of a sum of Rs. 1,242-15-2 awarded as compensation for land taken under the provisions of the Land Acquisition Act, I of 1894. The first party, who is the appellant before us, claims that he had a *lakhiraj* title to the land acquired. The second party claims as *patnidars* and *darpatnidars*. The Land Acquisition Collector made an award in favour of the *lakhirajdar* and paid him the compensation. Then as the *patnidars* did not admit the title of the *lakhirajdar*, he referred the case to the Civil Court under S. 30 of the Act. The learned Subordinate Judge who heard the reference held that the first party had no *lakhiraj* right to the land and that the *maliks*, *viz.*, the *patnidars* and *darpatnidars* were entitled to get the compensation that had been awarded. He directed that the *maliks* should get the above compensation from the Government and that the Government would be at liberty to realize from the first party the sum which had been wrongly paid to him. Against this decree the first party has preferred this appeal and the second party, after an unsuccessful application for review, have taken a cross-objection that the Court ought to have directed the first party to pay them the compensation with interest from the date of his withdrawal.

It is *first* contended on behalf of the appellant that the Collector, after he had paid the amounts, had no jurisdiction to make an order of reference to the Civil Court under S. 30 of the Land Acquisition Act. In support of this contention reliance is placed on the case of *Gobindaranee Dasee* v. *Brinda Ranee Dasee* (1). In this case the learned Judges observed that it was open to doubt whether S. 18 or S. 30 of the Act can have any

(1) (1908) 35 Cal. 1104.

application after the money has actually been paid away. They, however, came to no decision that would be binding on us on this point and as pointed out in *Mrinalini Dasi* v. *Abinash Chunder Dutt* (2), a different view was taken in the case of *Nobin Kali Debi* v. *Banalata Debi* (3). In our opinion though the Act clearly contemplates that when there is a dispute as to apportionment the reference to the Civil Court under S. 30 should be made before any payment has been made, still there is nothing in the Act that prohibits the Land Acquisition Collector from acting as he has done in this case, namely, making the reference after payment of compensation to one of the parties. When such a reference has been made, it is undesirable that the party who succeeds in showing that the Collector's order was wrong be compelled to resort to a regular suit to compel the opposite party to refund the compensation to which he has been held not to be entitled, nor can the rights of the opposite party be in any way prejudiced by the reduction of litigation. Before the lower Court the appellant raised no objections to the proceedings and unless those proceedings were without jurisdiction it is too late for him to plead prejudice. As we hold that the lower Court had jurisdiction we, therefore, decide against the *first* objection taken on behalf of the appellant.

On the merits we think the learned Subordinate Judge is right in holding that the appellant has no title to the land acquired. The unregistered deed of sale which is his title-deed is of a very suspicious appearance and in the absence of direct evidence of its execution and having regard to the unsatisfactory nature of the evidence called to prove the signatures of the attesting witnesses, we can attach no weight to it. The evidence as to possession is contradictory, but apparently the land which consists of a tank and its bank was regarded as of no great value before the land acquisition proceedings were contemplated. The owner probably did little to assert his right or to prevent casual grazing and fishing by the villages generally. However that may be, we are certainly not disposed on a perusal of the recorded evidence to reverse the finding of the lower Court on this point. The omission of the appellant to file any roadcess return with regard to this land goes strongly against his claim to have asserted a *lakhiraj* title to it. It is contended that the onus has been wrongly thrown on the appellant. This, however, is not a case in which the onus lies on the *zemindar* to prove the land is *mal* against a person claiming it as *lakhiraj*. The parties to these proceedings claim the property as being in separate *mahals*. Also obviously a claimant in a land acquisition proceeding can get no share of the compensation without establishing either title to or possession of the land acquired and the appellant has failed to prove either in this case.

We think the cross-objection taken by the respondent must be allowed. Government was not a party to these proceedings and the lower Court, therefore, could not direct in its decree that the amount payable to the second and third parties should be realised from Government. The order also is unnecessary. The money has to be paid by the first party and to be received by the second and third parties and it is simpler that the payment should be made directly by the former to the latter. The respondents are entitled to interest from the date of withdrawal which we allow at the rate of 6 per cent.

We dismiss this appeal with costs.

We allow the cross-objection taken by the respondents and vary the decree so far as it directs that the sum of Rs. 1,242-15-2 be realised from Government by the second and third parties and that Government will recover the said sum from the first party. This sum will be paid by the first party to the second and third parties with interest at 6 per cent. per annum from the date of withdrawal. The appellants will also pay the respondent's costs, if any, on this cross-objection.

V.B/R.K.

Appeal dismissed.

(2) (1910) 6 I. C. 508.

(3) (1905) 32 Cal. 921.

A. I. R. 1916 Calcutta 515

MOOKERJEE AND CHATTERJEA, JJ.

Gobind Rani Dasi—Defendant—Appellant.

v.

Brinda Rani Dasi and *others*—Plaintiffs and others—Defendants—Respondents.

Appeal No. 290 of 1915, decided on 27th August, 1915, from the Order of Sub-Judge, Dacca, dated 16th and 17th June, 1915.

(a) Civil P. C. (5 of 1908), O. 34 and O. 40, R. 1—Mortgage suit—Application by mortgagee for appointment of Receiver—Question for consideration.

Where in a mortgage suit, the mortgagee applies for the appointment of a Receiver, the primary question for consideration is, what steps should be taken to protect the mortgagee. [P. 516, C. 1.]

(b) Civil P. C. (5 of 1903), O. 34 and O. 40 R. 1—Mortgage suit—Appointment of Receiver—Application by mortgagee supported by reversioner's of widow mortgaging property—Matters to be considered.

Where some of the defendants in a mortgage suit, who as presumptive reversioners to an estate mortgaged by a Hindu widow joined in the execution of the mortgage, support the application of the mortgagee for the appointment of a Receiver, the Court should not consider the matter from the point of view of the reversioners as from that of the mortgagee. [P. 516, C. 1.]

Surendra Nath Guha—for Appellant.

Dhirendra Lal Kastgir, Joges Chunder Bose, Ambicapada Chowdhury and *Prokash Chunder Pakrasi*—for Respondents.

Mookerjee, J.—This appeal is directed against an order for the appointment of a Receiver in a mortgage suit. The application for the appointment of a Receiver was made by the mortgagee. That application was supported by some of the defendants who, at the instance of the mortgagee, had joined in the execution of the mortgage, as they were the presumptive reversioners to the estate, which was granted by way of security by a Hindu widow in possession of the properties left by her husband. These defendants, though responsible under the mortgage instrument for repayment of the loan, have thus no present interest in the mortgaged property. The Court below was satisfied that the mortgagor had wasted the property and appointed a Receiver. The Court, however, considered the matter, not so much from the point of view of the mortgagee, as from that of the reversioners. This clearly was not the proper standpoint in the investigation of the case. When the mortgagee applies in his suit for the appointment of a Receiver, the primary question for consideration is, what steps should be taken to protect the mortgagee. Here the reversioners-defendants have taken advantage of the application by the mortgagee to secure a benefit to themselves, as if they themselves had instituted a suit to restrain the widow from improperly dealing with her husband's estate and had obtained an order for the appointment of a Receiver for a protection of their contingent interest. This much, however, may be charged against the lady that she did, on one solitary occasion, fail to pay the Government revenue punctually. But an undertaking has been given in this Court that the Government revenue will in future be paid at least seven days in advance of the date fixed for such payment, and the appellant has also agreed that in the event of default, the Receiver will take possession of the mortgaged properties. She has given a further undertaking that she will not, during the pendency of the suit, alienate the mortgaged property without the leave of the Court. This entirely satisfies the mortgagee. But the reversioners have vehemently urged that the Receiver should be retained. We are unable to accede to this prayer. The reversioners have resolutely attempted to divert these proceedings from their true purpose and to secure an advantage for themselves by no means within the scope of a mortgage suit. In our opinion, the objections taken by the reversioners are entirely groundless.

The result is that this appeal is allowed in part; while the order appointing the Receiver is maintained, the order directing the Receiver to take possession is cancelled. In lieu thereof we direct that the Receiver do take possession, only if the appellant fails to carry out the undertaking to deposit the Government revenue, instalment by instalment, at least seven days before the date fixed for the payment thereof.

Let the order be sent down as early as possible.

V.B./R.K.

Appeal allowed in part.

A I. R. 1916 Calcutta 516

CHAPMAN AND MULLICK, JJ.

Bhagaban Mahapatra and *another* —Defendants—Appellants.

v.

Palturam Singh and *another*—Plaintiffs—Respondents.

Appeals Nos. 1108 and 1109 of 1913, decided on 6th January, 1916, from the Appellate Decrees of Dist. Judge, Cuttack, dated 6th January, 1913.

(a) Bengal Tenancy Act (8 of 1885), Ss. 30 and 113, Chapter X—Settlement of rent with reference to previous rent involving enhancement of more than two annas in rupee is not illegal.

A settlement of rent with reference to the prevailing rate is not illegal if it involves an enhancement of more than two annas in the rupee, as there is no limit to the amount of enhancement which can be effected on the ground of prevailing rate. [P. 517, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 30 and 113, Ch. 10—Settlement of rent under Ch. 10—Entry of existing rate of rent is no bar to proceeding for settlement of rent within next fifteen years.

An entry of a certain sum as rent at a settlement made under Chapter X of the Bengal Tenancy Act is no bar to a proceeding for settlement of rent within the next fifteen years when the entry was merely an entry of the existing rate. It is only if the entry resulted from an actual settlement of rent that the bar of fifteen years under S. 113 of the Act is applicable. [P. 518, C. 1.]

(c) Civil P. C. (5 of 1908), O. 1, R. 4—Appeal should not be dismissed merely on ground of non-joinder of parties.

Under the Civil Procedure Code, 1908, an appeal is not to be dismissed on the mere ground of non-joinder of parties. [P. 518, C. 2.]

Provash Chandra Mitra and *Satish Chandra Bose*—for Appellants.

Rai Guru Saran Prosad—for Respondents.

Judgment.

Nos. 1108 and 1109.—These two appeals arise out of two suits, which were tried together. The first suit out of which Appeal No. 1108 of 1913 arises, was instituted by the landlords for rent at the rate of Rs. 48 odd. The second suit which has given rise to Appeal No. 1109 of 1913, was a suit brought by the tenants asking for a declaration that the rental was Rs. 14 and that the entry in the Record-of-Rights to the effect that the rental was Rs. 48 odd was incorrect. The landlords succeeded in both suits in the first Court. In appeal the learned District Judge has held that the rental is Rs. 14 as alleged by the tenants and not Rs. 48 odd as alleged by the landlords and has decided the two suits accordingly. The landlords now appeal to this Court.

It appears that at the Orissa Settlement, the rental was recorded as Rs. 14 in or about the year 1897. In the year 1905, a proceeding was instituted in the Collectorate by the landlords asking for the creation of a rental of Rs. 48 odd with effect from the ensuing year. The tenants appeared in that proceeding; but the final decision was made *ex parte* in favour of the landlords, the decision being to the effect that from the following year the rental should be at the rate of Rs. 48 odd. Thereafter a suit was instituted by the tenants to set aside this decree upon the ground of fraud. This suit failed. In 1910-1911, the landlords instituted a suit for rent at the rate of Rs. 48 odd but succeeded in obtaining a decree at the rate of Rs. 14 only and this decision was upheld in appeal. At the recent Provincial Settlement, the rental was entered as Rs. 48 odd. From these facts the learned District Judge has drawn the conclusion that the rental is Rs. 14 and not Rs. 48 odd. His judgment has been assailed by the landlords-appellants mainly upon the ground that the learned District Judge has fallen into an error in the view he has taken of the decree of 1905, which created a rental of Rs. 48 odd from the ensuing year. Shortly stated the ground on which the learned District Judge has refused to give any effect to that decree is that that decree involved an illegal enhancement, being an enhancement from Rs. 14 to Rs. 48 odd within fifteen years from the settlement. In taking that view, the learned District Judge fell into an error. The rental appears to have been settled by that decree with reference to the prevailing rate and a settlement with reference to the prevailing rate is not illegal merely for the reason that it involves an enhancement of more than two annas in the rupee. There is no limit to the amount of enhancement which can be effected on the ground of prevailing rate. As regards to the period of fifteen years from the date on which Rs. 14 was entered at the Provincial Settlement as the rent payable, we are not satisfied that the learned District Judge really directed his mind to the essential question, whether that entry of Rs. 14 was merely an entry declaring the existing rate or whether it was an entry resulting from a settlement of rent. Under the law as it stood when the Provincial Settlement was made, a settlement of rent could only have been effected upon the ground of difference in area or upon the application of the landlord or of the tenant. No reference to these matters appears to have been made by the learned District

Judge and this makes it clear that he did not direct his mind to the point. The importance of the matter is this that, if the entry of Rs. 14 was merely an entry of the existing rate, then there was no bar to a proceeding for settlement within fifteen years. It is only if the entry resulted from an actual settlement of rent that the bar of fifteen years under S. 113 of the Bengal Tenancy Act would be applicable. The learned District Judge has also somewhat confused the question of the importance of the decree of 1905 by taking it as a question of *res judicata*. It was really a decree creating a new relationship between the landlord and the tenant and the question was, whether the Revenue Officer who made that decree had the power to make it and whether he did, in fact, make it and whether the effect of that decree had subsequently been modified. There is another matter as to which there is some confusion, and as the documents are not before us, we have not been able to elucidate it. The Revenue Officer who tried the tenants' suit states in his judgment that the decree for rent, which is the latest in date, is in favour of the landlords. No reference is made to this decree in the judgment of the learned District Judge in the case brought by the tenants; but, in his judgment in appeal in the suit brought by the landlords, he appears to say that the latest decree is adverse to the landlords' case. This is a matter which requires clearing up and will have to be considered by the learned District Judge when the case is remanded to him.

In the suit brought by the tenants (Suit No. 298 of 1911-12), there was a mistake in the memorandum of appeal (Special Appeal No. 133 of 1912) to the District Judge. The landlords, defendants in that suit, were named as Bhagawan, Trilochan and Narahari; but in the memorandum of appeal by the tenants to the District Judge, the respondents were named as Bhagawan, Parasuram and Narahari. The defendant Trilochan's name was omitted and, in the place of that name, the name Parasuram was given, Parasuram who is now dead being the father of Trilochan. This mistake was not noticed by either party or by the Court during the hearing of these appeals by the learned District Judge. It would seem, therefore, that Trilochan was not affected by the adverse decision of the learned District Judge in appeal. Trilochan, however, did join Bhagawan and Narahari in the appeal to this Court, although subsequent to the filing of the appeal a Rule was obtained on the tenants to show cause why his name should not be removed upon the ground that he was not bound by the adverse decision of the learned District Judge. The argument of the landlords now is that the tenants' appeal to the learned District Judge should stand dismissed upon the ground of non-joinder of Trilochan. Upon the law as it stood before the recent amendment of the Code of Civil Procedure, the non-joinder of Trilochan would have been fatal to the appeal; but we feel pressed by the recent amendments of the Code which have been directed to the avoidance, if possible, of the defeat of litigation merely upon the ground of non-joinder. Our consideration of the case upon the law has led us to the conclusion that there must be a remand to the learned District Judge; and, as there has to be a remand and as this point was not taken at the first hearing before the District Judge, we think it desirable that the learned District Judge on remand should consider whether Trilochan cannot now be added as a party under O. 41, R. 20, of the Schedule to the Code of Civil Procedure so that an adjudication may be come to between the parties. We accordingly set aside the judgment and decree of the learned District Judge in the tenants' suit (Special Appeal No. 133 of 1912) and direct the learned Judge to consider whether he cannot under O. 41, R. 20, Civil Procedure Code, now add Trilochan as a party to the tenants' appeal. We say nothing in regard to the application of law of limitation or any other law which may prevent such a course being taken. If Trilochan cannot be added, then the tenants' appeal must stand dismissed. If Trilochan can be added, the learned District Judge will proceed to dispose of the tenants' appeal in the light of the remarks we have made. The judgment of the learned District Judge in the landlords' suit (Rent Appeal No. 26 of 1912) is a judgment which depends entirely upon the decision of the tenants' suit. As this judgment in the tenants' suit has been set aside and the said case has been remanded, it is necessary now for us

to set aside the judgment and decree of the learned District Judge in Rent Appeal No. 26 of 1912 also and direct him to decide that appeal afresh after deciding the analogous appeal arising out of the suit by the tenants (Special Appeal No. 133 of 1912).

Costs of both cases will abide the result.

Rule No. 767.—This Rule is discharged. We make no order as to costs.

V.B./R.K.

Decree set aside ; Case remanded.
Rule discharged.

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SANDERSON, C. J. AND MOOKERJEE, J.

Bidhumukhi Chowdhurani—Plaintiff—Appellant.

v.

Asmatulla and *others*—Defendants—Respondents.

Letters Patent Appeal No. 57 of 1914, decided on 16th May, 1916, against the decision of Mullick, J., dated 28th April, 1914.

(a) Bengal Tenancy Act (8 of 1885), Ss. 160 and 167—*Se-Patni* created by *Dur Putnidar* under terms of his lease is protected interest within S. 160 and cannot be annulled under S. 167.

A *putnidar* granted a *durpatni* lease by a lease deed which contained the following words : " I give you right to alienate the same at pleasure by gift and sale and to grant *se-patni*, etc., settlements of your own interest" :

Held, that the *se-patni* created by the *durpatnidar* was a " protected interest " within the meaning of S. 60 (*g*) of the Bengal Tenancy Act and could not be annulled under the provisions of S 167. [P. 520, C. 1. & P. 521, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), S. 160—Protected interest, creation of—Landlords permission is not necessary.

In order to create a " protected interest " within the meaning of S. 160 (*g*) of the Bengal Tenancy Act, it is not necessary that an express written permission must be obtained from the landlord on the occasion when the tenant creates the interest. [P. 521, C. 1.]

Babu Bimal Chandra Das Gupta—for Appellant.

Babus Sarat Chandra Roy Chowdhury and *Atul Chandra Gupta*—for Respondents.

Sanderson, C. J.—In my judgment this case raises a point of some interest.

It appears that on the 30th of April, 1906, the *zemindar* Maharaja, who was the *putnidar*, got a decree for *durputni* rent, and the result of that was that on the 25th of January, 1907, the plaintiff at the execution sale which was held under the decree, purchased the *durpatni* interest, and thereupon the plaintiff gave a notice under S. 167 of the Bengal Tenancy Act to Bhairab, with reference to the *se-patni* interest which was in him at that time. That *se-patni* estate had been created by Juggomohan in the year, 1886.

Now, the suit was brought in this case by the plaintiff against the defendants, the occupancy-holders, for rent. They set up the defence that the plaintiff was not entitled to sue for rent, the first ground for that defence being that the *se-patni* interest which was in Bhairab had not in fact been put an end to, and the reason why they said it was not put an end to, was that it was a " protected interest " within the meaning of S. 160, Clause (*g*) of the Bengal Tenancy Act, which runs as follows :

> "any right or interest which the landlord, at whose instance the tenure or holding is sold, or his predecessor-in-title, has expressly and in writing given the tenant for the time being permission to create :"

the landlord in question in this case being Lachmiput or his successor-in-title, namely, the *zemindar* Maharajah, the *putnidar*, to whom I have already made reference.

Now, the deed upon which this question depends, made between Lachmiput and one Manulla Shah is set out at page 11 of the paper-book, and in that deed, the *landlord*, using the word as used in the section, granted a lease to Manulla, and after describing the *land* and the boundaries proceeded as follows : – I give you

> " right to alienate the same at pleasure by gift and sale, and to grant *se-patni*, etc, settlements of your own interest."

The *first* question raised in this appeal is whether those words used in that document bring this case within Clause (*g*) of S. 160 of the Bengal Tenancy Act : or, in other words, has the landlord, by the words which I have quoted, expressly and in writing given the tenant for the time being permission to create the particular interest, *viz.*, the *se-patni*. In my judgment the landlord has done so. The words used are first of all general ; and, they give the tenant a right to alienate the same at pleasure by gift and sale, and then they go on to specify this particular kind of interest, " to grant

se-patni, etc., settlements of their own interest." In my judgment this case is not governed by either of the two cases which have been cited to us, namely, *Afazuddi Khan* v. *Prasanna Gain* (1) and *Kristo Das Laha* v. *Jatindra Nath Basu* (2). The former of the two cases, namely, *Afazuddi Khan* v. *Prasanna Gain* (1), in which the judgment was given by the late Chief-Justice and Mr. Justice Digamber Chatterjee, to my mind, is of some assistance to us in coming to a conclusion in this case, because in that case the words were far more general than they are in the case now before us; the particular interest which was there created was not specified, whereas in this case the specific interest which was created by the tenant, namely, the *se-patni* was mentioned in the deed, and express authority in writing was given by the landlord to create such interest.

It was argued that, in order to come within Clause (*g*) of S. 160, it was necessary for the landlord to specify the particular interest which the tenant was to create, giving, I suppose, the name of the person in whom the interest was to be vested. I cannot think that that was the meaning of the Act. It does not say so: and if that were the meaning I can imagine all kinds of difficulties arising: I do not think the section contemplated that the tenant had to come each time to the landlord and ask him for express authority in writing authorizing the specific interest which the tenant intended to create. I think that the words in the deed were sufficient to authorize the creation of the sub-tenancy which was created by Juggomohan in favour of Bhairab. Therefore, the *first* point taken on behalf of the defendants was a good one.

Then, it is said that even if this was a good point, the plaintiff was entitled to ⅔rds of the rent even if the other ⅓rd was to be paid to Bhairab. But this is quite inconsistent with the claim which was originally made in this case, and I do not think it would be right to deal with this matter on the fresh case which has now been made: and I think that the judgment of Mr. Justice Mullick was right and the appeal from his judgment should be dismissed with costs.

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(1) (1912) 39 Cal. 139 = 14 I. C. 991.

(2) (1912) 14 I. C. 145

Mookerjee, J.—The facts, material for the determination of the interesting question of law raised in this appeal, are not in controversy and may be briefly stated. On the 25th January, 1907, the plaintiff purchased a *dar-putni* tenure at a sale held in execution of a decree for its own arrears obtained by the *putnidar* on the 30th April, 1906. On the 14th April 1910, she instituted this suit for recovery of arrears of rent from the cultivators in actual occupation of the land. They pleaded that the rent was payable, not to her, but to a *se-patnidar* whose interest was still in force. The plaintiff replied that the *se-patni* interest was an encumbrance and had been annulled at her instance by service of notice in accordance with S. 167 of the Bengal Tenancy Act. The question thus arose for decision whether the *se-patni* interest was, as alleged by the plaintiff, an encumbrance capable of annulment under S 167, or, as asserted by the defendants, a "protected interest" within the meaning of Clause (*g*) of S. 160. Now, that clause provides that "any right or interest which the landlord, at whose instance the tenure or holding is sold, or his predecessor-in-title, has expressly and in writing given the tenant for the time being permission to create" is a protected interest within the meaning of Chapter 14 of the Bengal Tenancy Act. The point for investigation consequently is, whether the *se-patni* is a right or interest which the *putnidar* at whose instance the *dar-patni* was brought to sale had expressly and in writing given the *dar-patnidar* permission to create. The plaintiff-appellant has argued that this question should be answered in the negative, because S. 160 (*g*) implies that such permission, to be of any avail, must have been expressly given, at the time of the creation of the *se patni*, by a document specially executed in this behalf,—and no such instrument was admittedly executed in this case. In support of this proposition reference has been made to the decision of *Kristo Das Laha* v *Jatindra Nath Basu* (2). Our attention, however, has also been drawn to the decision in *Afazuddi Khan* v. *Prasanna Gain* (1), which possibly lends support to a different view. Neither of these decisions, however, directly bears upon the question raised before us, although, perhaps, the first of the two cases mentioned is more

analogous than the second to the case now before the Court. As the matter is thus not concluded by authority, S 160 (*g*) requires to be construed, and I feel no doubt that we should not accept the interpretation put forward on behalf of the appellant, namely, that the express permission must be contained in a written instrument, other than the lease whereby the tenancy was created, which is specially executed when the encumbrance is created. If that had been the intention of the Legislature, Clause (*g*) would have been differently framed. There is, I think, no foundation for the contention that an express written permission must be obtained from the landlord on the occasion when the particular encumbrance is created; there is in principle no difference between a permission to create an interest of a particular description given in the lease itself, and a permission subsequently given by a separate document.

The question next arises whether the *dar-putni* lease of the 4th June, 1866 did contain an express permission in writing sufficient for the purpose of Clause (*g*). In my opinion, the answer must be in the affirmative, for the document states expressly that the *dar-patnidar* would have authority to grant a *se-patni* and it was pursuant to the power thus conferred on the *dar-putnidar* that he created the *se-patni* on the 21st January, 1886. There is thus no escape from the position that the *se-patni* is a "protected interest" within the meaning of S. 160 (*g*) and has not been annulled, because it could not be annulled under the provisions of S. 167.

This really concludes the litigation. But as a last resort the argument has been put forward that as the *se-patni* covered only one-third of the property, the plaintiff is entitled to rent in respect of the remaining two-thirds share. The obvious answer is that this was not the case made in the plaint. If such a claim had been put forward, it would have been necessary to determine whether the rent in respect of a two-thirds share had hitherto been collected separately from the rent of the one-third share. This question has not been raised and could not be raised on the pleadings, nor could it be investigated in this suit, in the absence of the *se-patnidar* interested in the one-third share.

On these grounds, I agree that the decree made by Mr. Justice Mullick must be affirmed and this appeal dismissed with costs.

V. B./R. K.

Appeal dismissed.

A. I. R. 1916 Calcutta 521

JENKINS, C. J. AND WOODROFFE, J.

Abed Khondkar and *others*—Defendants—Appellants.

v.

Mohendra Lal De and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 26 of 1911, decided on 31st March, 1915, against the Decree of N. Chatterjea, J., dated 23rd January, 1911.

(a) Civil P. C. (5 of 1908), O. 47, R. 4 (2) (b)—(Per *Jenkins, C. J.*) Proof in R. 4 (2) (b) refers to formality of evidence—It means evidence in legal form sufficient to convince the Court.

Per *Jenkins, C J.*—"Strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality which is prescribed and not the result that is described. [P. 523, C. 1.]

(b) Civil P. C. (5 of 1908), O. 47, R. 6—R. 6 restricts grounds of objection—Objection to jurisdiction also can be raised when application is made to wrong Court.

S. 629 of the Code of Civil Procedure, Act XIV of 1882, limits the grounds on which objections may be taken to the admission of a review; an objection may be taken when the admission has been in contravention of the provisions of S. 624, that is to say, it has been made to a tribunal that has no power to grant it. [P. 523, C. 1.]

(c) Civil P. C. (5 of 1908), O. 47, Rr. 2 and 4—Original Court can entertain an application but should not grant it unless conditions are satisfied.

Without proper safeguards, the Court of first instance is, the proper Court to determine whether or not there should be a review, but before a review is granted those safeguards must be observed. [P. 523, C. 2.]

(d) Civil P. C. (5 of 1903), O. 47, Rr. 4 (2) (b) and 7—(Per *Woodroffe, J.*)—Strict proof refers to formalities of evidence—Objection on this ground can be raised in appeal—Objection to sufficiency of evidence cannot be raised.

Per *Woodroffe, J.*—The term 'strict', O. 47, R. 4 (2) (*b*), refers to formalities, such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination, and so forth. If such legal evidence be wanting objection may be made in appeal under O. 47, R. 7, which does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that

the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review.

"Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. 22 Cal. 734; 20 W. R. 84 (F. B.); 25 W. R. 324 and 24 W. R. 186, ref.

[P. 523, C. 2 & P. 524, C. 1.]

(e) Civil P. C. (5 of 1908), O. 47, R. 7—Appellate Court can only interfere if evidence is wanting in formality not otherwise.

Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, but the question of sufficiency of evidence is for the Court admitting the review.

[P. 524, C. 1. & 2]

Jnanendra Nath Sircar—for Appellants.

Shiva Prasanna Bhattacharjya — for Respondents.

Jenkins, C. J.—This is an appeal under the Letters Patent from a judgment of Mr. Justice Nalini Ranjan Chatterjea, before whom the case came by way of appeal from an appellate decree. The question that arises is as to the competence of an Appellate Court to question the propriety of a review granted by the Court of first instance, on the ground that the evidence in support of the application should not have been believed.

This suit is one for rent, and in the first instance it was decided adversely to the defendants' contention. The defendants, as a result of what appeared in the course of the trial, became aware of some new and important matter or evidence and as a result of that made an application to the Court of first instance for a review. The review was granted, it was granted because it appeared to the Court that there was strict proof of the allegation of the discovery of new and important matter or evidence not within the knowledge of the applicants and because that strict proof convinced the Court of first instance. The result was that the review having been granted, the case was re-heard and a decree passed favourable to the defendants. From that decree an appeal was preferred by the plaintiffs, who objected not only on the merits but on the ground that the review should not have been granted. The lower Appellate Court has dealt with the second of these contentions and has held that the review was *ultra vires* or beyond the jurisdiction of the Court of first instance, so that the first decree was restored. The position of the defendants became this: that the decree in their favour was set aside and the first decree stood without their having any right to appeal therefrom. From this decree of the lower Appellate Court there was an appeal to this Court, which was heard by Mr. Justice Nalini Ranjan Chatterjee to whom it appeared that the decision of the lower Appellate Court was correct, and it is in these circumstances that the matter now comes before us by way of appeal under the Letters Patent.

The propriety of the course adopted by the learned Judge of first instance in granting the application for review is to be determined by reference to the provisions of the old Code which are substantially reproduced, though with a slight variation, in the present Code. S. 623 permits an application for a review of a judgment and provides that it may be made by any person considering himself aggrieved, who from the discovery of new and important matter or evidence, which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, desires to obtain a review of the decree passed or order made against him. It is only with that part of the section that we are now concerned. S. 624 provides that,

"Except upon the ground of the discovery of such a new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.

S. 626 provides that

"If it appears to the Court that there is not sufficient ground for a reivew, it shall reject the application. If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion: Provided that (*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree a review for which is applied for; and (*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation; and (*c*) an application made under S. 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (*a*) to this section, be disposed of by his successor."

It is only necessary now to refer to S. 629 which provides that,

"An order of the Court rejecting the appliaation shall be final; but, whenever such application is admitted, the admission may be objected to on the ground that it

was—(*a*) in contravention of the provisions of S. 624, (*b*) in contravention of the provisions of S. 626, or (*c*) after the expiration of the period of limitation prescribed therefor, and without sufficient cause. Such objection may be made at once by an appeal against the order granting the application, or may be taken in appeal against the final decree or order made in the suit."

No provision is made in S. 588 of the old Code for an appeal from order in the case of an order granting a review; and the power to appeal, such as it is, rests on S. 629 alone. It is in that respect that there is a slight difference between the old and the present Code.

The view taken by Mr. Justice Chatterjea in affirming the lower Appellate Court is that "strict proof" means proof that convinced the lower Appellate Court, and it is on that ground and on that ground alone that the result can be affirmed. In my opinion this is not the true view of the provisions of this chapter relating to review of judgments. The word "proof" ordinarlly has one of two meanings: either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of word 'strict' seems to me to point to the second of these two meanings, and the strict proof, in my opinion, means anything which may serve directly or indirectly to convince a Court, and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is the formality which is prescribed and not the result that is described. This I think is apparent from the whole scheme of this Chapter on review. For instance, we find on one side that the rejection of an application for a review is final. There is no enquiry into the merits. On the other hand, we find that the granting of a review is not final, and as I read the Chapter it means this that when a review is granted, certain formalities have to be observed—formalities designed to secure that the application for review should not be too readily and thus improperly granted. An examination of S. 629 appears to me to support that view. It limits the grounds on which objections may be taken to the admission of a review; and the first ground described shows that an objection may be taken when the admission has been in contravention of the provisions of S. 624, that is to say, it has been made to a tribunal that has no power to grant it. Passing over for a moment S. 629 (*b*) we find that another objection allowed by S. 629 (*c*) is that the application is made after the expiration of the period of limitation prescribed therefor and without sufficient cause. Then we come to the only other objection, which is, that it is in contravention of the provisions of S. 626; and S. 626, so far as it relates to this topic, requires that there should be strict proof of the allegation. That appears to me to mean that there must be proof adduced before the Court that has to deal originally with the question of granting a review. Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under S. 629 it was to be open to the Appeal Court to say, though there has been legal evidence, and in that sense strict proof, that the proof did not convince it, though it convinced the Judge who heard the witnesses and, therefore, the application and the order granting the review were *ultra vires* and beyond the competence of the Court. That would bring about a state of affairs most undesirable and would bring into litigation fresh elements of chances and speculation. I think that the whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed. These safeguards have been observed in this case. I, therefore, think that the judgment of Mr. Justice Chatterjee is erroneous and must be set aside, and so also the decree of the lower Appellate Court. The case must, therefore, go back to the lower Appellate Court to be re-heard on the merits. The appellants before us are entitled to all the costs in the High Court.

Woodroffe, J.—The learned Subordinate Judge has held that an Appellate Court can consider whether there was strict proof of the allegations on which an application for a review was made. Assuming for the sake of argument that this is so, a question arises, what is the meaning of strict proof. The Subordinate Judge was in effect of opinion that though the evidence was presented with strict formality, he could reject it as not being strict, because in his opinion it was insufficient, that is, lacking sufficient probative force in his eye to establish the allegations of the party applying for a review. I do not think this is correct. The term "strict" refers in this section, in my opinion, to formalities. Thus the section

requires that formalities of law should be observed such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination so forth. If such legal evidence be wanting, objection may be made in appeal under O. 47, R. 7. This rule does not, I think, refer to the weight or sufficiency of the evidence. If the legal formalities are observed, it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. In the present case the evidence was legally taken but the Appellate Court disbelieved the evidence. The latter after criticising the evidence says that he disbelieves it, and because the first Court did believe it held that it was acting *ultra vires* As an instance of the nature of the ground upon which the lower Appellate Court proceeded, I may refer to the following passage in his judgment :

"Then it is not at all likely that the defendants would forgot all about their own rent receipts which they had filed in a previous suit regarding this very property. I, therefore, disbelieve their story."

"Strict proof," in my opinion, means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. Thus an appeal has been allowed where the Judge has not recorded his reasons for granting an application for a review. [See the case of *Gyanund Asram* v. *Bepin Mohan Sen* (1)], or where he granted a review without inquiry or proof that the evidence was not within the knowledge of the applicant at the hearing or could not be adduced by him before the decree was passed. [See the case of *Bhyrub Chunder Surmah Chowdhry* v. *Madhubram Surmah* (2)], or where by going through the evidence a second time the Judge might come to a different conclusion [See the case of *Chunder Churn Aggrodany* v. *Loodunram Deb* (3)], or merely to enable the case to be re-argued [See the case of *Koleemooddeen Mundhul* v. *Heerun Mundul* (4)]. In all these cases there was an absence of due formalities required by law. Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, the question of sufficiency of evidence is for the Court admitting the review. I may add here that the result of holding otherwise would be to affirm a judgment of a Judge in whose opinion it was erroneous. I, therefore, agree with the order passed by the Chief Justice.

V.B./R.K.

Appeal allowed ; Case remanded.

(1) (1895) 22 Cal. 734.
(2) (1873) 20 W. R. 84. (F.B.).
(3) (1876) 25 W. R. 324.
(4) (1875) 24 W. R. 186.

A. I. R. 1916 Calcutta 524

JENKINS, C. J., MOOKERJEE AND HOLMWOD, JJ.

Emperor.

v.

Nogendra Nath Sen Gupta – Accused.

Original Criminal Jurisdiction, decided on 22nd March, 1915, against the Commitment by Chief Presdy. Magte, Calcutta, dated 19th January, 1915.

(a) Criminal Law Amendment Act (14 of 1908), S. 9—Offences of S. 302 and 302 read with S. 34, I. P. C. can be tried jointly by Special Bench of High Court.

An accused can be charged, in the same trial, with an offence under S. 302 as also an offence under S. 302 read with S. 34. [P. 525, C. 1.]

(b) Criminal trial—Duty of prosecutor is to help to find truth.

It is the duty of the Counsel for the Crown to assist the Court in arriving at the truth and not to secure a conviction. [P. 526, C. 1.]

(c) Criminal trial—Miscellaneous—Truthful explanation from accused cannot injure him, an innocent person.

In a trial before the Special Bench an accused may be given an opportunity of explaining the circumstances appearing against him and a truthful explanation coming from the accused cannot injure him, innocent as he is presumed to be. [P. 525, C. 2.]

(d) Criminal trial—Local injury—Court may visit spot.

For the correct understanding of a case, the Court may visit the place of occurrence. [P. 526, C. 2.]

(e) Criminal trial—When evidence does not lead to probable conclusion of guilt accused must be acquitted.

Where it is not shown that the guilt of the accused is so probable that a prudent man ought to act upon the supposition that he is guilty, the accused should not be given merely the benefit of the doubt but must be acquitted as absolutely innocent. [P. 528, C. 2.]

S. P. Sinha and *N. Gupta*, *K. N. Chaudhuri* and *A. Sinha* –for the Crown.

Langford James, *L. Palit* and *Arabinda Roy*—for Accused.

Jenkins, C. J.—On the evening of November 25th last, at or about 7-30, two

bombs were exploded in a lane off Harrison Road known as Mussalmanpara Lane. It resulted in the death of a Police Officer, Ram Bhujan Singh, and in severe injuries to two other Police officers, Monoranjan Chuckerbutty and Someswar Dutt Panday, and also to a man named Harabilas Ghosal.

Of the two bombs one was thrown through the open street door into a room of the house No. 10/4/1, Mussalmanpara Lane, the other struck the front wall of the house to the west of that door. It is the prosecution's case that both bombs were thrown by a party of three or more Bengali youths in furtherance of the common intention of all and that the accused Nogendra Nath Sen Gupta not only was of the party, but actually threw one of the bombs. Eight charges have accordingly been framed against the accused Nogendra. Four impute to him that he himself threw a bomb, the other four impute to him that if he did not throw the bomb, still he was a member of the party that did and that this establishes his guilt. Objection was taken on behalf of the accused that even on the case made by the prosecution the charge in reliance on S. 34 of the Indian Penal Code could not be sustained. We, however, overruled the objection and have heard the case on the merits. The charges as drawn would seem to impute to the accused that he was the thrower of both bombs, for they charged him with having directly caused the injury both to Harabilas Ghosal and to the other three men, though it is fairly obvious that the injury to Harabilas was occasioned by the bomb that fell within the room and that to the other three by that which struck the wall. In the argument before us, the case made was that the accused threw the bomb that struck the wall or the second bomb as it has been termed. This view rests on the evidence of Someswar. He describes the man who threw the bomb as wearing an *alwan* and this is probable ; but according to evidence on which reliance can safely be placed, the accused had no *alwan* that evening. Apart from this, we regard Someswar as a patently unreliable witness, as will later appear, and it would be absolutely wrong to base any conclusion on an identification purporting to be made by him. Beyond this, there is no evidence that could justify the conviction of the accused on the first, third, fifth or seventh charges.

It has then to be seen whether the bomb was thrown by a party of men and whether the accused was of that party. It is beyond question that two bombs were thrown and that there were two or more men of the party by whom they were thrown. The object of the attack was undoubtedly Basanta Kumar Chatterji, a Deputy Superintendent in the C. I. D. and the occupier of No. 10/4/1, Mussalmanpara Lane. Those by whom this dastardly attack has been made have been assumed to be members of a society described as anarchist. With the commendable fairness that has marked his conduct of this case, Sir Satyendra Sinha has stated that, apart from what is disclosed in this proceedings, the prosecution know nothing of the accused that would associate him with any anarchical movement. At the same time, we know that he is a student of the Presidency College residing in the Oxford Mission Hostel, and it is apparent that he is as far removed from the class of degenerates as a lad well can be.

Undoubtedly, the accused was in the immediate neighbourhood of the explosions ; he admits as much, and the injuries he received point to the same conclusion. Could he, then, have been there consistently with his innocence? To ascertain this, it was thought that the accused should be asked to give his explanation, and, notwithstanding an objection taken by Mr. James, we thought and still think that was the right course to follow. An innocent man cannot well injure himself by a truthful explanation, and it would be deplorable were we to hold that it was beyond the competence of the Court, when dealing with a case under Act XIV of 1908, to give an accused an opportunity of explaining the circumstances appearing against him. And there is high authority in favour of a similar view for Sir Alfred Wills has recently cited with approval the opinion of the Court of Criminal Appeal that in the case of an innocent man the failure even to offer evidence is an unwise course (Wills on Circumstantial Evidence, page 102). The explanation in this case has certainly been of service to the accused, for, taken with the prosecution's admission as to the place at which the accused's brother resided last November, it demonstrates that there was nothing impossible or even unreasonable in the accused's presence in the lane. The fact, therefore, that the accused was injured in the lane, though calculated to arouse suspicion if unexplained, cannot be regarded in itself as incompatible with his innocence. This was recognised in the argument before us, and so the

prosecution rely on other facts as inculpatory of the accused, and with these we will now deal.

The first suggestion was that the accused was at the Alipore Magistrate's Court on the 24th of November in circumstances which were suggestive of a design against Deputy Superintendent Basanta Kumar Chatterji, either immediate or prospective. Norendro Nath Mukerji, differing in this from Basanta, purports to identify the accused. We were far from being satisfied with this evidence, and the testimony of Mr. Holmes of the Oxford Mission amply justified our doubt. Mr. Holmes spoke with caution, but his testimony is, on that account, entitled to the greater weight. And we would here remark that it was certainly right of the prosecution to call Mr. Holmes, for the duty of the Counsel for the Crown is not to secure a conviction but to assist the Court in arriving at the truth. We are satisfied that this attempt to create a prejudice against the accused has no foundation in fact.

Next, there is the evidence of Monoranjan and Someswar. That they were present is beyond doubt, but an essential part of the story each has told is manifestly untrue. Monoranjan's testimony would place him in a part of the lane not far from the dust-bin, and it is in reference to that position that he describes the incidents and individuals he professes to have observed. He would place the party of bomb-throwers nearer the actual explosions than he himself stood. And yet we find that while he is most seriously injured, they if the accused be excluded—apparently escaped untouched. Nor is this all, for the evidence, furnished by the scene itself after the explosions, affords cogent proof that Monoranjan was, at the time of the explosions, not near the dust-bin, but close to the lamp-post, standing at the corner to the east of the street door. It is our belief that this misdescription was deliberate and was an endeavour to improve the case by supporting the story that Someswar has since placed before the Court. If regard be had to probabilities, then we agree with the argument that to secure escape from injury and capture, the most favourable position for throwing the bombs would be slightly to the north of the dust-bin, and this would be naturally followed by flight towards the east. The prosecution evidence shows that two youths did actually take that course. The traces of preparations for the attack also support this view. Someswar swears that he pursued three men, the number that Monoranjan had described as passing to his right. He has detailed his pursuit of these men along Mussalmanpara Lane to Harrison Road, and from that point the pursuit of one of them along the pathway towards Akhil Mistry's Lane, till his chase was cut short by his stumbling over a stone and falling on his hands, thereby, as he says, causing a state of unconsciousness from which he recovered after a short but appreciable measure of time. Then he returned to 10/4/1, Mussalmanpara Lane. This story is palpably untrue. Sheik Hingoo, who appeared to us to be a truthful witness, gives a narrative of events which absolutely negatives Someswar's version and shows that Someswar cannot have been in pursuit and that three men cannot have been in flight; in fact, the only man seen was walking, not running. Nor is this all, for the evidence of Satish Chander Banerji, another witness who impressed us favourably, is inconsistent with the idea that Someswar ever left 10/4/1, Mussalmanpara Lane. Someswar was undoubtedly so affected by the shock of the explosion as to be in a state of great and unbalanced excitement, and his story may represent what he would have wished to have done, but certainly not what he did. We are convinced that there is no foundation in fact for the pursuit or any of its incidents.

Then we come to the story of Sarafat. If true, it would be a most important link in the evidence against the accused and almost conclusive of his guilt. But we do not hesitate to pronounce this story false, and, indeed, Sir Satyendra Sinha on behalf of the Crown did not even refer to it in his reply. Our view rests not merely on an appreciation of the evidence as given before us, which left no room for doubt as to its worthlessness, but also on our personal observations on the spot, which convinced us that the story told by this witness was in its most important details an absolute impossibility. We would here desire to explain that we visited the locality, at the urgent request of both parties who felt, and we now think rightly, that this was almost necessary to a correct understanding of the case.

The next step in the case is that the accused was found in the narrow part of Akhil Mistry's Lane which runs east and west. This undoubtedly is true; but so

far as it goes, it bears out his story that he was on his way to his brother's mess, for it is not disputed, and is, indeed, apparent, that this was on the road there from Mussalmanpara Lane. Nor is it without its relevance that while lying there, he at once gave his brother's name and address and begged that information might be given to him. This fact is an answer to the suggestion that the accused endeavoured to conceal his identity by withholding his name. It is at least as reasonable to refer his silence to the state of collapse in which he obviously was. Sudhir's suggestion that the accused wore his *dhoti* in *malkocha* fashion may be dismissed, as he himself conceded in cross-examination that he was unable to support it on oath, and it is a circumstance to which no other witness speaks. The next move was to the hospital, and it is here that Subodh, a C. I. D. officer, attributes to the accused two remarkable and unintelligible replies. He says that the accused, when asked his name, replied "My name is name," and when asked by a European, whether he was a Policeman answered, "I am not a Police but a man." Not only is the medical evidence of the accused's condition strongly opposed to the probability of this being true, but there is no confirmation, by any European or by any Bengali doctor, of these answers. On the contrary, the evidence of those called negatives it. Mention may here be made of an incident on which Mr. James has laid much stress, the discovery of the exploded Mauser cartridge. He evidently regarded it as a fabricated discovery designed to prejudice his client. We do not share this view; we see no reason to distrust Mr. Lowmen's evidence on the point; and in fact no use of the discovery has been made to the accused's prejudice.

This brings us to the endeavour to show that the accused, when found in Akhil Mistry's Lane, was in possession of a revolver. Sir Satyendra did not exaggerate the importance of this alleged incident when he declared that if it was not established, then he could not ask for a conviction. From what has already been said, it is apparent that there has been an endeavour to import into the case several matters that may well occasion anxious doubt as to the preparation of the evidence by which it was sought to fasten guilt on the accused.

But, in dealing with this revolver incident, we have endeavoured to estimate its worth on its own independent merits. Does, then, the evidence establish, with the degree of assurance that any prudent man would require, the accused's possession of the revolver produced before us in Court? For, if it does, then it goes far to show that the accused is guilty and has merited the law's extreme penality. We have the lad's positive statement that he had not the revolver, and this the law ordains we may take into consideration. On the suggestion of its later importation, he does not throw any light, nor could he in the collapsed condition in which he was, for he was practically dead to all around him.

The witnesses who speak to the "shining thing," or the revolver which we are invited to regard as its equivalent, are many. There is, however, displayed throughout this evidence an anxiety to make it appear that the "shining thing" was observed before the Police came on the scene. This anxiety appears to us to cast a needless slur, for if a discovery by the Police squared with the facts, we certainly should not on that account regard it as unworthy of acceptance. But the difficulty we feel in connection with this part of the case is that we find ourselves confronted with stories so difficult to reconcile with each other or to fit in with ordinary probabilities that after serious consideration, we unhesitatingly come to the conclusion that we must regard this part of the case with grave distrust. In dealing with it, we have been materially assisted by Mr. James, who, with his junior, Mr. Palit, has obviously made a most searching inquiry into all that relates to this alleged discovery of the pistol, and has spared no effort to master and understand all the details of the problem with which he had to deal. Unless something has been kept back, the constables Nawrang and Paltoo, two most important witnesses, should, according to their evidence, have been at the spot where the accused was lying in Akhil Mistry's Lane not later than 7-45; and yet the case presented for our acceptance by the prosecution, and apparently as an essential feature of the case, is that their arrival at the west end of the lane was absolutely synchronous with the arrival of Sub Inspector Belcher and Head Constable Mohangoo Misser at its eastern end. But Sub-Inspector Belcher cannot have reached the lane before 8-20, that is, 35 minutes later than the time at which the two

constables, on their own evidence, ought to have arrived We should have attributed little importance to this, if it could fairly have been ascribed to a mistaken estimate of time. But it is nothing of the kind; and having followed the case day by day as it was unfolded before us, we feel that that is not the true explanation of the remarkable discrepancy which resulted in the equally remarkable coincidence of simultaneous arrival. We cannot resist the conclusion that there has not been a complete disclosure of all that occurred, and that something has been withheld from our knowledge.

Then, again, the evidence of Sarat and Sudhir, two other witnessess of importance, so far from clearing up matters, rather tends to increase the preplexities of the case. Both of them agree in this that they will not pledge themselves to more than "a shining thing," and curiously enough they were neither of them shown the revolver with a view to identifying it in appearance with what they profess to have seen. Sarat before us has deposed to the presence of a constable before the arrival of Belcher, and describes him as handling the pistol. At the same time he does not identify him as either Nawrang or Paltoo, and in this he probably is right, as the man of whom he speaks did not wear a *pugri*. This man, obviously a most important witness if Sarat spoke the truth, has not been called, and it seems to be the prosecution's case that they do not know of any such constable as Sarat describes. Mr. Belcher declared that when he arrived, he saw the pistol and took possession of it. We do not say that it may not have been so, but when we bear in mind Belcher's evidence of its spotless condition and its freedom from all trace of blood or mud or water, we find it difficult to reconcile this with what must have been the condition of the lane and of the accused. It would seem to be the prosecution theory that the revolver was carried in the accused's hand; but if in his right hand, one would have expected traces of blood, having regard to the injuries and the profusion of blood on that side; if on the left hand, equally would one expect traces of blood, from the wound in the palm of that hand, for it was sufficiently severe to be dressed and sutured at the hospital. It is difficult to speculate as to whether it may not have been in the accused's coat pocket, for, so far is this from being the case for the prosecution, that the coat has not even been put in evidence before us, and we do not know what pocket (if any) there were in it. The reason for this doubtless was that the prosecution felt that it was impossible to square the prosecution evidence as to the position of the revolver with any other theory than that it was in the accused's hands.

We have dealt with some of the difficulties in the way of accepting that view. But there is yet another circumstance to be noticed, and that is that Sheik Hingu, who certainly might have been expected to see a revolver in the accused's hand, did not observe one, nor was it observed by Monoranjan or Someswar or, as far as we know, by any one else. Then, again, if the pistol was really in the accused's hand, we find it difficult to account for the several positions from time to time attributed to it, or how it was not visible from the first.

The whole story of the revolver is surrounded by difficulties and is enveloped in mystery, and observing that standard of care which the positive enactment of the law imposes on us, we hold it not to be established that the accused was in possession of the revolver. But if possession of the revolver is not brought home to the accused, there clearly is no evidence on which we can hold his guilt proved, and this Sir Satyendra himself declared.

We desire to make it clear that in our judgment we do not merely give the accused the benefit of the doubt, but after considering the matters before us, we decline to hold that he is shown to be guilty, or that his guilt is so probable that a prudent man ought under the circumstances of this case to act upon the supposition that he is guilty. That is the test prescribed by law, and it is amply satisfied in the accused's favour in the circumstances of this case.

The Court accordingly acquits the accused of the several charges brought against him and directs that he be set at liberty.

Mookerjee, J.—I am in full agreement with the views set out in the judgment of the Court, which has just been read out by the Chief Justice and to which I am a party. I desire only to emphasise that, after anxious consideration of every element in the case as it was developed before us from day to day, I am strongly convinced of the absolute innocence of the accused. My deliberate conclusion is that the endeavour made to establish a connection between this innocent lad and a dastardly crime by means of evidence tainted in a large measure by manifest

untruths and manufactured incidents, has been completely unsuccessful.

Holmwood, J.—I am in entire agreement with the judgment of the Court to which I am a party, and I only wish to add that I am convinced of the absolute innocence of the accused. He was the victim of an unfortunate train of circumstances which made the case at first appear very black against him; but the assiduity of those whose duty it was to investigate the facts, in endeavouring to el borate and clench those circumstances, has served the purpose of clearly demonstrating to my mind that he can have had no hand in the diabolical crime with which he was charged.

V.B./R.K.

Accused acquitted.

A. I. R. 1916 Calcutta 529

COXE AND BEACHCROFT, JJ.

Monindra Mohan Roy Mukhopadhya—Defendant-Respondent—Petitioner.

v.

Ram Krishna Sadhukhan — Plaintiff-Appellant—Opposite Party.

Civil Rule No. 1184 of 1914, decided on 8th February, 1915, against the Judgment of Coxe and Beachcroft, JJ., dated 21st May, 1914, in Second Appeal No. 868 of 1913, reported in 27 I. C. 30.

Evidence Act (1 of 1872), S. 32 (5)—Suit against minor—Minor's aunt as guardian made statement giving date of birth—Statement is admissible under S. 32 (5).

In a suit against a minor, a statement made by the minor's aunt in an application to be appointed his guardian, to the effect that he was born on a particular day is admissible in evidence under S. 32, Clause (5) of the Evidence Act, as it relates to the existence of relationship. 20 Cal. 758, ref. to. 25 Mad. 183, ref.

[P. 529, C. 2 & P. 530, C. 1.]

Samatul Chandra Dutta and *Satis Chandra Mookerjee*—for Petitioner.

Sarat Chandra Roy Choudhury—for Opposite Party.

Coxe, J.—The only question that arises in this review is whether a statement by the defendant's aunt, in an application to be appointed his guardian, to the effect that he was born on the 29th *Pous* 1296, is admissible under S. 32, Clause (5) of the Evidence Act. The District Judge, relying on the decision of *Dhanmull* v. *Ran Chunder Ghose* (1), held that the statement was admissible. In appeal we preferred to follow the decision in *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk* (2) and held that it was inadmissible. The defendant then obtained this Rule to show cause why the decision should not be reviewed and we have now heard both parties again on the point.

On re-consideration, I think that we are bound by authority to hold that the statement is admissible. The application of the minor's aunt has been put in. The second paragraph contains a statement that the defendant was born on the 29th *Pous* 1296, and the ninth recites that the applicant is the defendant's aunt. Speaking for myself I must say that I think it a great straining of simple English words to call the former statement a statement relating to the existence of any relationship. The only way in which the words can answer to this description is by taking them to imply that the relationship existed on the 29th *Pous* and did not exist on the 28th *Pous*, a mode of interpretation that seems to me very far-fetched. But this interpretation of the section is certainly supported by authority. It was accepted in the case of *Ram Chandra Dutt* v. *Jogeswar Narain Deo* (3) and apparently was not questioned when that case was appealed: *Jogeswar Narain Deo* v. *Ramachandra Dutt* (4). It was also accepted in *Oriental Government Security Life Assurance Company Limited* v. *Narasimha Chari* (5). The decision of a single Judge in the case of *Bipin Behary Daw* v. *Sreedan Chunder Dey* (6), cannot weigh against these decisions. If, however, the case rested merely on judicial decisions, I should have some hesitation in treating the words of the section with what seems to me considerable violence, but the terms of Illustration (*e*), which I regret that I overlooked when the appeal was first heard, indicate that the decisions have correctly interpreted the intentions of the Legislature. I think, therefore, that our former decision must be held to be wrong and that the appeal must be dismissed with costs.

Beachcroft, J.— I agree that this review must be allowed. At the first hearing the case of *Ram Chandra Dutt* v. *Jogeswar*

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(1) (1897) 24 Cal. 265.

(2) (1890) 17 Cal. 849.
(3) (1893) 20 Cal. 758.
(4) (1896) 23 Cal. 670=23 I. A. 37 (P.C.).
(5) (1902) 25 Mad. 183.
(6) (1886) 13 Cal. 42.

Narain Deo (3) was not cited, nor was our attention drawn to Illustration (*e*) of S. 32 of the Evidence Act. Under that section a statement of a relevant fact by a deceased person is relevant if the statement relates to the existence of relationship. The line of thought which influenced me at the first hearing was that the statement of the date of birth in Nistarini's application for guardianship was not a statement relating to the existence of relationship. But that statement must be read with the statement in paragraph 9 of the application, and that the two statements when read together are admissible to prove the defendant's age is shown by Illustration (*e*) of S. 32.

V.B./R.K.

Petition allowed.

A. I. R. 1916 Calcutta 530

MOOKERJEE AND RICHARDSON, JJ.

Shaik Galim and *another*—Plaintiffs.

v.

Sadarijan Bibi and *another*—Defendants.

Civil Ref. No. 1 of 1915, decided on 22nd March, 1915 made by Munsif, Iswarganj, dated 4th December, 1914.

(a) Specific Relief Act (1 of 1877), S. 21—Suit for recovery of balance of consideration of mortgage being suit for specific performance does not lie.

A suit by a mortgagor for the recovery of the balance of the mortgage-money not paid to him, being a suit for the specific performance of so much of an agreement as has not already been performed, does not lie. [P. 530, C. 2.]

(b) Provincial Small Cause Courts Act (9 of 1887), Arts. 15 and 16—Suit for recovery of balance of mortgage consideration or rectification of instrument is not cognizable.

Such a suit or a suit for the rectification of the instrument is not cognizable by a Court of Small Causes. [P. 531, C. 1.]

(c) Provincial Small Cause Courts Act (9 of 1887), Arts. 15 and 16—Suit for damages for breach of contract by non-payment of part of consideration of mortgage is cognizable.

It is, however, open in such circumstances to the plaintiff to sue in the Small Cause Court for damages for breach of contract provided the damages are within the pecuniary jurisdiction of the Court. [P. 531, C. 1.]

Order.—This is a reference by the Munsif of Iswarganj in a suit instituted before him as a Small Cause Court suit.

The plaintiffs allege that out of Rs. 150, the nominal consideration for a mortgage by conditional sale in favour of the defendants, the plaintiffs received only Rs. 104. The suit was brought to recover the balance together with interest and Rs. 11 as compensation. When the case came on for hearing, one of the defendants admitted that the plaintiffs had not received the full amount of the consideration but only Rs. 106.

The questions referred by the Munsif are:—

(1) Whether a mortgagor can sue for the recovery of the balance of the mortgage-money not paid to him.

(2) If so, whether such a suit is cognizable by a Court of Small Causes.

In regard to the *first* question it, is clear that the claim to which it refers can only be regarded as a claim for the specific performance of so much of an agreement to lend money as has not already been performed. Authority shows that such a claim is not maintainable.

In *Rogers* v. *Challis* (1) the defendant agreed to borrow the sum of £1,000 from the plaintiff on certain security. The defendant afterwards obtained better terms from a third person and refused to perform his agreement with the plaintiff. The plaintiff asked for specific performance which was refused. The Master of the Rolls (Sir John Romilly) said:

"It certainly is new to me, that this Court has ever entertained jurisdiction in a case where the only personal obligation created is, that one person says, if you will lend me the money I will re-pay it and give you good security, and the terms are settled between them. The Court has said that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation and a Jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action (that is, an action for damages) would or would not lie... ..."

In that case an attempt was made to compel a man to borrow money. In *Sichel* v. *Mosenthal* (2) an attempt, conversely, to compel a man to lend money was equally unsuccessful. The same learned Judge said:—

"It would be quite new to me to hear that this Court could specifically enforce a contract

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(1) (1859) 27 Beav. 175=29 L. J. Ch. 240=54 E. R. 68=7 W. R. 710.

(2) (1862) 30 Beav. 371=31 L. J. Ch. 386=5 L. T. 784=10 W. R. 283=54 E. R. 932.

to lend money, and as to compelling a person to borrow money, according to his agreement, that was the point which I decided in *Rogers* v. *Challis* (1)."

He went on to suggest that the proper remedy was an action for damages.

These cases were cited and approved by the Privy Council in *Larios* v. *Gurety* (3), where the agreement which it was sought to enforce took the form of a conditional sale.

Their Lordships said:

"The parties throughout the negotiation which led up to the contract were stipulating for advances of money on one side, and for security for those advances on the other; the pleadings state and admit an agreement of that nature; and it seems impossible to treat the cause of action in this case as anything more than the breach of a contract to honour the drafts of the respondent to the extent of the amount agreed to be advanced, and placed to his credit. And, upon a full consideration of the arguments and authorities, their Lordships are constrained to admit that the Court of Chancery would not have entertained a suit for the specific performance of such an agreement, but would have left the party aggrieved by the breach of it to seek his remedy, where he would find an adequate remedy, in a Court of Law."

The case of the *South African Territories* v. *Wallington* (4) in the House of Lords is to the same effect.

Upon the principle so exemplified it is clear that the present suit, regarded as a suit for specific performance of the contract between the parties, does not lie. Nor would such a suit or a suit for the rectification of the instrument be cognizable by a Court of Small Causes (Provincial Small Cause Courts Act, 1887, Schedule II, Clause, 15 and 16). Both the question referred must, therefore, be answered in the negative.

On the other hand, it is open to the plaintiff to sue in the Small Cause Court for damages for the breach of contract, provided the damages claimed are within the pecuniary jurisdiction of the Court.

If the plaintiff is prepared to confine himself to a claim for damages within the jurisdiction of the Court to award, he may be given an opportunity to make the necessary amendments in his plaint and the suit may then be proceeded with. Otherwise the plaint should be returned to him.

V.B/R.K.

Reference answered.

(3) (1873) 5 P. C. 346=61 L. J. Ch. 244.
(4) (1898) A. C. 309=67 L. J. Q. B. 470=78 L. T. 426=46 W. R. 545.

A. I. R. 1916 Calcutta 531

N. R. CHATTERJEA AND MULLICK, JJ.

Promotha Nath Chakravarthi—Defendant—Petitioner.

v.

Mohini Mohan Sen—Plaintiff—Opposite Party.

Civil Rule No. 1119 of 1914, decided on 26th February, 1915, against the Order of Munsif, Maldah, Dated 27th July, 1914.

Provincial Insolvency Act (3 of 1907), S. 34—Cash deposited as security for withdrawing attachment berore judgment—Defendant declared insolvent—Plaintiff does not acquire any right in security deposit—Receiver in insolvency entitled to get money.

Where the properties of the defendant, which were attached before judgment, are released on his payment of a cash security and the defendant is subsequently declared insolvent under Act III of 1907, the plaintiff acquires no lien or charge upon the money deposited as security for getting the attachment before judgment withdrawn and the Receiver in insolvency of the defendant's property is entitled to have the money paid to him.

Such money not having been realized in execution of a decree prior to the adjudication order, S. 34 of Act III of 1907 does not apply. [P. 532, C. 1 & 2.]

Gobinda Chandra Dey Rey and *Abani Nath Bhattacharjee*—for Petitioner.

Mohini Mohan Chuckerbutty and *Nishitha Nath Ghatak*—for Opposite Party.

Judgment.—The opposite party in this rule instituted a suit for recovery of money on a *hatchitta* against one Doyachand in the Court of the Munsif of Maldah. He applied for attachment before judgment of certain movable properties of the defendant. The Court directed an attachment, but ordered that the properties were to be released from attachment on the defendant's paying Rs. 500 as cash security. The defendant paid Rs. 500 to the peon who went to attach the properties, which were accordingly released and the money was deposited in Court by the peon.

Subsequently, another creditor of the said Doyachand applied to the District Judge of Murshidabad to have him adjudged an insolvent under the provisions of the Provincial Insolvency Act and the petitioner was appointed *interim* Receiver of his estate. The petitioner thereupon applied to the Munsif of Maldah for payment of the said sum of Rs. 500 to him and for stopping payment of the amount to any rival claimant. The Munsif on the 11th April, 1911 stopped payment of the amount until further orders of the Court.

Doyachand was adjudged an insolvent on the 25th May, 1911 by the District Judge of Murshidabad, and the petitioner was appointed Receiver of his estate under S. 18 of the Provincial Insolvency Act. The petitioner then applied for payment to him of the said sum of Rs. 500. The opposite party obtained a decree in his suit in the Maldah Court on the 20th July, 1914 and he objected to the application of the petitioner.

The learned Munsif held that as the money was realised before the order of adjudication was made, the Receiver had no priority over the opposite party and accordingly ordered the amount to be paid over to the latter. The petitioner thereupon obtained this Rule for setting aside the said order.

We are of opinion that this Rule must be made absolute. The opposite party acquired no lien or charge upon the money deposited as security for getting the attachment before judgment withdrawn. It is contended, however, on behalf of the opposite party that the money was paid to his credit and was in fact a part payment of the debt for the recovery of which he had instituted the suit, provided it was decided in his favour, and that the money having been realised before the order of adjudication was made, the Receiver had no right to the same. This argument is founded upon the fact that in the chalan by which the sum of Rs. 500 was deposited in Court, by the peon, it was stated that it was deposited to the credit of the opposite party. But the order of the Court was that the attachment on the goods was to be removed on the defendant's paying Rs. 500 as cash security. The peon thereupon could not by any statement of his, convert the security to a payment to the credit of the opposite party, specially at a time when the suit was not decided. It is next contended that the Receiver having been added as a party to the suit was precluded from setting up any right as Receiver to the money. But the decree was only for money, and did not create any charge upon the money deposited and although the Receiver was a party to the suit, there was no decision as to the respective rights of the Receiver and the opposite party to the money which was in deposit in Court as security, nor could there be any such decision.

The money not having been realised in execution of a decree prior to the adjudication order, S. 34 of Act III of 1907 does not apply.

We are of opinion that the order of the Munsif directing the money to be paid over to the opposite party, is erroneous. The order is accordingly set aside and the opposite party is directed to refund the money to the petitioner.

The petitioner will get his costs, one gold *mohur*.

V.B./R.K.

Order set aside.

A. I. R. 1916 Calcutta 532

N. R. CHATTERJEA AND MULLICK, JJ.

Rajab Ali Chowdhury — Plaintiff — Appellant.

v.

Hedayet Ali Chowdhury and *others*— Defendants — Respondents.

Appeal No. 127 of 1909, decided on 4th June, 1915, from the Original Decree of Sub-Judge, 1st Court, Chittagong, dated 23rd December, 1908.

(a) Transfer of Property Act (4 of 1882), S. 53— Where fraud is not carried out parties can be relieved.

Where the contemplated fraud has not been effected, a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. Case-law discussed.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected when and when alone does the fraudulent grantor or giver lose his right to claim the aid of the law to recover the property he has parted with.

[P. 537, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 53 —Principle that parties to fraudulent transactions are relieved against if fraud not carried out is effective even if collusive decree is passed.

The principle, that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against his fraudulent confederate so long as the fraud contemplated has not been carried into effect, is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme.

[P. 538, C. 1.]

(c) Decree—Collusive—Collusive decree fraudulently intended to be executed against plaintiff's brother was executed against plaintiff –Plaintiff though cannot set aside the decree is entitled to relief.

Where, therefore, the defendant obtained a collusive decree against the plaintiff promising to execute only against the plaintiff's brother and then sued out execution against the plaintiff himself, on a suit to have it declared void and of no effect:

Held, that even if the plaintiff could not impugn the decree he was entitled to relief having regard to the agreement that it could not be enforced against him. [P. 538, C. 1 & 2.]

Dwarka Nath Chakrabarti and *Dhirendra Lal Kastgir*—for Appellant.

Sarat Chandra Bysack and *Chandra Sekhar Sen*—for Respondents.

Judgment.—The plaintiff and the defendants in the present suit are residents of Chittagong, who were carrying on business at Rangoon. In 1898 the business of the plaintiff and his brother, defendant No. 5, failed and it is alleged that he thereupon under the advice of Nur Ali, the predecessor of defendants Nos. 2 to 4, paid Nur Ali a sum of Rs. 50,000 out of his own pocket for the purpose of settling with the creditors of the joint business. In 1899 the plaintiff and his brother fell out and the latter declined to contribute his share of Rs. 50,000 thus paid by the plaintiff. The plaintiff admits that he thereupon on the 5th June, 1899, at the instigation of Nur Ali executed in favour of Nur Ali a collusive mortgage-bond for Rs. 67,000, in which he gave as security the joint ancestral properties of himself and his brother, signing the bond on behalf of himself and also on behalf of his brother upon the authority of an alleged power-of-attorney. Being subsequently advised that the power-of-attorney had ceased to be operative after the dissolution of the partnership between the plaintiff and his brother and a mortgage-deed executed after such dissolution was not binding upon his brother, the plaintiff again at the instigation of Nur Ali executed a collusive promissory note for Rs. 5,000 in favour of Nur Ali on the 10th June, 1900, on behalf of himself and his brother. In this document also the plaintiff signed for his brother as his duly constituted agent, and his case is that it was intended that Nur Ali should bring a test suit upon the promissory note and in the event of obtaining a decree against both the plaintiff and defendant No. 5, should execute the decree against the defendant No. 5 alone. A suit was next to be brought upon the mortgage-bond and a similar procedure was to be adopted in respect of it in execution. The plaintiff does not deny that his scheme from the outset was to defraud his brother. But all did not go smoothly. The plaintiff returned to Chittagong and was away from Rangoon for nearly three years. It is alleged that during his absence and without any notice to him Nur Ali in 1903 transferred the promissory note to the first defendant, Hedayet Ali. Hedayet Ali then sued upon the note and on the 25th November, 1903, obtained a decree against the plaintiff alone. The decree was subsequently transferred to Chittagong for execution and on the 17th August, 1907, attachment of the plaintiff's immovable property was made in the Chittagong District. The plaintiff thereupon brought the present suit in the Court of the Subordinate Judge at Chittagong on the 6th December, 1907 praying for the following reliefs.

1. That the decree in Suit No. 86 of 1903 of the Chief Court of Lower Burma on the basis of the said on-demand note, which is without consideration and ineffectual, be declared to be collusive, fraudulent and ineffectual and not binding upon the plaintiff and the said decree be declared null and void and incapable of execution against the plaintiff.

2. That an order be made for whatever other relief the Court thinks fit to grant under the circumstances of the case.

Separate written statements were filed on the one hand by defendant No. 1, Hedayet Ali, and on the other by defendants Nos. 2-4 the sons of Nur Ali who have succeeded to his estate upon his death. The Subordinate Judge found in the plaintiff's favour upon the issues relating to jurisdiction and limitation and *res judicata*, but he found against the plaintiff on each of the most important issues which run as follows.

5. Whether the decree in the suit was obtained by fraud as alleged in the plaint?

6. Whether the defendant No. 1 was servant *benamidar* of the deceased Nur Ali Chowdhury?

7. Whether the promissory note on demand on which the decree complained against has been based was executed by the plaintiff under misrepresentation and inducement without consideration as alleged in the plaint?

8. What relief, if any, can the plaintiff get in the suit?

The suit having been dismissed, the plaintiff appeals.

Although the learned Subordinate Judge finds that there was no fraud on the part of Nur Ali, either in execution of the mortgage-deed of the 5th June, 1899 or in the execution of the on-demand promissory note of the 10th June, 1900, orin its subsequent transfer to Hedayet Ali or in the matter of the decree of the 25th November, 1903

obtained in the Chief Court of Lower Burma, he is of opinion that the last finding alone is sufficient for defeating the suit now before us. We think, however, that the plaintiff has succeeded in establishing that he was prevented from making a proper defence to the suit by the fraudulent assurances received from Nur Ali and Hedayat Ali. The learned Subordinate Judge has, in our opinion, refused on inadequate grounds to accept the evidence of the plaintiff and of his witness D'Costa to the effect that Nur Ali in the presence of Hedayet Ali assured the plaintiff that he would take out a decree against the plaintiff and his brother, defendant No. 5, but execute it against the latter only and that relying upon that assurance, the plaintiff went to his home in Chittagong and took no further steps to defend the suit. The plaintiff admits that one Kala Mia, a mutual friend of the parties, attempted to induce Nur Ali to withdraw the suit, that Nur Ali decline to do so and that the plaintiff thereupon filed a written statement alleging undue influence in the matter of the promissory note. This admission is not inconsistent with the plaintiff's allegation that there was a subsequent arrangement between the parties by which Nur Ali agreed to proceed in execution against defendant No. 5 only. The view that there was some such agreement is further supported by an examination of the various transactions between the parties. To begin with we must, in disagreement with the learned Subordinate Judge, hold that mortgage-bond of 1899 was a fraudulent contrivance for cheating defendant No. 5. The partnership between the plaintiff and his brother was dissolved on the 31st July, 1898 by mutual consent and a notice to that effect was duly published in the local official Gazette dated the 25th February, 1899. There is no reason for doubting that after the dissolution the claims against the plaintiff amounted to Rs. 67,000 as set out in the schedule to the mortgage-bond. The plaintiff's case is that out of this sum he paid Rs. 50,000 and Nur Ali paid Rs. 2,500, but that the bond was a wholly collusive affair. It is contended by the defendant that the whole of this sum of Rs. 67,000 was paid by Nur Ali out of his own pocket. Upon the face of it this allegation is untrue, for it appears from the bond that a sum of Rs. 8,000 was not paid by Nur Ali at all, while the plaintiff asserts without contradiction that a cheque for the sum of Rs. 6,500 issued by Nur Ali in plaintiff's favour was subsequently dishonoured. It further appears that at the time when Nur Ali is said to have been making these advances to the plaintiff at an interest of 12 per cent. per annum, he was himself borrowing money at much higher interest and that his liabilities were then certainly not less than Rs. 2,00,000. In our opinion he was not in a position to lend so large a sum as Rs. 67,000 to the plaintiff. It is noticeable that defendants Nos. 2 to 4 do not come forward to depose, nor do they attempt to show either by their account books or by calling any attesting witnesses, that any consideration passed. On the other hand the plaintiff's witness Kalusemam states on oath that on the same day that the bond was executed Nur Ali gave the plaintiff an acknowledgment, in the shape of the letter Exhibit 13, of the payment of Rs. 50,000 by plaintiff. The learned Subordinate Judge has declined to believe Kalusemam and ordinarily we should in appeal be loth to interfere with his finding on a question of the credibility of a witness, but in the present case this witness as well as the witness D'Costa was examined on commission and we in appeal are in as good a position as the learned trial Judge to judge of his veracity. We think that having regard to the witness's present position in life and all the circumstances of the case, his story as to the character of the bond is substantially true. It is to be noticed that no one denies that the signature on the latter purporting to be that of Nur Ali was his.

The plaintiff charged his brother's properties when he had no authority to do so. His object was to realise from his brother a part of the Rs. 50,000 he had paid to Nur Ali. The mortgage-deed was clearly a fraudulent transaction. The same remark applies to the promissory note executed in the following year. The defendants allege that Nur Ali lent Rs. 5,000 on this note to enable plaintiff to pay a creditor named Veerappa Chetty. But Nur Ali was then in no better financial position and the plaintiff story that the promissory note was executed for the purpose of bringing a test case, to be followed up in the event of success by the larger suit upon the mortgage-bond, is true.

The plaintiff's case on this point is supported by his witness Abdul Gani. On the other side we have no evidence whatsoever to prove passing of consideration. Nur Ali's account books would have been very valuable

evidence in behalf of the defence. Moreover, if the schedule to the mortgage-bond is to be believed Verappa Chetty, though a former creditor, was not one of the creditors in June 1899. It appears from Exhibit II that the plaintiff owed Rs. 15,000 to M. T. T. V. Verappa Chetty, which was secured by a mortgage of eleven boats. The plaintiff swears that the debt was satisfied by making over the boats to the creditors and the bond has been produced by the plaintiff in the present case. Did he then again become a creditor subsequently? It is singular that we have no definite evidence upon this point on either side, and we think that the probabilities are that the alleged consideration for the promissory note was a fictitious debt. At that time Rajab Ali had lost all credit and it is not likely that a Chetty would advance a loan of Rs. 5,000 at such a time without any security. We are satisfied that the document was fraudulent, collusive and without consideration. The Court below relies upon a statement of the plaintiff that he offered to renew the promissory note when he proposed to Nur Ali to withdraw the suit, but plaintiff has offered an explanation which may be accepted.

The defendants are in no better position in the matter of assignment of the promissory note by Nur Ali, and here again we must differ from the learned Judge's finding upon a question of fact. Hedayet Ali came to Burma without any money and worked for some years as Nur Ali's servant till apparently by means of a successful marriage, he started business on his own account. He says he paid Nur Ali Rs. 4,500 for the note. For a man of his position this was a large sum to lay out on an obviously bad investment, for from the notification in the *Burma Gazette* he must have known that Rajab Ali and his brother had dissolved partnership long before the execution of the alleged note and that so far as the defendant No. 5 was concerned, it was extremely doubtful whether he was liable for the debt. The plaintiff is supported by his witness Abdul Bari and Abdul Rasul, who state that Nur Ali made a *benami* transfer to Hedayet Ali who was then a fellow-employee in Nur Ali's service. On the other hand Hedayat Ali's brother, Ahmad Mian, and witness Sayanutulla depose to a cash payment of Rs. 4,500 to Nur Ali and Hedayet Ali. But the latter witness is on hostile terms to the plaintiff and the balance of evidence is decidedly in the plaintiff's favour. We have to observe again that the defendants have declined to produce any account books to show the payment or receipt of the alleged consideration. The result is that, in our opinion, the assignment was fraudulent and part of the general scheme to defraud defendant No. 5.

Finally we come to the proceedings in the suit in Rangoon. The bond was executed on the 10th June, 1900. The suit was instituted on the 9th June, 1903 when Rajab Ali was absent at Chittagong. Rajab Ali filed his written statement on the 6th July, 1903 and Faiz Ali filed his on some date in the same month not disclosed in the evidence. The plaintiff's case is that shortly before he filed his written statement, Kala Mian made an unsuccessful attempt to get Nur Ali to withdraw from the suit; that a few days after that he met Nur Ali in Court and was advised by Nur Ali not to contest the suit; that not satisfied with this assurance he on the 11th August, 1903 applied for a commission to examine witnesses; that night or the following night Nur Ali and Hedayet Ali came to his house and assured him that the suit was for his benefit and advised him to leave by the next day's steamer, and that he accordingly did so. It is alleged that the witness D'Costa, whose father had been in plaintiff's service and, his mother were present at this conversation. We think this story substantially true. It is argued that the plaintiff had the full knowledge of the suit and that as he failed to defend it, he alone must be responsible. But the question is whether the plaintiff was deceived by any promise made by Nur Ali and, in our opinion, the reply must be in the affirmative. The plaintiff was induced into the belief that Nur Ali would obtain the decree against the plaintiff and defendant No. 5 but would execute it against the defendant No. 5 alone. It appears that on the 25th November, 1903 the Court, after examining the defendant No. 5, recorded the following order: "Mr. Burjorji, after examining the said defendant, says that he cannot carry the case further against him. There is, therefore, no sufficient evidence on the record to prove what is required, namely, the authority of the second defendant to his brother, the first defendant, to borrow the money sued for. The power of attorney, which the first defendant held from the second defendant, was for the purpose of partnership and this was dissolved in July 1898—two years before the promissory

note in question was signed. The suit must be dismissed as against the second defendant with costs. There will be a decree against the first defendant, who admits execution of the promissory note but has not appeared or offered any evidence on the other issues, the burden of proving which lay upon him.

It may be that it was not Nur Ali's fault that the Court declined to give a decree against the defendant, No. 5 but that does not affect the question whether there was fraud upon the plaintiff, if the plaintiff was in fact induced by Nur Ali not to defend the suit upon the assurance that the decree would be passed jointly against the two defendants but would be executed against the plaintiff's brother alone.

The result is that we are satisfied that the mortgage-bond and the promissory note were executed with the intention of defrauding the defendant No. 5 Faiz Ali; that Nur Ali thereafter turned against his confederate and with the intention of defrauding him assigned the promissory note to Hedayet Ali; and fraudulently caused an *ex parte* decree to be obtained thereupon. We understand that a suit has been instituted upon the mortgage-bond for Rs. 67,000. The question whether the bond is a real or fictitious transaction does not directly arise in the present case. It arises incidentally and we desire to make it clear that our finding so far as that bond is concerned is based solely on the evidence before us and is necessarily incidental.

The decree being a fraudulent one, the question is, has the plaintiff any remedy? Is the plaintiff debarred from relief, because he was a party to a scheme for defrauding his brother, although as a matter of fact the brother was not defrauded?

Now it is well-established that where the contemplated fraud has not been effected, a party to a fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. It is unnecessary to discuss the authorities upon the point, as the question has been finally set at rest by the Judicial Committee in the case of *Petherperumal Chetty* v. *Muniandy Servai* (1). In that case a *benami* deed of sale was executed in order to defeat the claim of an equitable mortgagee, but his claim was not defeated and the Judicial Committee observed:—

"The plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put every one, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers* (2), and the authorities upon which that decision is based, clearly establish this. *Symes* v. *Hughes* (3) and *In re Great Berlin Steamboat Company* (4) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L. J., in *Kearley* v. *Thomson* (5)."

It is contended, however, on behalf of the respondent that the transaction in that case rested merely upon the conveyance and that the principle enunciated in that case is inapplicable where, as in the present case, the original relations of the parties had merged in a decree of the Court. It is urged that a party to a collusive decree is bound by it and reliance is placed upon the cases of *Chenvirappa* v. *Puttappa* (6) and *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (7), quoting *Prudham* v. *Phillips* (8), *Venkataramanna* v. *Viramma* (9), *Rangammal* v. *Venkatachari* (10) and *Varadarajulu Naidu* v. *Srinivasulu Naidu* (11). In the last two cases, the fraud had been partially carried out, and those cases, therefore, need not be considered. In the first three, however, the fraud contemplated does not appear to have been effected.

On the other hand, the Allahabad High Court in *Param Singh* v. *Lalji Mal* (12) held that the plaintiff in that case was entitled to recover possession of properties in respect of which he had executed a fictitious deed of conditional sale, in order to protect the properties from the claims of his

(1) (1908) 35 Cal. 551=35 I. A. 98 (P.C.).

(2) (1876) 46 L. J. Q. B. 39=1 Q. B. D. 291=34 L. T. 938.
(3) (1870) 9 Eq. 475=39 L. J. Ch. 304=22 L. T. 462.
(4) (1885) 26 Ch. D. 616=54 L. J. Ch. 68=51 L. T. 445.
(5) (1890) 59 L. J. Q. B. 288=24 Q. B. D. 742=38 W. R. 614=54 J. P. 804.
(6) (1887) 11 Bom. 708.
(7) (1881-82) 6 Bom. 703.
(8) 2 Amb. 763=27 E. R. 490.
(9) (1887) 10 Mad. 17.
(10) (1895) 18 Mad. 378
(11) (1897) 20 Mad. 333.
(12) (1875-78) 1 All. 403.

son, and had suffered judgment to go by default in a suit for foreclosure upon the deed, on the defendant undertaking that the decree would not be executed and if executed, the property would be restored to him. The learned Judges were of opinion that the plaintiff was not estopped by the decree, and that even if it were held that the plaintiff was bound by the decree, he was entitled to insist upon the agreement and on the strength of it to recover possession from the defendant. The case was not followed by the Bombay High Court in *Chenvirappa* v. *Puttappa* (6). But the Bombay case, as well as some of the Madras cases cited above, were considered by this Court in the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (13), and the learned Judges declined to follow those cases, if they laid down anything inconsistent with the decisions of this Court. In the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (13) there was no decree passed upon the conveyance, and the question of the effect of a collusive decree upon one of the parties to it does not appear to have been considered in that case. In a later case, however, *Akhil Prodhan* v. *Manmatha Nath Kar* (14), the Court relieved the plaintiff from the effect of a collusive *ex parte* decree. The facts of that case are given in the head-note, and are as follows: —

"In 1898, a tenant executed a fictitious conveyance of his land in favour of *A*, with a view to protect himself from invasion of his rights by his landlords. In 1899 he, to protect himself from *A*, who proved unfaithful, induced his landlords to institute a fictitious suit for rent. That suit was decreed on the 7th November, 1899. The landlords took out execution of that decree. *A* thereupon preferred a claim which was disallowed on the 20th January, 1900. The decree was subsequently executed, and at the sale which followed, the landlords purchased the holding on the 19th March, 1900 and possession was delivered on the 5th June, 1900. On the 10th April, 1900, *A* sued the tenant and the landlords for declaration of his title on the basis of his conveyance; but on the 23rd July, 1900 this suit was withdrawn. In 1906 the landlords turned against the tenant and with the help of the Police took away by force the crops raised by him. On the 15th March, 1907 the tenant commenced the present suit for declaration that the entire proceedings in the rent suit of 1899 were fictitious and that the landlords did not acquire any title on the basis of their purchase at the execution sale. The plaintiff also alleged that the landlords-defendants agreed to execute a release and in the prayer clause of the plaint he asked for a decree for execution of such release by the landlords."

It was held that as the conveyance in favour of *A* was a fictitious document, *A* had no real title to the property and was not defrauded: that the case thus falls within the principle of the decision of this Court in *Jadu Nath Poddar* v. *Rup Lal Poddar* (13) and the Judicial Committee in *Petherpermal Chetty* v. *Muniandy Servai* (1), namely, that to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. The plaintiff is consequently not disentitled to protection in a Court of Equity. It was declared that the rent suit and all proceedings based thereon were fictitious and had not affected the plaintiff's title and the plaintiff's possession was confirmed. The two cases referred to in the judgment, *viz.*, *Jadu Nath Poddar* v. *Rup Lal Poddar* (13) and *Petherpermal Chetty* v. *Muniandy Servai* (1), were both cases in which the plaintiff sought to be relieved from the effect of a fraudulent conveyance and not cases where a decree of Court had been passed upon it. Apparently, therefore, in the opinion of the learned Judges in the case of *Akhil Prodhan* v. *Manmatha Nath Kar* (14), the question whether a party to a fraudulent transaction is entitled to protection in a Court of Equity depends upon whether the fraud has been carried out, irrespective of the question whether a collusive decree has been passed between the parties. The learned Judges in dealing with the contention whether S. 317 of the Civil Procedure Code barred the suit, which was overruled by them on the ground that a fictitious decree was passed in a fictitious suit and that the sale held in execution of that decree was equally fictitious, referred to the observations of Lord Brougham in *Bandon* v. *Beecher* (15): "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these qualities not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a

(13) (1906) 33 Cal. 967.
(14) (1914) 22 I. C. 86.

(15) 3 Cl. and F. 479=9 Bligh (N. S.) 532=6 E. R. 1517.

person invested with the ensigns of a Judicial Office is misemployed in listening to a fictitious cause proposed to him : there is no party litigating, there is no party defendant no real interest brought into question." It is true that these observations were made in a case where the person who impugned the decree was not a party to it. But he was a tenant in remainder and was treated in argument in that case as having been represented by the parties to the former suit, and the observations were relied upon in the case of *Akhil Prodhan* v. *Manmatha Nath Kar* (14) as showing the nature of a fictitious and collusive suit.

We agree with the decision in the case of *Akhil Prodhan* v. *Manmatha Nath Kar* (14) and *Param Singh* v. *Lalji Mal* (12). We think that the principle that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against his fraudulent confederate so long as the fraud contemplated has not been carried into effect, is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme.

But even if the decree cannot be impugned by the plaintiff, we think that having regard to the agreement that it would not be enforced against the plaintiff, the latter is entitled to relief. The Bombay High Court in the case of *Chenvirappa* v. *Puttappa* (6) is of opinion that such an agreement should be pleaded in the first suit and cannot be made the basis or support of a separate subsequent suit by the defendant in the earlier case. But we agree with the view taken by the Allahabad Court that the agreement bound the plaintiff in the first suit not to execute his decree and that the question whether it barred execution could not have been determined in that former suit and, therefore, the then defendant (the present plaintiff) is not estopped by the decree and is entitled to have it declared that the decree is incapable of execution.

There is no prayer for injunction but we can grant that relief under the prayer for general relief, if it were necessary to grant relief by way of injunction. We are of opinion however that it is unnecessary to do so, and it would be sufficient to declare, having regard to the agreement not to execute the decree, that it cannot be executed, a declaration expressly prayed for by the plaintiff.

It is true that a Court of Justice will not interpose actively in favour of a party who is *particeps criminis* to an illegal or fraudulent transaction but will leave him to the consequences of his own inequity. But here it is the defendant who by applying for executing the fictitious decree sought the assistance of the Court actively in his favour, and the plaintiff thereupon sought the assistance of the Court to prevent the decree being put into execution.

The result is that the decree of the Court below is set aside and the *ex parte* decree, dated the 25th November, 1903, obtained by the defendant is declared incapable of execution. But having regard to the circumstances of the case, each party will bear its own costs in both Courts.

V.B./R.K.

Decree set aside.

A. I. R. 1916 Calcutta 538

CHITTY AND BEACHCROFT, JJ.

Nilmoney Nag and *another*—Accused—Petitioners.

v.

Durga Pado Banerjee—Complainant—Opposite Party.

Criminal Revn. Nos. 501 and 505 of 1915, decided on 20th May, 1915.

Indian Penal Code (45 of 1860), Ss. 28, 478 and 486—For purpose of S. 478 whole design must be considered and not only the one registered—Where intention is to deceive and case is not covered by exception, it is counterfeit within S. 28.

The expression "trade-mark," as defined in S. 478, Indian Penal Code, must not be confined to the trade-mark of the complainant as registered but must include the whole design.

Where the express intention is to deceive and the petitioners have failed to bring themselves within the exception to S. 486, the case clearly comes within the definition of "counterfeit" in S. 28, Indian Penal Code. [P. 540, C. 1.]

Manmatha Nath Mukherjee and *Bibhuti Bhusan Saha*—for Petitioners.

Gregory and *Tarakeswar Pal Chowdhury*—for Opposite Party.

Facts of the case appear from the following judgment of the 4th Presidency Magistrate of Calcutta, dated the 26th February, 1915 :—

The complaint in this case was lodged by Durga Pado Banerjee, a clerk in the Office of Morgan & Co., under instructions from Mr. Mitchel, one of the Solicitors of the firm. Mr. Mitchel derives his authority to prosecute on behalf of Messrs. Calvert & Co. from a Power of Attorney sent to

Morgan & Co. for the purpose of this case by Mr. Ross, who holds the head Power of Attorney from Calvert & Co. at Bombay. This Power of Attorney has been marked as Exhibit I in this case. The facts of the case are shortly these. F. C. Calvert & Co. have been selling carbolic tooth powder in tin boxes like Exhibit I since a long time in India and their boxes have a very large sale. Accused Jatindra Mohan has been selling carbolic tooth powder in boxes of similar size and design with the name of Paul & Co. in Calcutta. At Bombay his agent, Mukadam, was prosecuted and convicted for infringement of trade-mark under S. 486, Indian Penal Code, in 1913. The matter went up on appeal before the Bombay High Court and the Judges there upheld the conviction *vide* (Exhibits 2 and 3) in this case. After that on 14th February, 1914, Mr. Mitchel sent for accused Jatindra Mohan and told him about the prosecution of his agent in Bombay and asked the accused to return all the boxes to him. Accused gave a half hearted undertaking to give up all the boxes in his possession. Thereafter, some correspondence passed between the parties, accused virtually agreeing to dispose of the boxes with the letters obliterated. As a matter of fact the boxes were not delivered. So, Mr. Mitchel sent his clerk, Durga Pado, to purchase Paul & Co.'s tooth powder. In April he purchased six boxes and on 3rd August, 1914 three boxes, marked Exhibits II and III in this case, from the shop of the 2nd and 3rd accused where these boxes were for sale. The prosecution is confined to the three boxes sold on 3rd August, 1914. Amongst these boxes, was one box with the label of Mukadam at the foot. This has been separately marked as Exhibit III. This Mukadam was Paul & Co.'s agent at Bombay and was convicted there. The question now is whether Paul & Co.'s boxes are counterfeit trade-marks of F. C. Calvert & Co.'s Mr. Mitchel on behalf of Calvert & Co., claims the whole of the shape, size, design, colouring and lettering on the boxes as Calvert & Co.'s trade-mark and I think that he is right in so doing. A comparison between the genuine box of Calvert & Co. with Paul & Co.'s boxes would show that the general get-up, the size, the design, the lettering, the colour of the back-grounds, the lettering on the starting portion of the two boxes closely resemble each other and the resemblance is such that one is likely to be mistaken for the other. In my opinion, it is no defence to say that the name Paul & Co., is different, that in Paul & Co.'s boxes the word "*Dantina*" occurs and that the cross mark in a circle which exists in Calvert's boxes does not exist in Paul & Co.'s boxes. With slight difference, the resemblance is so great that one is apt to be mistaken for the other and that I think is the gist of the offence. Jatindra Mohan was asked to give up the boxes and though he gave a half-hearted undertaking and was told of the conviction of his agent at Bombay, he did not give up the boxes. It appears that the boxes of Paul & Co. continued to be sold in Calcutta and were sold in April and August in the shop of the 2nd and the 3rd accused. There is no evidence that Jatindra continued to manufacture after he was warned and so I acquit him of the charge, S. 483, Indian Penal Code But taking all the circumstances into consideration, there can be no doubt that he abetted the sale of these boxes. It has been proved that these were sold at the shop of the 2nd and 3rd accused. The 2nd accused was not present at any of the sales and so I acquit him, S. 258, Civil Procedure Code. As regards Nilmoney, he sold the boxes and it is for him to show that he did so innocently. He has not disclosed that onus and I find him guilty, S. 486, Indian Penal Code, and sentence him to pay a fine of Rs. 100 (one hundred) or in default two months' simple imprisonment. I find accused Jatindra Mohan Paul guilty, S. 486/109, Indian Penal Code, and as he is the principal man, I sentence him to pay a fine of Rs. 150 or in default three months' simple imprisonment. On the side of the defence, several other boxes of other manufacturers were produced as sold in the market. But there is nothing to show that Calvert & Co. or their agents ever acquiesced in that, nor it appears to me a good defence to say that others have infringed complainants' trade-mark.

Judgment.—These are two Rules issued at the instance of the two accused, Jatindra Mohan Pal and Nilmoney Nag, on the ground that the facts found do not constitute an offence under S. 486, Indian Penal Code. Nilmoney Nag was charged with selling goods bearing a counterfeit trade-mark and Jatindra Mohan Pal was charged with abetment of the offence. The matter has been fully argued before us, and we are of opinion that the petitioner's acts bring them within the purview of S. 486 The trade-mark said to be counterfeited is

that of F. C. Calvert & Co., manufacturers of carbolic tooth powder. The expression "trade-mark" as defined in S. 478 must not be confined to the trade-mark of the complainants registered in England, but must include the whole design on the top of the box and the black label pasted round the side. For the name F. C. Calvert has been substituted the name of Paul, and for the registered trade-mark, which consists of four arrows in a circle, has been substituted the word "*Dantina.*" But apart from these two points of difference the imitation of the whole design is most marked and complete. It clearly comes within the definition of "counterfeit" in S. 28. There is no doubt that the intention was to deceive and the petitioners have failed to bring themselves within the exceptions in S. 486. The same view seems to have been taken by the Bombay High Court. The Rules are discharged.

V.B./R.K.

Rules discharged.

A. I. R. 1916 Calcutta 540

SHARFUDDIN AND COXE, JJ.

Rameshwar Singh — Decree-holder — Appellant.

v.

Bheekdhari Singh and *others*—Applicants Respondents.

Appeals Nos. 208 and 308 of 1911 and 530 of 1912, decided on 5th February, 1915, from the Orders of Sub-Judge, Darbhanga, dated 22nd February, 1911 and 13th July, 1912.

Civil P. C. (5 of 1908), O. 40, R. 1—Receiver of judgment-debtor's property advertised for sale, on ground that he will be poor if sold, cannot be appointed.

The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for the appointment of a Receiver of his properties advertised for sale as in all cases in which a judgment-debtor's property is advertised for sale, he is liable to become poor.

An appointment of a Receiver in such a case is not just and convenient within the meaning of O. 40, R. 1, Civil Procedure Code.

[P. 540, C. 2.]

Judgment.

In A. No. 208 of 1911.

Sharfuddin, J.—This an appeal against an order of the Subordinate Judge of Darbhanga, passed on an application under O. 40, R. 1, Civil Procedure Code. The Maharaja of Darbhanga is the decree-holder and the respondents are the judgment-debtors.

A preliminary objection was taken to the maintainability of the present appeal, on the ground that the order appealed against was really not an order for the appointment of a Receiver but one granting an application for such an appointment. Reference was made to an order in the order-sheet, dated 22nd February, 1911, which is to this effect:

"judgment delivered, application for appointment of a Receiver is allowed. Case disposed of"

and this is followed by the order dated 10th March, 1911, which runs as follows:

"Babu Ram Nihara Singh is appointed Receiver."

The reply was that the order of the 22nd February, was an order for the appointment of a Receiver and reference was made to O. 43, R. 1, Clause (*s*).

We are of opinion that the appeal is in substance an appeal against the appointment of a Receiver and is maintainable.

The only ground on which the order was made was a ground not warranted by law. The judgment runs:

"It is true there have been law suits between these parties for the last 5 or 6 years, but it has not been shown that these Babus are always in the wrong or ever committed any act of bad faith. The decree-holder, Maharaj, opposes this application and wants to sell even the houses in which his relatives (judgment-debtors) live immediately and would not agree even to a postponement of the sale. It is apparent that if the properties of the judgment-debtors are sold, there will be no other purchaser besides the Maharaj and it is apprehended with some show of reason that these properties will not fetch a proper price at the sale. Regard being had to this fact and to the fact that the Babus who are up to this time very respectable persons would be reduced to poverty if the properties are allowed to be sold, I am of opinion that it is just and convenient that a Receiver of all their properties be appointed."

This is no ground for the appointment of a Receiver and all the necessary elements for that purpose are wanting in this case. In all cases in which a judgment-debtor's property is advertised for sale, he is liable to become poor which can scarcely be a ground for the appointment of a Receiver. The rule on that point is laid down in O. 40, R. 1, and we do not see how the appointment can be considered just and convenient in the present case.

We, therefore, set aside the order and decree the appeal with costs of both Courts. We assess the hearing-fee at two gold *mohurs*.

In A. No. 308 of 1911.—This appeal is governed by the above judgment.

In A. No. 530 of 1912.—In consequence of the decision of appeals Nos. 208 and 308, this appeal no longer requires decision. It is dismissed without costs.

Coxe, J.—I agree.

V.B./R.K.

Appeals Nos. 208 & 308 *decreed* ;
Appeal No. 530 *dismissed.*

A. I. R. 1916 Calcutta 541

FLETCHER AND RICHARDSON, JJ.

Krishna Bar—Defendant—Appellant.

v.

Ranamoyi Debi—Plaintiff—Respondent.

Review in Appeal No. 2381 of 1912, decided on 10th March, 1915, from the Appellate Decree of Sub-Judge, 1st Court, Midnapore, dated 7th May, 1912.

Civil P.C., (5 of 1908), O. 34, R. 5—Application for final decree is application in execution and Art. 181, Limitation Act applies.

An application for an order absolute for sale in a mortgage-suit is a proceeding in execution and must be made within the time prescribed by the Limitation Act. Case-law discussed.

[P. 542, C. 2.]

Jyotish Chandra Hazra—for Appellant.

Brojo Lal Chakravarti—for Respondent.

Facts of the case appear fully from the following judgment of Fletcher and Richardson, JJ., dated the 26th May, 1914, under review :

Fletcher, J.—The only point that calls for our decision in this appeal is whether an application for an order absolute for sale of a decree *nisi*, dated the 28th of September, 1898, is barred by limitation.

The actual date of the application of the order absolute for sale does not appear from the paper-book, but it is admitted that the application was made after the Code of Civil Procedure, 1908, came into operation.

The Code of Civil Procedure, 1908, repealed Ss. 85 to 90 of the Transfer of Property Act, 1882, and in lieu thereof enacted the provisions contained in O. 34 in the first Schedule to the Code with reference to suits relating to mortgages on immovable property.

Prior to the Code of 1908 it had been established by the decisions of this Court that there was no period of limitation within which a plaintiff was bound to apply for the order absolute for sale in a suit brought for sale of the mortgaged property. Thus in the case of *Tiluck Singh* v. *Parsotein Proshad* (1) Prinsep and Ghose, JJ., decided that an application under S. 89 of the Transfer of Property Act, 1882, to have a mortgage-decree for sale made absolute was not governed by Article 178 of the Indian Limitation Act, 1877, and that the Article was limited to applications under the Code of Civil Procedure. The learned Judges towards the close of their judgment made the following remarks : " We may further observe that no final order for sale having been passed, the suit may properly be regarded as being still pending." Article 181 of the Limitation Act of 1908 is in identically the same terms as Article 178 of the Act of 1877.

The question for our decision depends on whether the provisions of O. 34 of the first Schedule to the Code of Civil Procedure, 1908, apply so as to take away a vested, right which the plaintiff had, of applying to have the decree for sale made absolute.

The Allahabad High Court has laid down in the case of *Konsilla* v. *Ishri Singh* (2) that the effect of the Code of Civil Procedure, 1908, did not take away the vested right that a party had to apply to have his decree for sale made absolute.

A contrary view was taken by the Bombay High Court in the case of *Datto Atmaram Hasabins* v. *Shankar Dattatraya* (3).

But with all respect to the learned Judges who decided that case, it seems to me that they founded their judgment on a misreading of the judgment of Jenkins, C. J., in the case of *Amolak Chand Parak* v. *Sharat Chundra Mukerjee* (4).

Moreover, we have the recent decision of a Special Bench of this Court in the case of *Gopeshwar Pal* v. *Jiban Chandra* (5), which laid down that a right of suit is a vested right and that it is an established axiom of construction that though procedure may be regulated by the Act for the time being in force still the intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature unless it be expressed in unequivocal terms.

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(1) (1895) 22 Cal. 924.

(2) (1910) 32 All. 499=6 I. C. 188.

(3) A. I. R. (1914) Bom. 263=21 I. C. 318=38 Bom. 32.

(4) (1911) 38 Cal. 913=11 I. C. 943.

(5) A. I. R. (1914) Cal. 806=24 I. C. 37=41 Cal. 1125.

Applying those principles to the case before us I think the learned Judge in the lower Appellate Court came to a correct decision.

The present appeal, therefore, fails and ought to be dismissed with costs.

Richardson, J.—I agree.

Fletcher, J.—This is a Rule obtained by the defendant-appellant calling on the plaintiff-respondent to show cause why a review of judgment should not be granted. The only question involved in the appeal was, whether an application for an order absolute for sale of a decree in a mortgage suit, dated the 28th of September, 1898, was barred by limitation. Following the decisions of this Court on appeals from Courts subordinate thereto we held, as we were bound to hold, that no period of limitation applied to such an application and that the Code of Civil Procedure, 1908, had not taken away any vested right that the plaintiff had. On the original side of the Court a different view has been taken, namely, that an application for an order absolute for sale in a mortgage suit is a proceeding in execution and must be made within the time prescribed by the Indian Limitation Act: *Amolak Chand Parak* v. *Sharat Chunder Mukerjee* (4). After our decision in the present case the learned Vakil for the defendant appeared and called our attention to two decisions of the Privy Council published since the date of our judgment. These two decisions are *Batuk Nath* v. *Munni Dei* (6) and *Abdul Majid* v. *Jawahir Lal* (7). In both of these cases the Privy Council had expressed an opinion contrary to the view we expressed in our judgment. We, therefore, issued the present Rule.

I think the present Rule must be made absolute. The present case is covered by the two decisions of the Privy Council that I have cited above. Moreover the case of *Munna Lal Parrack* v. *Sarat Chander Mukerjee* (8) has been on appeal to the Privy Council and the decision of this Court has been affirmed. See *Raja Narendra Lal Khan* v. *Jogi Hari* (9). That being so, the present Rule must be made absolute. The appeal of the defendant must be allowed and the judgment of the Subordinate Judge set aside and that of the Munsif restored. The plaintiff must pay to the defendant his costs in this Court and the Courts below including the costs of this Rule, the hearing fee in the Rule being one gold *mohur*.

Richardson, J.—I agree.

V. B./R. K.

Rule made absolute.

(6) A. I. R. (1914) P. C. 65=23 I. C. 644=36 All. 284 (P. C.).

(7) A. I. R. (1914) P. C. 66=23 I. C. 649=36 All. 350 (P. C.).

(8) A. I. R. (1914) P. C. 150=27 I. C. 683.

(9) (1905) 32 Cal. 1107.

A. I. R. 1916 Calcutta 542

CHAUDHURI, J.

Kunja Lal Banerji —Plaintiff.

v.

Narsamba Debi and *another*—Defendants.

Original Civil Suit No. 1039 of 1910, decided on 15th February, 1915.

(a) Interest— Mortgage — Hindus— Calcutta High Court disallows interest larger than amount of principal.

In the Calcutta High Court, the uniform rule has been to disallow as between Hindus interest larger than the amount of principal in making up a mortgage account. [P. 543, C. 1.]

(b) Interest—Rule of *damdupat*—Rule applies to mortgages—Transfer of Property Act (1882).

The rule of *damdupat* is applicable to mortgages under the Transfer of Property Act.

[P. 543, C. 1.]

C. C. Ghose—for Plaintiff.

Judgment.—This matter arises upon a contention raised on behalf of the plaintiff that the rule of *damdupat* does not apply to mortgages under the Transfer of Property Act. There was a reference for accounts upon a mortgage decree in this suit in the usual course. Accounts have been taken and the Official Referee has made his report, disallowing interest exceeding the amount of principal applying the rule of *Damdupat*. It was contended before me on the strength of *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1) that the rule of *Damdupat* does not apply. The question has not so far come up for decision in this Court. In *In the matter of Hari Lall Mullick* (2), the point was raised but not decided. It was held in that case that an order admitting a creditor's claim was tantamount to a decree, and as such put an end to the contractual relationship between the parties. The very same principle has been acted upon in the case of *Nanda Lal Roy*

(1) (1903) 26 Mad. 662.

(2) (1906) 33 Cal. 1269.

v. *Dhirendra Nath Chakravarti* (3). In the Bombay case of *Jeevanbai* v *Manordas Lachmandas* (4), the learned Judge held that the rule of *damdupat* was applicable. I find, however, that in that case 26 Madras was not cited. The current of decisions in the Bombay Court has been that the rule of *Damdupat* does apply: see the case of *Sundarabai* v. *Jayavant Bhikaji Nadgowda* (5).

In this Court the uniform rule, so far as I know, has been to disallow as between Hindus interest larger than the amount of principal in making up a mortgage account. As a Court of first instance I am not prepared to follow, under the circumstances, the Madras case of *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1). It seems to me that in that case the learned Judges have overlooked the provision of S. 4 of the Transfer of Property Act, taken with S. 37 of the Contract Act. It is conceded in the Madras case that in the Contract Act provision has been made for the application of the rule of *damdupat*. S. 4 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contract shall be taken as part of the Contract Act. I, therefore, confirm the report made by the Referee and disallow the contention raised.

V.B./R.K.

(3) (1913) 40 Cal. 710=21 I. C. 974.
(4) (1911) 35 Bom. 199=8 I. C. 649.
(5) (1900) 24 Bom. 114.

A. I. R. 1916 Calcutta 543

MOOKERJEE, J.

In the goods of G. A. Quiningborough.

Civil Ref. under S. 5 of the Court Fees Act, decided on 19th July, 1915.

Court Fees Act (7 of 1870), Sch. 1, Art. 11—'Amount of value of property' for purpose of Art. 11 what is is stated.

For the purpose of Article 11 of the first Schedule to the Court Fees Act, the expression "the amount or value of the property" signifies what is described as the net total in Annexure A in Schedule 3, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the movable and immovable property left by the deceased.

[P. 545, C. 2.]

J. E. Bagram—for the Administrator-General.

Letter of Reference of the Taxing Officer.

"This is an application by the Administrator-General of Bengal for Letters of Administration as in case of intestacy.

The applicant being the Administrator-General no affidavit of valuation, such as is required in the case of an ordinary applicant by S. 19 (1) of the Court Fees Act, has been filed, but in his petition the Administrator-General has, in accordance with the practice, set out a list (Annexure A) of the assets of the estates and also a list (Annexure B) of the items not subject to duty.

From this it appears that the gross value of the estate as shown in Annexure A is over Rs. 1,000, *viz.*, Rs. 1,244-11-0, the value of the items in Annexure B being Rs. 522. The net value of the assets, therefore, is below Rs. 1,000, *viz.*, Rs. 722-11-0.

In paragraph 7 of this petition the Administrator-General submits that as the net assets of the estate are under Rs. 1,000 in value no duty is payable, and I have been asked as Taxing Officer to grant a certificate that no duty is payable, or in the event of my being of opinion that I cannot do that, to refer the point under S. 5 of the Court Fees Act to the final decision of the Chief Justice.

A similar question came up before the Board of Revenue in 1904, who referred the matter to the then Advocate-General, Mr. O'Kinealy, for opinion. That officer was of opinion that in such cases duty was payable notwithstanding the fact that the deduction of the debts brought the value of the estate below Rs. 1,000. Thereafter the practice of the Court was in cases of this kind to charge duty upon the net value of the estate.

In 1913—*In the goods of Harriett Teviot Kerr* (1)—a question arose as to the rate of, and the proper method of calculating, the duty in an estate the gross value of which was Rs. 2,17,800 odd, the net value, after deduction of the items in Annexure B, being Rs. 18,000 only. The question arose in the course of correspondence between me as Registrar and the Collector of Stamp Revenue. I then submitted the correspondence with a note to Mr. Justice Fletcher, and as his Lordship was of opinion that Mr. O'Kinealy's opinion above referred to was wrong, the Collector was informed that in future we should follow what had been our practice of deducting the amount of Annexure B from the amount of Annexure A and taking duty only on the difference when, and at the rate, payable on such difference—and that we should do this even in estates where the gross value was over, and the net under, Rs. 1,000.

The Collector subsequently drew attention to the then recent case of *Collector of Maldah* v. *Nirode Kamini Debya* (2) which was a case in which the gross value was Rs. 1985, the net value under Rs. 1,000 and it was there held that duty was payable.

No question, however, arose in that case as to the rate at which duty was to be charged on the net value, and as that was the principal point in *Harriett Teviot Kerr's* case (1), I, at the request of the applicant, referred it under S. 5 of the Court Fees Act.

His Lordship, the Chief Justice, appointed Mr. Justice Mookerjee to hear the reference. His Lordship's decision will be found in *In the goods of Harriett Teviot Kerr* (1). When referring to the case of *Collector of Maldah* v. *Nirode Kamini Debya* (2) his Lordship on page 507

(1) A. I. R. (1914) Cal. 40=21 I. C. 502.
(2) (1912) 15 I. C. 621.

said :—" It is not necessary to decide on the present occasion whether this view (*i.e.*, that an estate is not exempted from duty in a case where the gross value is over Rs. 1,000, and the net value under) is well founded. I reserve my opinion upon this matter with the remark that when it arises again it may require re-examination and further consideration." The point has come up on several occasions since then, and the office, considering itself bound by the ruling in *Collector of Maldah* v. *Nirode Kamini Debya* (2), has taken duty—the parties not having cared to take the matter further, the estate being so small.

In the present case, however, the Administrator-General, having regard to the judgment of Mr. Justice Mookerjee in *Harri tt Teviot Keri's* case (1) and to the fact that since that ruling the Revenue Authorities have been refunding to him duty paid by him in cases where the net value of the assets was under Rs. 1,000, desires to be heard on the point and obtain a final decision. As the point in question is one of general importance, I, at the request of Messrs. Leslie & Hinds, Attorneys for the Administrator-General, refer it under S. 5 of the Act to the final decision of His Lordship, the Chief Justice."

Judgment.—This is a reference under S. 5 of the Court Fees Act, 1870, made by the Taxing Officer on the original side of this Court. The circumstances under which the reference has been made are lucidly stated in the order of reference and need only be narrated here very concisely.

An application has been made by the Administrator-General for Letters of Administration in respect of the estate of G. A. Quiningborough as in a case of intestacy. As the application has been made by the Administrator-General, no affidavit of valuation, such as is required in the case of an ordinary application under S. 19-H of the Court Fees Act, has been filed. But, in accordance with established practice, the Administrator-General has set out in his petition a list of the estate, and in another list the debts payable out of the estate. The value of the estate in the first list is given as Rs. 1,244 11-0, and the amount of the debts in the second list at Rs. 522, leaving a balance of Rs. 722-11-0. The question for determination is, whether the fee mentioned in Article 11 of the first Schedule to the Court Fees Act is payable in respect of the estate left by the deceased.

Article 11 of the first Schedule to the Court Fees Act provides for the payment of a fee on a Probate of a Will or Letters of Administration, with or without Will annexed, when the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds Rs. 1,000. The question thus arises as to the true import of the expression "amount or value of the property in respect of which the grant of Probate or Letters is made" does it mean the gross value of the property or does it signify the net value obtained by the deduction of the debts and expenses from the gross value. Sir Richard Couch, C. J., held in the case of *In the goods of Ram Chunder Doss* (3) that in estimating the amount of the *ad valorem* fee chargeable under Article 11 of the first Schedule to the Court Fees Act, the fees must be paid in respect of the property without deducting the amount of the debts to be paid out of it. It cannot be reasonably disputed, I think, that this is a possible interpretation of Article 11 taken by itself. But since this decision was given in 1872, the Court Fees Act has been twice amended, *first*, by Act XI of 1899, and, *next*, by Act VII of 1910. In my opinion, a substantial alteration in the law has been effected by these amendments and Article 11 must now be interpreted in the light of S. 19 I, which was inserted in the Court Fees Act by S. 2 of Act XI of 1899. Sub-S. 1 of S. 19, I requires the applicant for Probate or Letters of Administration to file in this Court a valuation of the property in the form set forth in the third Schedule and to pay on such valuation the fee mentioned in Article 11. When we turn to the third Schedule, we find that the petitioner is required to state in the prescribed Form of Valuation that he has truly set forth in Annexure B all the items which he is by law allowed to deduct. Annexure A is a statement of the valuation of the movable and immovable properties of the deceased. On the face of the Form of Valuation, it is thus patent that the petitioner is required to state the value of the property and is allowed to deduct the amount shown in Annexure B as not subject to duty. When we turn to Annexure B we find that it is headed "Schedule of debts, etc"; then follow five different items, as to each of which a statement of value has to be made. These are as follows: (1) amount of debts due and owing from the deceased, payable by

(3) (1872) 18 W. R. 153=9 B. L. R. 30.

law out of the estate; (2) amount of funeral expenses; (3) amount of mortgage encumbrances; (4) property held in trust not beneficially or with a general power to confer a beneficial interest; (5) *other property not subject to duty*. Three positions are now perfectly plain; *first*, that each of the first four items constitutes property not subject to duty and that consequently the fee cannot be calculated on the gross value of the estate as also on the debts and the difference taken; *secondly*, that unsecured debts are, for this purpose, placed on the same basis as mortgage encumbrances; *thirdly*, that the second paragraph of the Form of Valuation, read with the last clause of Annexure A and the first and last clauses of Annexure B, makes manifest the Legislative intent that the fee is payable, only on the difference between the gross value of the estate and the amount of debts, as such difference alone constitutes property subject to duty. This has admittedly been always the law with regard to mortgage-debts: *In the goods of Peter Innes* (4), *In the goods of Charles Edward Maclean* (5), *In the goods of Ramchandra Lakshmanji* (6); and I feel no doubt that this is the law also in respect of unsecured debts under the Court Fees Act as amended in 1899, whatever view might have been maintained before that date. The essence of the matter is that when an estate is burdened with the payment of debts, the market value of the property is the value of the estate left after deduction of the amount of the debts: *Cooper* v. *Cooper* (7): *Blake* v. *Bayne* (8). It is worthy of note that under the Law of England, in determining the value of an estate for the purpose of Estate Duty, allowance is made for debts and encumbrances (Finance Act 1894, Stat, 57 and 58 Vict. C. 30, S. (7). I am not unmindful that a contrary opinion was adopted in the case of *Collector of Maldah* v. *Nirode Kamini Debya* (2); but for reasons fully set out in my judgment in the case of *In the goods of Harriett Teviot Kerr* (1), I am unable to accept that view as a correct exposition of the true intent of the Legislature. That decision holds that the fee is to be paid on the net value of the property, but the liability for assessment is to be determined with regard to the gross value of the estate; in other words, the fee is first determined on the gross value and is then reduced by the fee calculated on the amount of debts. This cannot be right, for the debts, as already explained, are exempt from duty. I hold accordingly that for purposes of Article 11 of the first Schedule to the Court Fees Act, the expression "the amount or value of the property" signifies what is described as the net total in Annexure A in Schedule III, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the movable and immovable property left by the deceased. In this view fee cannot be levied in the case before me.

V.B./R.K.

Reference answered.

(4) (1871) 16 W. R. 253=8 B. L. R. App. 43.
(5) (1874) 6 N. W. P. H. C. R. 214.
(6) (1875-77) 1 Bom. 118.
(7) (1874) 7 H. L. 53=30 L. T. 409.
(8) (1908) A. C. 371=77 L. J. P. C. 97.

A. I. R. 1916 Calcutta 545

MOOKERJEE AND RICHARDSON, JJ.

Ambika Charan Bepari — Plaintiff — Appellant.

v.

Aswini Kumar Banerjee and *others*— Defendants—Respondents.

Second Appeal No. 3098 of 1911, decided on 25th February, 1915, against the Decree of Sub-Judge, Backergunj, dated 18th July, 1911.

Bengal Tenancy Act (8 of 1885), S. 149 (3)—Scope of S. 149—In rent suit no question of apportionment of rent due arises.

In a suit for arrears of rent against a tenant, the money mentioned in sub-S. (3) of S. 149 of the Bengal Tenancy Act is the entire sum deposited into Court under sub-S. (1) and no question of apportionment between rival claimants to proprietorship of the tenancy is intended to be raised or decided under the section.

Where it is admitted by the tenant defendant that part at any rate of the sum deposited is due to the defendant-landlord but the precise part so due is not determined:

Held, that S. 149 of the Bengal Tenancy Act has no application, the question of apportionment being not within the scope of the suit. [P. 546, C. 1.]

Surendra Nath Das Gupta—for Appellant.

Satish Chunder Ghose and *Biraj Mohan Majumdar*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit instituted under S. 149 (3) of the Bengal Tenancy Act. The plaintiff was successful in the Court of first instance but his claim has been dismissed

on appeal by the Subordinate Judge. The landlord-defendant instituted a suit for arrears of rent against the tenant-defendant in respect of the eleven parcels of land. The tenant pleaded in substance that he was liable to pay rent in respect of nine plots, but that in respect of the other two plots he was not liable to pay rent as rent had already been recovered from him by the present plaintiff on the allegation that those two parcels were included in a property owned by him. The tenant thereupon paid into Court the entire sum claimed in the suit. Notice was thereafter issued to the present plaintiff, who forthwith instituted this suit under S. 149 (3), Bengal Tenancy Act. The question for decision is, whether S. 149 is applicable to the circumstances of this case.

Sub-S. (1) of S. 149 is in these terms: "When a defendant admits that money is due from him on account of rent but pleads that it is due not to the plaintiff but to a third person, the Court shall refuse to take cognizance of the plea, unless the defendant pays into Court the amount so admitted to be due." Sub-S. (2) then provides that where such a payment is made, the Court shall forthwith cause notice of the payment to be served on the third person. Sub-S. (3) lays down that unless the third person, within three months from the receipt of notice, institutes a suit against the plaintiff and therein obtains an order restraining payment out of the money, it shall be paid out to the plaintiff on his application.

It is plain that the money mentioned in sub-S. (3) is the entire sum deposited under sub-S. (1) and no question of apportionment is intended to be raised or decided under the section. In the present case, however, it is admitted by the tenant-defendant that part at any rate of that sum is due to the defendant-landlord; what precise part is so due has not been determined, because it involves a question of apportionment not within the scope of the suit. In a case of this description, we are of opinion that S. 149 has no application.

The result is that the decree of the Subordinate Judge is affirmed on the ground that the suit is not maintainable under S. 149 and the appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 546

CHATTERJEE AND CHAPMAN, JJ.

Paruchulla Shaikh —Defendant - Appellant.

v.

Sital Chandra Das and *others* —Plaintiffs—Respondents.

Second Appeal No. 3898 of 1912, decided on 4th February, 1915, against the Decree of Sub-Judge, Khulna, dated 17th September, 1912.

(a) Bengal Tenancy Act (8 of 1885), S. 85—S. 85 does not apply to sub-*raiyat's* granting sub-leases.

S. 85 of the Bengal Tenancy Act has no application to a sub-*raiyat* granting an under-lease. A. I. R. (1914) Cal. 833, ref. to.

[P. 547, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 11 and 18—Transfer of Property Act does not apply to tenancy—Transfers in Ss. 11 and 18 are not leases but out and out transfers.

The Transfer of Property Act has no application to a tenancy under the Bengal Tenancy Act and the transfer contemplated in Ss. 11 and 18 of that Act are transfers out and out, and not partial transfers by way of sub-lease.

[P. 547, C. 1.]

(c) Bengal Tenancy Act (8 of 1885), S. 85—Sub-leases by under-*raiyats* are valid.

The Bengal Tenancy Act does not prohibit the grant of sub-leases by an under-*raiyat* and, therefore, such sub-leases are valid documents between the grantors and the grantees.

[P. 547, C. 1. & 2]

Jadu Nath Kanjilal—for Appellants.

Sarat Chandra Roy Chowdhury and *Bhudar Haldor*—for Respondents.

Judgment.—Defendant No. 1 and the predecessor-in-interest of defendants Nos. 6 and 7 owned an under-*raiyati* holding in equal shares. Defendant No. 1 granted a permanent sub-lease to the plaintiffs in respect of his half-share on the 24th March, 1908, and defendant No. 6 granted a permanent sub-lease of the other half to the same party on the 13th of August, 1908. The plaintiffs had, therefore, a permanent sub-lease of the entire under-*raiyati* holding under the said lessors. The plaintiffs, paid the *selami* and obtained possession. There was then a dispute and a case under S. 145 of the Criminal Procedure Code was decided in favour of defendant No. 1 and defendant No. 2, in whose favour defendant No. 1 sold his interest in the under-*raiyati* holding. The plaintiffs, therefore, brought this suit for declaration of title and recovery of possession. The Court of first instance dismissed the suit holding that the permanent sub-leases of the plaintiffs were void under S. 85 of the Bengal Tenancy Act. The

lower Appellate Court has set aside the decree of the first Court and given a decree in respect of 9-annas of the property, holding that although the leases were invalid, the plaintiffs could prove their tenancy otherwise and had done so by proving the payment of *selami* and holding of possession.

Defendant No. 1 and his co-sharers were dealt with in the Courts below as occupancy *raiyats* and the appeal before us was originally argued on the same footing. On looking into the record, however, we found that the interest of defendant No. 1 and his co-sharers was that of under-*raiyats* and we have had the case re-argued on the basis of the said state of things. The argument based on S. 85 of the Bengal Tenancy Act has no application to a sub-*raiyat* granting an under-lease and if authority were necessary for that proposition, we may refer to the case of *Guru Das Das* v. *Kali Das Changa* (1). It is contended, however, that there is no provision in the Bengal Tenancy Act which authorises an under-*raiyat* to create a further under-lease and, therefore, the plaintiffs have acquired no title. It is argued that S. 11 provides for the transfer of permanent tenures and S. 18 for the transfer of *raiyati* interest at fixed rent: there is no provision for the transfer of under-*raiyati* interests and it has been held that they are not transferable. See *Amirunnissa* v. *Jinnat Ali* (2). A transfer according to the Transfer of Property Act includes a lease and, therefore, the grant of a sub-lease, by an under-*raiyat* is void. We think that this argument is fallacious; in the first place, because the Transfer of Property Act has no application and in the next place the transfer contemplated in Ss. 11 and 18 are transfers out and out and not partial transfers by way of sub-lease. There is no provision in the Bengal Tenancy Act which expressly authorises the grant of sub-leases. Even S. 85 does not authorise a sub-lease it only limits the period of the grant. There is no provision for the grant of lease by tenure-holders, but such leases are recognised by the Act in the definition of a tenure-holder. In the same way the grants of under-leases of any degree are recognised by the definition of the word "under-*raiyat*" as tenants holding immediately or mediately under a *raiyat*.

Then it is contended that when S. 85 of the Bengal Tenancy Act allows the *raiyat* to grant a sub-lease for nine years only, the under-*raiyat* cannot be allowed to grant a permanent right. That may be so and the permanency granted may be limited to the existence of the right of the grantor; but there is no provision in the law which prohibits such grants, none that such grants shall not be registered, and the prohibition under S. 85 cannot be expanded by analogy, *Guru Das Das* v. *Kali Das Changa* (1). The sub-leases granted to the plaintiffs are therefore, valid documents between the grantors and the grantees, and the defendant No. 1 having granted the lease cannot be allowed to derogate from the same; nor can defendant No. 2, who derives his title from defendant No. 1, do so.

In this view of the case we think the plaintiffs are entitled to a decree and we dismiss the appeal and affirm the decree of the lower Appellate Court. The plaintiffs are entitled to costs against defendants Nos. 1 and 2.

V. B./R. K.

Appeal dismissed.

(1) A. I. R. (1914) Cal. 833=24 I. C. 287.
(2) (1915) 27 I. C. 271.

A. I. R. 1916 Calcutta 547

FLETCHER AND TEUNON, JJ.

Benode Behari Patra—Plaintiff--Petitioner.

v.

Janki Kalwar—Defendant — Opposite Party.

Civil Rule No. 31 of 1915, decided on 16th April, 1915.

Promissory Note—Suit—Whatever amount found advanced should be decreed—Claim need not be dismissed because whole amount not paid.

In a suit for recovery of the sum of Rs. 40 alleged to have been advanced on a hand-note with interest, the Judge found that the sum of Rs. 30, and not Rs. 40, was really advanced by the plaintiff to the defendant, but dismissed the suit on the ground that the plaintiff had failed to prove the advance of Rs. 40 claimed:

Held, that judgment ought to have been entered in favour of the plaintiff for the amount found to have been actually advanced.

[P. 548, C. 1.]

Debi Prosad Dutt – for Petitioner.

Manmotha Nath Ganguli for Opposite Party.

Fletcher, J.—This is a Rule calling upon the opposite party to show cause why the judgment and decree complained of should not be set aside. The plaintiff sued the

defendant in the Small Cause Court to recover the sum of Rs. 40 which, it is alleged, had been advanced to him on a hand-note with interest. The learned Judge has found that the story of the hand-note is untrue. He also has found that the story of the defendant that he did not borrow any money is equally untrue. The real fact is he says, that the plaintiff advanced to the defendant the sum of Rs. 30, and not Rs. 40, without any agreement as to the payment of interest. Speaking for myself, I am inclined to think that the learned Judge was wrong in finding that, because, so far as my experience goes, the people in this country who lend out money do not do so without any interest. People who carry on business of this sort always take good care for the stipulation of interest and, not uncommonly, interest at a very high rate. The learned Judge has found that the plaintiff advanced to the defendant the sum of Rs. 30 and he has adopted this course, namely, he has held that the plaintiff having claimed Rs. 40 with interest and having failed to prove the advance of Rs. 40, is entitled to recover nothing. Obviously this cannot be supported. The learned Judge ought to have entered judgment in favour of the plaintiff for the amount that he has found to have actually been advanced by the plaintiff to the defendant and that amount, according to his judgment, is Rs. 30 without any interest. I think we must enter judgment for the plaintiff for Rs. 30 with interest thereon at six per cent. per annum from the date when the suit was dismissed by the learned Judge of the Court of Small Causes, that is the 19th of December last, up to realization. The defendant must pay the costs of this Rule to the plaintiff. We assess the hearing fee at one gold *mohur*. As both parties have been guilty of adducing false evidence before the learned Judge of the Court below, we make no order as to the costs in that Court.

Teunon, J.—I agree.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 548

JENKINS, C. J. AND WOODROFFE, J.

Patiram Banerjee — Plaintiff—Appellant.

v.

Kankinarra Co., Ltd. and *another*—Defendants—Respondents.

Appeal from Orig. Civ. Juris. No. 69 of 1914, decided on 26th February, 1915.

(a) Contract Act (1 of 1872), S. 230—Broker—Undisclosed principal—Contract—Liability.

The plaintiff was a broker who bought on behalf of the agents of the defendant mills a certain quantity of jute and he sent to the mill agents a bought note stating—"We have bought to your order and for your account from our principals, etc.", and at the same time he sent to the firm from whom the jute was bought, a sold note saying—"We have sold by your order and for your account to our principal, etc." The plaintiff disclosed to the mill agents the name of the firm of whom jute was bought about the time delivery was due, but more than three months after the contract was effected, whereupon the mill agents refused to recognise this firm and sought to make the broker liable as seller:

Held, by *Jenkins, C. J.*—That the plaintiff here was no more than an intermediary, and was not an agent for sale to whom the provisions of S. 230 of the Indian Contract Act would apply so as to make him liable as an agent who has not disclosed his principal's name. [P. 550, C. 1.]

(b) Contract—Construction—Contracts to be interpreted by themselves—Construction by similarity improper.

Contracts should be interpreted by themselves and it is improper to interpret one contract by reference to another because they may seem to differ very little, as it may result in identifying contracts which are wholly different. 17 Cal. 449, dist. *Southwell* v. *Bowditch*, (1876) I. C. P. D. 374, foll. [P. 550, C. 1.]

(c) Broker—Position of, explained.

Woodroffe, J.—A broker is an agent to find a contracting party and as long as he adheres strictly to his position as broker, his contract is one of employment between him and the person who employs him, and not a contract of sale or purchase with the party whom he in the course of such employment finds. [P. 550, C. 2.]

Jenkins, C. J.—The plaintiff carries on business as a jute-broker under the name of S. N. Banerjee & Co., and he has brought this suit for declaration that an award, dated the 14th February, 1914, is invalid and inoperative, and for consequential relief. In the alternative, he seeks a decree for indemnity.

This award professes to have been made on a dispute between Messrs. Jardine, Skinner & Co., Managing Agents, Kankinarra Co., Limited and Messrs. S. N. Banerjee & Co., with reference to a claim for damages for non-delivery of 250 bales jute bought and sold under contract No. D/2382 of 2nd June, 1913.

The bought note was in these terms:—

No. D/2382.

Indian Jute Manufacturers' Association.

Jute Contract.

Calcutta, 2nd June, 1913.

Messrs. Jardine, Skinner & Co.

Agents, Kankinarra Jute Mills Co., Ltd.

Dear Sirs,

We have this day bought by your order and for your account from our principals.

(Here follows a description of the jute and provisions not material at this stage).

Arbitration.—Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both parties to this contract.

Yours faithfully,
(*Sd.*) S. N. Banerjee & Co.,
Brokers.

A corresponding sold note was sent to Babu K.D. Shaha on the same date.

On the 16th September, 1913, S. N. Banerjee & Co., by letter declared Messrs. Jardine, Skinner & Co., Agents, Kankinarra Co., Limited, on the one hand, and Babu K.D. Shaha on the other, their principals.

On the 17th September, Messrs. Jardine, Skinner & Co., replied to Messrs. S. N. Banerjee & Company :—

"We do not agree to accept your principals' names under this contract. The contract must, therefore, stand as originally made out."

On the 29th September, Messrs. Jardine, Skinner & Co., called on Messrs. Banerjee & Company to hand them documents for 250 bales, and on the 30th, Banerjee & Co., replied requesting them to ask the seller direct for the jute due under the contract. There was further correspondence but no delivery or payment was made, and ultimately Messrs. Banerjee & Co., received notice from the Registrar, Bengal Chamber of Commerce, that Messrs. Jardine, Skinner & Co., had applied for arbitration. Messrs. Banerjee & Co. repudiated the jurisdiction of the Chamber of Commerce and the arbitrators appointed by it. The arbitrators, however, proceeded with the arbitration and made their award directing Messrs. Banerjee & Co., to pay Messrs. Jardine, Skinner & Co., the sum of Rs. 4,593-12-0.

This is the award now impugned. Chitty, J., has dismissed the plaintiff's suit, and from this judgment, the present appeal has been preferred.

It is contended by the appellant that there was no contract between Messrs. S. N. Banerjee & Co. and Messrs. Jardine, Skinner & Co., or the Kankinarra Co., Ltd., that authorised the reference to arbitration.

The Kankinarra Co., Ltd., on the other hand maintain that the reference is justified by the clause providing for arbitration in the bought note.

The arbitration clause contemplates two parties, each a party to the contract, and there can, I think, be no doubt that those two parties are the sellers and the buyers.

Was then the plaintiff a party to the contract so as to be bound by the arbitration clause, was he a seller or buyer?

This question is not to be solved by describing the plaintiff as an agent with an undisclosed principal and finding what Contract Act says about a person in that predicament: that would be a superficial mode of investigation. We must find out what was the contract between the plaintiff on the one hand, and Messrs. Jardine, Skinner & Co., as representing the Kankinarra Co., Ltd., on the other. For this purpose, we must examine the bought note and also the surrounding circumstances, among them being the fact that a corresponding note was sent to Babu K. D. Shaha. The bought note is no doubt signed by the plaintiff, and *prima facie*, that would bind him, but it would only bind him to that which is expressed in that document.

If the document be examined, it does not purport to be a sale by the plaintiff even as an agent: it is an intimation that Messrs. Jardine, Skinner & Co.'s order has been carried out by a purchase made by the plaintiff on their account not from himself, but from some one else.

The note may be an admission of the plaintiff's employment by Messrs. Jardine, Skinner & Co., to buy on their behalf, but the contract (if any) as between the plaintiff and them, which it evidences, is a contract not of sale, but of employment.

This employment was to negotiate a sale and to be an intermediary, not to sell on behalf of another. The position is described by Jessel, M. R., in *Southwell* v. *Bawditche* (1), where he says,

"Blackburn, J., in a remarkably clear judgment says: "there is no doubt at all in principle that a broker, as such, merely dealing as broker and not as purchaser, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either 'buyer or seller' (the phrase the very nature of things' hitting the fallacy of 'the Court below in this case),' and that consequently where the contract says "sold to A B" or "sold to my principals", and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods' ".

(1) (1876) 35 L. T. 196=24 W. R. 838.

That a person signs simply as broker may be clear from the terms of the contract as well as from any statement to that effect appended to his signature, and this is illustrated by Mellish, L. J., in the same case at page 379, where he says :—

"Now there is, I think, a material difference between the words 'sold for you to my principals' and 'bought of you for my principals'. The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying 'bought of you for my principals' is himself liable; but this contract says 'sold for you to my principals, *i.e.*, I, your broker, have made a contract for my principals, the buyers.'"

I have already pointed out that the note in this case is in the 2nd of these two forms, and, on its true construction, I hold that the plaintiff was no more than an intermediary, and was not an agent for sale, to whom the provisions of S. 230 of the Contract Act applies, so as to make him liable as an agent who has not disclosed his principal's name.

It has been contended before us that the present case is governed by *Gubboy* v. *Avetoom* (2). It is true that it was there held that the defendant in that case was an agent for an undisclosed principal within the meaning and operation of S. 230. But to treat the construction placed on the document, and circumstances under consideration in that case, as a decision binding us in this case, is to fly in the teeth of the doctrine propounded by Jessel, M. R., in *Southwell* v. *Bowditch* (1) where he says

"There is no more vicious line of argument, if I may say so with deference to the Court below, than that which was adopted by the Court below in this case of comparing one contract with another and saying it differs very little; you arrive ultimately at identifying wholly different contracts".

And yet this is the way Mr. Avetoom would have us go. In a word, the Court there on the construction of the document before them, came to the conclusion that a particular relation was established: this cannot bind us in our construction of a different document written under wholly different circumstances. I do not propose to discuss the competence of a suit like the present, for no objection on this score has been raised. Nor is it necessary to consider the plaintiff's claim to indemnity against K. D. Shaha. In my opinion, the judgment of Chitty, J., must be modified and a decree passed in the plaintiff's favour setting aside the award. The respondent Company must pay the plaintiff's costs of the suit and appeal, and the plaintiff must pay K. D. Shaha's costs of the suit and appeal.

Woodroffe, J.—We must look at the terms of S. 230 of the Contract Act. The first question is whether the appellant, who is a broker, is as such an agent. I think, a broker is an agent. For what purpose he is an agent is another question. Primarily and for some purposes, he is the agent of the party by whom he was originally employed. He is also generally the agent of each of the two parties for whom he negotiates. The engagement of a broker is like that of an ordinary agent, but with this difference, that the broker being employed by persons who have opposite interests, he is, as it were, agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in the execution of what each of them entrusts him with. A broker, when he closes a negotiation as the common agent of both parties, usually enters it in his business book and gives to each party a copy of the entry or a note or memorandum of the transaction, which as given to the seller, is the sold note, and as given to the buyer, is the bought note. *Prima facie* a broker is employed to find a purchaser or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to his position as broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase. For he can go beyond his position of mere negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. The section, therefore, refers to contracts "entered into by him on behalf of his principal." The next question is, therefore did the appellant enter into the contract in suit on behalf of his principal, that is, was he an agent to sell to the respondent or was he a mere negotiator to bring the parties together, but otherwise not concerned?

(2) (1890) 17 Cal. 449.

If in this case, the broker did enter into a contract, then I think on the facts he would be liable. For his principal was undisclosed at the date of the contract and the effect of the subsequent disclosure some three months later, would not in itself affect the right of the respondents to proceed against the appellant though they might, if they chose, elect to proceed against the principal when disclosed. Whilst, however, I am of opinion that the appellant would be liable to the buyers if the case falls within S. 230, the question is whether that section applies.

Prima facie, a broker does not make himself liable and upon the question whether he has entered into a contract or not, we must look at the terms of the contract itself. Reference has been made to the fact that the appellant did not disclose his principal until three months later and did not, when Messrs. Jardine, Skinner & Co. attempted to make him personally liable, repudiate the liability then sought to be put upon him. He also appears to have billed the seller for the difference. There is, however, a letter in which he refers Messrs. Jardine, Skinner & Co. to the sellers, and the difference bill is headed "Kankinarra Account". Subsequently, personal liability was denied. It is not contended that these facts amount to acquiescence or estoppel, or constitute a new contract. So far as the contract in suit is concerned, we must look to the terms of the contract itself. I should have had no difficulty as to this, had it not been for the case of *Gubboy* v. *Avetoon* (2), on which the respondent relies, and which is very similar to the case before us, and which (whether it has been rightly or wrongly decided) is, it is contended, binding on us. I felt some difficulty on this point during the hearing, but as the learned Chief Justice is of opinion that this case does not stand in our way and his decision is in accord with the natural justice of the case, I do not dissent from the order he would pass. I wish to note with reference to the observation that in Calcutta, this would be regarded as a principal contract, that there is no evidence of such usage before us.

V.B./R.K

Appeal allowed.

A. I. R. 1916 Calcutta 551

SHARFUDDIN AND COXE, JJ.

Udit Narain Chowdhury and *others*—Defendants—Appellants.

v.

Mathura Prasad and *others*—Plaintiffs—Respondents.

Appeal No. 558 of 1910, decided on 17th March, 1915, from the Original Decree of Dist. Judge, Dharbhanga, dated 1st September, 1910.

(a) Transfer of Property Act (4 of 1882), S. 54—Sale of immovable property below Rs. 100 registered instrument or delivery are alternatives to effect the sale.

Per *Sharfuddin*, J.—Under S. 54 of the Transfer of Property Act the sale of immovable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property. [P. 553, C. 1.]

(b) Registration Act (16 of 1908), Ss. 28 and 29—Person registering a bond must have property in the district.

A Registrar has no jurisdiction to register a bond where the person giving the bond has no property in the district. 19 Cal. 623 (F.B.) and A.I.R. (1914) P.C. 67 foll. and 19 Cal. 622, foll. [P. 552, C. 2.]

Sorashi Chandra Mitter—for Appellants.

Chandra Sekhar Banerjee and *Sib Chandra Palit*—for Respondents.

Sharfuddin, J.—This is an appeal against the judgment and decree of the District Judge of Darbhanga, dated the 1st September, 1910.

The learned District Judge decreed the suit of the plaintiff and hence the present appeal by the defendants. In order to understand the grounds urged against the judgment of the lower Court, it is necessary to refer to certain facts antecedent to the institution of the present suit.

The suit is to recover a sum of Rs. 10,243-6-0, principal and interest on a registered mortgage bond dated the 27th February, 1902 executed by the defendant No. 1, Udit Narain Choudhury, as head and manager of a Hindu joint family of which the other defendants are members.

The plaintiff's mother, *Musammat* Moharani Bibi, inherited the property of her father, Brij Bhukhan Lal. While she was in possession of the property, she sold a share in *Mouza* Mahammadpore Bowari in 1884 to Nena Choudhury, father of Udit Narain. All the time the

members of Nena's family were joint, but in 1899 there was a partition and the property in Mohammadpore Bowari fell to the share of Nena, who had originally purchased it as the manager of a joint family including himself and his brother and their issue.

Moharani Bibi died in 1890 and Ram Anugrah Persad, generally known as Polai Lal Mahta, became guardian of the plaintiff who at the time was a minor. In 1901 the plaintiff filed a suit for setting aside the *kobala* executed by his mother, Moharani Bibi, in favour of Nena Choudhury during his minority, on the ground that the sale was made without legal necessity and the property was conveyed for an inadequate price. At that time the plaintiff filed seven other suits of a similar nature to cancel alienations of property made by his mother in favour of other persons.

On the 27th February, 1902 a petition of compromise with the permission of the Court was filed in the suit, in which it was stated that Udit Narain was to be allowed to retain the property which his father had bought from Moharani Bibi in consideration of a payment of Rs. 14,000. It was stated in the petition that Rs. 6,000 of this sum had been paid in cash and that Udit Narain on his own behalf and as manager of the joint family, consisting of himself and the other defendants in that case and in this, had executed a mortgage-bond for the balance, *i. e.*, Rs. 8,000. This bond of Rs. 8,000 is dated the 27th February, 1902, and is the bond in suit.

Udit Narain alleges that this bond was a sham transaction and it was never intended to be enforced. He gives a most absurd explanation why and with what object he subjected himself to a liability of Rs. 8,000. I do not think it is at all necessary to refer to his story, as the suit should have been decided on another ground.

One of the issues raised is this:

"Whether the share of *Mouza* Kolooha Jairampore, *Chakla* Nai, does not belong to the defendants; if so, whether the bond in suit is invalid and inoperative for being registered in the Mozafferpore registration office."

It appears that in the bond for Rs. 8,000 executed by Udit Narain two properties were mortgaged, namely, Mohammadpore in the Darbhanga District and one *kowri* of Kolooha in the Mozafferpore District. The question is whether this small share of Kolooha belonged to Udit, and if it did not belong to him, whether the registration of the bond in the Mozafferpore District was invalid, and whether if invalid, the bond is enforceable.

On behalf of the plaintiff it is urged that this share in Kolooha was purchased by Udit from one Usman (P. W. No. 1).

This witness says: —

"I sold a share of one *kowri* in Kolooha, a *kobala* was executed, but it was not registered. The price was Rs. 30. I do not remember who witnessed the execution. It was executed two or three days before the execution of the bond in suit. I do not remember if Polai was present. I sold the property at the request of Udit Narain, who wanted to register it in Mozafferpore in order to complete the transaction quickly and had no property in the district. He said if there was delay in registration the compromise might fall through."

It is apparent from the above statement that as Udit had no property in the District of Mozafferpore and as he was anxious to see that the bond was quickly registered, he asked Usman to sell to him a small share in Kolooha.

Under S. 54 of the Transfer of Property Act the sale of immovable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property.

The value of 1 *kowri* in Kolooha is said to be only Rs. 50 and the sale-deed admittedly was not registered and hence in order to effect a proper and binding sale, possession of the share should have been delivered to Udit. There is admittedly no evidence that any delivery ever took place. The sale, therefore, was not complete when the bond executed by Udit was registered. That being the case, he had no property in the District of Mozafferpore when the bond was presented for registration in the Mozafferpore registration office and hence the Registrar of that office had no jurisdiction to register that bond, and that bond, therefore, did not create any liability against Udit Narain. It was so held by their Lordships of the Judicial Committee in the case of *Harendra Lal Roy* v. *Hari Dasi Debi* (1). The facts of this reported case are these:—A property not belonging to a lady, alleged to be situated within the original jurisdiction of this High Court, was entered in the schedule of the mortgaged properties

(1) A. I. R. (1914) P. C. 67=23 I. C. 637=41 Cal. 972 (P. C.).

attached to a mortgage-deed for the purpose of securing registration in the Calcutta registry office. Their Lordships held,

"That the entry of such a property was a fictitious entry and represented no property that the mortgagor possessed or intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no property actually charged and intended to be charged in fact existed, was a fraud on the Registration Law and no registration obtained by means thereof was valid."

It appears that the High Court had passed a decree on the strength of the mortgage and their Lordships held that

"The High Court had no jurisdiction to make the decree, and the deed not having been registered in accordance with the Registration Act the mortgagee had no title to maintain the suit."

As to the provisions of S. 54 of the Transfer of Property Act, it was held in the case of *Makhan Lal Pal* v. *Bunku Behari Ghose* (2) that the transfer by the sale of tangible immovable property of value less than Rs. 100 can be effected only by one of the two modes mentioned in S. 54, Clause 3 of the Transfer of Property Act, *viz.*, by a registered instrument or by delivery of possession.

On the legal aspect of the transaction the appellant is bound to succeed, but we have no doubt that the defence set up by the appellant was a most dishonest defence. His story of the sham transaction in order to oblige Polai is a story which cannot be believed. In the above circumstances, the suit is dismissed and the appeal decreed.

Coxe, J —I agree. The circumstances of the case leave no doubt that the parties never intended that the share of Kolooha should really be sold to Udit Narain or mortgaged to Polai Lal. The so-called sale was a mere device to evade the Registration Act.

V.B./R.K.

Appeal decreed.

(2) (1892) 19 Cal. 623.

A. I. R. 1916 Calcutta 553

FLETCHER AND BEACHCROFT, JJ.

Baroda Kanta Sarkar and *others*—Petitioners.

v.

Emperor – Opposite Party.

Criminal Revn. Petn. No. 1989 of 1914, decided on 2nd February, 1915.

(a) Indian Penal Code (45 of 1860), S. 192—Intention is the main ingredient—Document admissible or not is immaterial.

Under S. 192 of the Indian Penal Code it is the intention that creates the criminal offence and not the fact as to whether, under the terms of the law, the document is admissible in evidence. [P. 554, C. 1 & 2.]

(b) Practice—Decisions that where document is inadmissible S. 192 does not apply are doubtful—Those decisions cause difficulty where inadmissible document is admitted.

Correctness of the reported decisions showing that S. 192 is limited to such cases as those in which the fabricated evidence is, in fact, admissible under the terms of the law of evidence, is doubtful and the view expressed in such reported decisions might raise considerable difficulty in cases where the Judge has improperly admitted in evidence a document not admissible under the terms of the law. [P. 554, C. 1.]

Manmatha Nath Mukherjee – for Petitioner.

Atulya Charan Bose and *Asita Ranjan Ghose*—for Opposite Party.

Fletcher, J.—This is a Rule calling on the District Magistrate to show cause why criminal proceedings instituted against the petitioners should not be quashed on the ground that the facts alleged do not constitute an offence under S. 193, Indian Penal Code. The learned District Magistrate has forwarded a very long explanation from the Sub-Divisional Magistrate, which I do not think we need go into. The facts relating to the present case are as follows; at any rate, these are the allegations, because nothing stated in this judgment must be deemed to be facts proved against the accused, but they are facts which will be assumed for the purposes of the present Rule. There are 12 accused in the present case who are all related to one another. The first three accused are the petitioners before us. As long ago as the year 1900, there was a civil suit instituted by the accused or some of them against one Purna Chandra Som, who is the father of the present complainant. That suit was compromised on the 18th February, 1902 and by the terms of the compromise, which was signed by amongst others, the three petitioners, it was declared that a certain piece of land was the property of Purna Chandra Som. The three petitioners on the 25th August, 1914, instituted criminal proceedings against Lolit Mohan Som, *i.e.*, the present complainant, charging him with mischief under S. 426,

Indian Penal Code, and, during those proceedings, the complainant and his father discovered, so the allegation, is. that a *kobala*, dated the 12th February, 1914, and two *pattas* had been executed. They obtained certified copies of those documents and thereupon the present petitioners abandoned the prosecution of Lolit Mohan Som under S. 426. The petitioners stated that they would bring a civil suit. That was on the 12th September, 1914. On the 21st September, 1914, Lolit applied for summons against all the accused for having committed an offence under S. 193 of the Indian Penal Code. Apparently, five prosecutions were instituted on the ground that the documents had been presented for registration on five different dates. The only question we have got to consider in this case is whether any case has been disclosed upon the complaint which would bring the case within the meaning of S. 192 of the Indian Penal Code. The *kobala*, which is one of the documents on which the present prosecution is founded, must be taken in the present case to have included, in the description of the land conveyed, a portion of the property which was given to the complainant's father by the compromise of the 18th February, 1902. If that be so, it seems to me that the document will fall within the definition of 'fabrication of false evidence' as given in S. 192. The decisions of the High Courts in India, at any rate some of them, would seem to show that S. 192 is limited to such cases as those in which the fabricated evidence is, in fact, admissible under the terms of the law of evidence. Speaking for myself, I have gravest doubt whether those decisions are correct. I think the words of the section will show that it is the intention that creates the criminal offence and not the fact as to whether, under the terms of the law, the document is admissible in evidence. The view expressed in the cases mentiond might raise a considerable difficulty in cases where the Judge has improperly admitted in evidence a document not admissible under the terms of the law. However, we have not got to consider that in this case, because the *kobala* in this case seems to me to be clearly admissible under S. 13 of the Evidence Act. If it is admissible under S. 13, then the accused who are the petitioners before us asserted a right to convey the property which, we must take for the present purpose, includes a portion of the property of the complainant's father. If they did that with criminal intent, it seems to me that that would be a fabrication of false evidence, within the meaning of S. 192 of the Indian Penal Code, and if the facts are proved, the accused – the petitioners before us—could be convicted of an offence under S. 193, Indian Penal Code. I do not wish to express any opinion one way or the other as to whether this document does, in fact, do so. That is a matter to be argued at the trial. This is a document in Bengali, which language I do not know. I have had only extracts read to me by one of the learned gentlemen who appear to show cause, from which I cannot say at the present moment that the statements asserted in this *kobala* would not, if a criminal intent is proved, render the petitioners before us liable to conviction under S. 193. I think, therefore, that the present Rule ought to be discharged.

Beachcroft, J.—I agree. I think the document would be admissible in evidence. But, in my view, the question of admissibility is not all important, the real question is the intention of the accused.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 554

HOLMWOOD AND MULLICK, JJ.

E. I. Ry. Co.—Defendants—Appellants.

v.

Changa Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 1120 of 1912, decided on 13th January, 1915, from the decision of Sub-Judge, Bankipur, dated 15th February, 1912.

(a) Civil P. C. (5 of 1908), S. 100—No second appeal lies on finding of fact—What is question of fact explained—Where upon a fair test a finding is given it cannot be interfered in second appeal.

After there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. 19 Cal. 249 (P. C.). ref. and foll.; 17 I. C. 224, foll.

The question whether silk in manufactured or unmanufactured state is to be treated as silk

within the meaning of Schedule II of the Railways Act is a question of fact.

Where, therefore, a Court has adopted a fair test and where upon that test it has found that the article is silk within the meaning of S. 75 of the Railways Act that is a clear finding of fact and the High Court cannot go behind it in second appeal. 12 W. R. 380, foll. [P. 557, C. 1.]

(b) Railways Act (9 of 1890), S. 75—Railway Company not liable for silk or other things contained in the parcel if silk not declared or insured under S. 75.

Where a parcel consigned to a Railway Company contain silk, in a manufactured or unmanufactured state and whether brought up or not brought up with other materials of the value of Rs. 100, the Railway Company are not responsible for anything contained in it on loss of it if the silk were not declared or insured under S. 75 of the Railways Act. 33 Bom. 703, foll. [P. 555, C. 2.]

S. R. Das, G. B. Macnair and *Ambicapada Chowdhury*—for Appellants.

Muhammad Mustafa Khan—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiffs against the East Indian Railway Company for the loss of a certain parcel consigned to the Company for conveyance from Bombay to Bankipore, the value of which is stated to be Rs. 516-5-7½ pies. After a prolonged correspondence about the claim the plaintiffs submitted to the defendants a detailed statement of the goods contained in the parcels, and it appears from that statement that fancy silk handkerchiefs of the value of Rs. 138-2 as had been lost with the parcels. The defendants thereupon denied their liability, relying on S. 75 of the Railways Act, IX of 1890, and Schedule II thereto annexed. The Munsif and the Subordinate Judge in concurrence held that the defendants were not liable for the silk, inasmuch as it had not been declared or insured. But they held that the plaintiffs can recover the value of the other goods contained in the parcels, which did not appear to have come within Schedule II of the Act.

The second appeal came before Mr. Justice Teunon sitting alone and he was of opinion, and rightly in our view, that the whole case of the plaintiffs must fail if scheduled goods of the value of over Rs. 100 were in the parcel, and for this reason, that S. 75 of the present Act, differing in that respect from the former Act, says that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel, and not of the articles mentioned in the Schedule II. It is, therefore, clear that if this parcel contained silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials of the value of Rs. 100, the Railway Company are not responsible for anything contained in the parcel; and that was the sole ground upon which the Railway Company came before Mr. Justice Teunon in appeal. Mr. Justice Teunon, as we have seen, decided that point in favour of the Railway Company, and there we should have thought would have been an end of the matter, inasmuch as the plaintiffs did not file any cross-objection and did not say anything about the question of silk. But Mr. Justice Teunon appears to have thought that the Company could not recover anything unless there really was silk to the value of over Rs. 100 in the parcel and he, therefore, remanded the case to the lower Court for a fresh finding as to the particular items of silk handkerchiefs and their respective values, directing that the Subordinate Judge in the first Court of appeal should come to a finding on the following issue, namely, what is the aggregate value of the handkerchiefs in which on the evidence adduced it may be found that the value of silk exceeds the value of the other materials?

The learned Subordinate Judge on remand expressed himself wholly unable on the evidence to decide this issue. But he said that he was satisfied with the statement in the plaint that the silk handkerchiefs were worth Rs. 91 and the other handkerchiefs which were not silk were worth Rs. 42 and odd, and this was a sufficient basis for making a new decree.

It is there that the principal question in this appeal arises. It is obvious even if the remand which was made was a competent remand, with which we shall deal presently, the Subordinate Judge could not make a new case for the plaintiffs. The finding of fact of the first two Courts before remand was at any rate conclusive that the plaintiffs had admitted to the Railway Company that they had consigned Rs. 138 worth of silk goods for them to carry, and the only question that was remanded was, what was the proportion of silk in each kind of handkerchief so as to show whether the

aggregate amounted to Rs. 100 or not? We are of opinion, relying on the decision in *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (1), that the remand itself was incompetent and that we in dealing with it as a Divisional Bench are bound to treat the case as coming before us on appeal from the Subordinate Judge who heard the first appeal. It is unnecessary to go into the considerations which induced the late Chief Justice and Mr. Justice Mitra to hold in a similar case that the remand was incompetent. It is clear as a matter of principle that after there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final. These are the words of their Lordships of the Judicial Committee in the well-known case of *Ramratan Sukal* v. *Nandu* (2).

It was argued that Mr. Justice Teunon remanded the case on finding that the onus had been wrongly placed and that that was a point of law. But we find that he does not specifically find that there was any misplacing of the onus. He says the Courts below while placing upon the plaintiffs the whole burden of proof have proceeded, it appears solely upon the description 'fancy silk' contained in the statement of claim, and he concludes by saying, even if the Courts below were right in throwing the whole burden on the plaintiffs in view of the expression of opinion to be found in the cases which we shall presently deal with, the findings at which they had arrived is not sufficient; and why is it not sufficient? because the possibility of equality in value has been overlooked and also the details of the value of each silk handkerchief have not been gone into. Now these points surely come within the dictum of their Lordships of the Judicial Committee as to the soundness of the findings of fact rather than as to the findings of fact themselves.

The learned Munsif found as a fact that from the list supplied by the plaintiffs to the defendants it appears that the lost box contained silk handkerchiefs worth more than Rs. 100. That *prima facie* clearly relieved the defendants from any burden. To avoid their liability to make a declaration and to insure the goods the plaintiffs stated that the handkerchiefs were not real silk but were known as such in the market, though they sold for no more than 5 or 6 pice each, while real silk handkerchiefs sold at Rs. 12 or 13 a dozen. They did not ask the Court to go into the question of whether there were so many at 15 annas and so many at higher price, so that the aggregate of the real silk would not amount to Rs. 100. They took the general statement that fancy silk meant sham silk. They then produced a witness with samples of handkerchiefs, which they alleged were similar to the lost handkerchiefs, and upon this evidence and relying on the case of *Lakhmidas Hirachand* v. *Great Indian Peninsula Railway Co.* (3) and on the case of *Saminadha Mudali* v. *South Indian Railway Company* (4), they sought to argue that such handkerchiefs could not be considered as silk within the meaning of the Act. The learned Munsif then said, in deciding whether a particular article when brought up with other articles is to be regarded as silk or not within the meaning of the Railways Act, the proper test to apply according to these decisions was to ascertain whether the value of the silk was more than half of the whole article. He then gives his findings,

"The evidence placed before me is not sufficient to show that the price of the silk contained in the handkerchiefs, if any, was less than half that of the whole article."

It is argued that if we deal with this finding on the strictest mathematical principles, it is not the finding that he set himself to find, namely, that there was more than half of the value in silk in the handkerchiefs. But having regard to what he sets out to be the necessary finding, it is obvious that he intends to find that there is a sufficient preponderance of silk in the handkerchief to bring them within the rulings he cites; and he fortifies his finding by saying that they go by the name of silk in the market and are sold as such; and this brings us to the consideration of the

(1) (1913) 17 I. C. 224.
(2) (1892) 19 Cal. 249=19 I. A. 1 (P.C.).
(3) (1866-67) 4 B. H. C. R. 129.
(4) (1883) 6 Mad. 420.

English case on which both the cases in India relied. It is the case of *Brunt* v. *Midland Railway Company* (5), where Baron Pollock clearly says, that the question whether silk in manufactured or unmanufactured state is to be treated as silk within the meaning of the English Act, the words in which are precisely similar to those in Schedule II of the Indian Act, is a question of fact which very properly might be left to a Jury. When it is left to a Judge, the Judge must decide where the line should be drawn, that is to say, some test must be taken by the Court as to whether the case came within the definition or not. The line shifted according to the circumstances; but the question which a Judge of fact has to answer is not where to draw the line, but whether the particular article before him is within the line; and he found as a fact that in this particular case that was before him the silk did come within the line. In the judgment by another Judge, Baron Pigott who also treats it as a simple question of fact it is stated that in that case the ingredients of silk amounted to more in proportion and value to any other article. As a matter of fact it was a question 2 pence in 2 shillings so that it was very near the dividing line of half and half.

We do not, and indeed we cannot, bind all Courts to follow the exact test which was adopted by the Madras Court in one case and by the Bombay Court in another. Each case must depend upon its own circumstanccs. Where a Court has adopted a fair test and where upon that test it has found that the article is silk within the meaning of the section, that is in our opinion a clear finding of fact and the Court cannot go behind it in second appeal. The Subordinate Judge. though he has said less, has put the matter even more strongly. He says the plaintiffs have failed to prove that the handkerchiefs were not silk handkerchiefs or rather that they contained less silk than cotton. This is sufficient to bring the case within the schedule, and we are, therefore, of opinion that in second appeal we cannot go behind that finding.

Then comes the question whether the decree made in favour of the plaintiffs with regard to the other articles can stand. We have already indicated that we agree with the view taken by Mr. Justice Teunon that it cannot, and we are fortified in that opinion by the clear decision in the case of *Pundlik Udaji Jadhav* v. *S. M. Railway Company* (6).

The result is that the appeal is decreed and the plaintiffs' suit is dismissed with costs in all Courts.

V.B./R.K.

Appeal decreed.

(5) (1864) 9 L. T. 690=12 W. R. 380.

(6) (1909) 33 Bom. 703=3 I. C. 964.

A. I. R. 1916 Calcutta 557

JENKINS C. J., AND WOODROFFE, JJ.

Sudamdih Coal Co., Ltd.—Plaintiffs—Appellants.

v.

Empire Coal Co., Ltd.—Defendants—Respondents.

Appeal from Original Civil Suit No. 78 of 1914, decided on 4th February, 1915.

Letters Patent (Calcutta), Clause 12—Jurisdiction—"Suits for land"—Meaning of—Compensation for wrong to land.

The expression "*suits for land*" extends to a suit for compensation for wrong to land, where the substantial question is the right to the land, and, therefore, Clause 12 of the Letters Patent, which empowers the Calcutta High Court to try "suits for land and other immovable property" applies to such a suit. [P. 558, C. 1 & 2.]

J. E. Bagram and *Buckland*—for Appellants.

S. P. Sinha and *A. K. Sinha*—for Respondents.

Jenkins, C. J.—This is an appeal from a judgment of Mr. Justice Fletcher who has dismissed the suit with costs. This was done on a preliminary hearing upon settlement of issues, and the only question involved is whether this is a *suit for land or other immovable property* within the meaning of Clause 12 of the Letters Patent. That clause was intended to define the original jurisdiction of the High Court as to suits, and it empowered the Courts

"to receive, try and determine suits of every description, if, in the case of *suits for land or other immovable property*, such land or property shall be situated.. .....within the local limits of the ordinary original jurisdiction of the High Court."

The matter in dispute here relates to a mining property outside the jurisdiction so defined. But on behalf of the plaintiff it is contended that having regard to the

pleadings it cannot be said that it is a *suit for land or other immovable property*. The question is, what was intended by that expression? It appears to me that it was not a mere formal test that was proposed —a test to be determined by the precise form in which a suit might be framed; but that regard was to be had to the substance of the suit, and I cannot help thinking that the particular expression was used, because there was its equivalent in the Civil Procedure Code of 1859, S. 6. Indeed, it is a matter of common knowledge that the Secretary of State's despatch forwarding the Letters Patent to this Court makes special reference to that circumstance. The course of decisions on the Charter shows that the description cannot be limited to suits for the recovery of land in its strict sense, and as to that there can be no dispute: and, running on parallel lines with that, we find the Code of Civil Procedure of 1859 developed in 1877, so as to embrace a number of topics which perhaps would not in strictness be regarded as *suits for land*, and it is instructive to observe what they are. They are suits for the recovery of immovable property (with or without rent or profits), suits for the partition of immovable property, suits for foreclosure, or redemption of a mortgage of immovble property, suits for the determination of any other right to or interest in immovable property, and suits for compensation for wrong to immovable property. This appears to me to be in accordance with principles of general, if not universal, application, according to which *suits for land* in its strict sense must come before the Court where the land is situate. The system on which our procedure is based, the English procedure, regards a suit for damages for trespass to land in the same way, and it is interesting to notice that Chancellor Kent in his commentaries on American Law states that 'an injury to real property is local as to jurisdiction, and trespass on real property situated in one State cannot be sued for in another.' Therefore, it seems to me that we are not giving a construction that is opposed to the general trend of legal thought, if we hold that *suits for land* at any rate extend to a suit of this kind, which is a suit for compensation for wrong to land when, as I hold to be the case here, the substantial question is the right to the land. In my opinion, the suit is one to which Clause 12 of the Letters Patent applies in the sense I have indicated and, therefore, it was rightly dismissed. The appeal should, therefore, be dismissed with costs.

Woodroffe, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 558

JENKINS, C. J. AND WOODROFFE, J.

Ram Charan Law—Plaintiff—Appellant.

v.

Fatima Begum and *others*—Defendants—Respondents.

First Appeal No. 56 of 1914, decided on 3rd February, 1915, from the Judgment of Imam, J., dated 15th June 1914.

Mahomedan Law—*Waqf*—Object of—Property conveyed in trust to trustees and his heirs creating a *Waqf* dedicating them for religious purpose with direction to apply net usufruct for that purpose—Held object of gift was plain and the trustees were not donees and valid *waqf* was created.

The recital to a deed purporting to be a deed of *wakf*, said that the executant was desirous of dedicating a certain "estate to the service of Imam Hassan and Imam Hossain and for religious purposes in the manner hereinafter mentioned" and the deed conveyed the estate to certain persons, their heirs, representatives and assigns "upon trust" with the direction that after paying the collection charges and the expenses of repairs etc., the surplus should be applied "in the due and proper observance of the annual Muhammadan festivals of the Muhurrum" with the condition that they should not encumber the estate or any part thereof:

Held, that the object of the gift was plain, that the trustees were not donees, that the gift was not vitiated by the condition, that a valid *wakf* was legally constituted, and that the employment of trustees for the purpose of carrying into effect in no way prejudiced the dedication. [P. 559, C. 2 & P. 560, C. 2.]

B. Chakravarti, *B. Lahiri* and *N. N. Ghuttak*—for Appellant.

A. Rasul, *Zakir Ali* and *Ashraf Ali*—for Respondents.

Jenkins, C. J.—The question involved in this appeal is whether a Muhammadan lady, Shahebzadee Fatima Begum, had a saleable interest in a moiety of premises known as No. 63, Dhurumtolla Street, which the plaintiff claims to have bought in execution of a mortgage-decree in Suit No. 527 of 1908. The suit has been dismissed by Imam, J., and from his judgment the plaintiff has appealed.

The decision of this suit depends upon whether or not this property has been validly dedicated as *wakf* or not. If it has, then the suit must fail. The dedication is said to have been effected by a document of the 16th July, 1864. It is in the form of an English indenture and is engrossed to be a conveyance to Fatima Begum and Fyezuddin, their heirs, representatives and assigns, of the entirety of the premises now in suit, upon trust that they, the said Fatima Begum and Fyezuddin, their heirs or representatives or other trustees or trustee for the time being should, from time to time, demise the said hereditaments and premises to such persons or person on such terms and at such rent as they should think fit, and should from time to time appoint such person or persons to act as *sircars* or a *sircar* in the collection of the said rents as they should think fit with full power to discharge such *sircars* or *sircar* and to appoint others or another in his place, and should apply the rents and profits of the said hereditaments and premises, *first*, in payment of the expenses of the collections of the said rents and profits and of the management of the salary of the said *sircars* or *sircar* and otherwise and of the execution of the trust and *next*, in payment of the expenses of the repairs of the said hereditaments and premises and should apply the surplus of the said rents and profits after making the payments aforesaid in the due and proper observance of the annual Muhamadan festivals of the Muhurrum. Fatima Begum is the defendant of that name. Fyezuddin is dead, and the other defendants are his representatives. On the 20th of October, 1907, Fatima Begum executed a document by which there was expressed to be mortgaged to the plaintiff the half share now in suit, it being recited that she was absolutely seized and possessed of or otherwise well entitled to that half share. It was on the basis of this mortgage that the decree was passed, in execution of which the plaintiff claims to have purchased this half share. Fatima Begum has appeared in the suit and put in a written statement alleging the *wakf* character of the property. She has, however, taken no part in the discussion before Imam, J., or this Court. The other defendants have appeared and contested the plaintiff's claim, contending that the property is *wakf*, or that at any rate what they describe as their moiety is unaffected by the mortgage and consequent sale. It is unnecessary to discuss any technical defect there may be in the form of the suit: the substantial question is, whether there has been a valid dedication or not, and it is on these lines that the case has been fought before us.

The plaintiff has urged many objections to the validity of the *wakf*. The *first* point made is that the gift was to Fatima Begum and Fyezuddin on a condition, and that is inoperative because the Muhammadan Law does not permit a condition to be attached to a gift. The recital to the deed, however, makes clear the executant's purpose, for it runs in these terms:

"Whereas the said Prince Mahomed Syeduddin is seized of or entitled to the hereditaments and premises hereinafter described for an absolute estate of inheritance and he is desirous of dedicating the same to service of Imam Hassan and Imam Hossain and for religious purposes in the manner hereinafter mentioned."

The object of the gift is plain, and the introduction of trustees is merely the employment of machinery whereby the gift is carried into effect. The trustees are not donees, and it would be far too narrow a view to hold that the gift is vitiated by a condition. Mr. Chakravarti would go the length of contending that all gifts through the instrumentality of trust are bad. It would be difficult to reconcile that view with the language of the High Court and the Privy Council in *Bishen Chand Basawat* v. *Nadir Hossein* (1). In my opinion, this objection fails, and I hold that the provision in favour of the due and proper observance of the annual Muhammadan festival is not invalidated by the introduction of trustees as part of the machinery for carrying it into effect.

But, *then*, it is contended that the disposition does not constitute a *wakf*, and Mr. Chakravarti has relied on the decision of *Delroos Banoo Begum* v. *Nawab Syad Ashgar Ally Khan* (2) as conclusive in his favour. But this argument appears to me to rest on a misreading of the judgments of the High Court and the Privy Council in that case. The defendant there dedicated the whole of her

(1) (1888) 15 Cal. 329=15 I. A. 1 (P. C.).
(2) (1875) 15 B. L. R. 167=23 W. R. 453.

property in perpetuity and provided that the income derived from the endowment, after the payment of the Government Revenue, should be divided into twenty-eight parts, fifteen parts whereof should be applied to the expenses of the Fatiha of Mahomed and the Imams as well as to those of the first ten days of the Muhurrum and all the holy days and the repairs of the *imambara* and the tomb; seven parts should be received by the *amlahs* and servants, whose names should be inserted at the foot of the document in question or any other document bearing the defendant's seal and signature, and which the said servants might have in their possession, some from generation to generation and others as long as they retain service: and the remaining six parts should be received by the *mutwallis*, *i. e.*, the defendant and her co-*mutwalli*. The plaintiffs as members of the Muhammadan community (in the above case) sued the defendant as the *mutwalli* of the endowment for her removal from that office, on the ground only of misfeasance with the *wakf* estate. Leave to institute the suit was obtained under Act 20 of 1863. It was objected that there was no jurisdiction to grant leave as the alleged endowment did not come within the scope of the Act, that there was no intention of creating an absolute *wakf*, and that the defendant was not aware of the contents and legal effect of the deed at the time of its execution. The other defences need not be mentioned. In the Court of first instance the plaintiff's suit was decreed. In the High Court this decree was reversed and the suit was dismissed, on the ground that the appropriation was not of a public character and that Act 20 of 1863 did not apply to it. It followed that the Judge had no authority to give the plaintiff leave to sue and that his decision was *ultra vires*. But while the learned Judges determined that there had been no grant of land for public purposes within the meaning of the Act, read in the light of Regulation XIX of 1810, they by no means decided that the dedication did not constitute a *wakf*. On the contrary, the Court *agreed* in thinking that so far as words went, it was a *wakf* which would have *bound* the appropriator, but held, in view of the dedicator's position as an illiterate and prejudiced woman with no professional assistance, that the dedication was not binding. This is made abundantly clear by the concluding words of the judgment, where it is said—"As to the objections raised by the defendant that the *wakf* was indefinite and void, I think it enough to say that it, in my judgment, fully answered all the requirements of the Imameea Law, and that if it had been really and knowingly executed, it would have bound Delroos Banoo Begum without the power of revocation." The case was taken on appeal to the Privy Council and the judgment was affirmed, See *Ashgar Ali* v. *Dalroos Banoo Begam* (2a) on the ground that the dedicator was not *bound* by the deed, as the precautions required in the case of *pardanashin* executants were not observed. There is, however, no trace of any suggestion that, apart from this, a *wakf* was not legally constituted; rather does the judgment indicate that its validity, apart from the executant's incapacity, was questioned. I, therefore, see nothing in this case that tells against the validity of the endowment now in question, and, if anything, it is an authority in its favour. And in support of the view that a *wakf* was legally constituted, reference may be made to *Phul Chand* v. *Akbar Yar Khan* (3), *Biba Jan* v. *Kalb Husain* (4) and *Mazhar Husain Khan* v. *Abdul Hadi Khan* (5).

Nor do I think that it is made out that the deed of the 15th July, 1864 was a colourable transaction; indeed, the plaintiff cannot well contend that it was fictitious or had no operation, for his suit is one for partition, and it is only by virtue of this deed that any of the defendants acquired any interest in the property that would support a suit for partition. Equally futile is any argument which depends on the contention that the earlier release is open to attack.

The result then is that, in my opinion, a valid *wakf* was legally constituted and that the employment of trustees for the purpose of carrying it into effect in no way prejudiced the dedication.

I, therefore, hold that the suit was rightly dismissed, and that this appeal, too, must be dismissed with costs.

Woodroffe, J.—I agree.

V. B./R.K.

Appeal dismissed.

(2a) (1877-78) 3 Cal. 324 (P. C.).
(3) (1897) 19 All. 211.
(4) (1909) 31 All. 136=1 I. C. 763.
(5) (1911) 33 All. 400=9 I. C. 753.

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Full Bench.

JENKINS, C. J. AND WOODROFFE, MOOKERJEE, HOLMWOOD AND CHATTERJEE, JJ.

Rup Keshwar Lal—Objector—Appellant.

v.

Jaijai Bibi and *others*—Applicants—Respondents.

Appeal No. 107 of 1914, decided on 12th April, 1915, from the Original Decree of Dist. Judge, Shahbad, dated 9th March, 1914.

Bengal N.-W. P. and Assam Civil Courts Act (12 of 1887), S. 8—Scope of S. 8 (2) stated—Transfer of case to Additional Judge is competent. A. I. R. (1914) Cal. 616, Overruled.

Under S. 8, sub-S. (2) of the Bengal, N.-W. P. and Assam Civil Courts Act it is competent to a District Judge to transfer a particular case to an Additional Judge. 8 C. L. J. 34, appr. and A. I. R. (1914) Cal. 616, Overruled.

[P. 562, C. 1.]

Kulwant Sahai—for Appellant.

Umakali Mookerjee, Raghu Nath Singh and *Sudhansu Sekhar Mookerjee*—for Respondents.

Order of Reference.

This appeal is directed against the grant of Letters of Administration, with a copy of the Will annexed, to the estate of one *Mussammat* Mohan Koer. The application was presented to the District Judge on the 16th July and registered in his Court on the 1st August, 1913. After various interlocutory orders, to which reference is not necessary for our present purpose, the case was transferred to the Additional Judge for disposal on the 18th December, 1913. The record does not show that any objection was taken to the order of transfer or to the trial of the case by the Additional Judge; but it has been stated before us that an objection was taken verbally and was overruled. It is immaterial, however, whether such objection was taken or not, because the question is one of jurisdiction, and, if the order of transfer was made without jurisdiction and if the Additional Judge was incompetent to try the case, it is open to the appellant to challenge the legality of his order on that ground.

On behalf of the appellant it has been contended that, under S. 51 of the Probate and Administration Act, the District Judge alone has jurisdiction in granting Letters of Administration in all cases within his district. The expression "District Judge" is defined in S. 3 of the Probate and Administration Act to mean the Judge of a principal Civil Court of original jurisdiction. An Additional Judge is *prima facie* a Judge of this description. Our attention is invited, however, to S. 8, sub-S. (2) of the Bengal Civil Courts Act, 1887, which provides that an Additional Judge appointed under sub-S. (1) shall discharge any of the functions of a District Judge which the District Judge may assign to him, and, in the discharge of those functions, he shall exercise the same powers as the District Judge. The appellant argues that as the District Judge transferred only this particular case for trial to the Additional Judge, and did not assign to him his functions as a District Judge in respect of any specified class of cases, the Additional Judge was not competent to hear the case. In support of this contention, reliance has been placed upon the decision of *Muhammad Musa* v. *Abdul Hasan Khan* (1) which apparently supports the argument of the appellant. The view taken in this case, however, is opposed to that adopted in the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2). In that case, it was contended on behalf of the appellant, that under S. 8 of the Bengal Civil Courts Act, the District Judge had power only to assign certain functions to the Additional District Judge, that is to say, that he could assign to him particular classes of cases but could not transfer to him any particular case for decision. Rampini, J., in answer to this contention stated that he was unable to accede to this view of the matter, and Woodroffe, J., expressed his concurrence with Rampini, J. But it has been suggested that the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2) is distinguishable, inasmuch as there the question arose in relation to the transfer of an appeal, as to which provision is made in sub-S. (2) of S. 22 of the Bengal Civil Courts Act. The distinction, however, is really not material because under sub-S. (2) of S. 22, a District Judge is competent to transfer an appeal

(1) A. I. R. (1914) Cal. 616=22 I. C. 951=41 Cal. 866.

(2) (1908) 8 C. L. J. 34.

to a Court under his administrative control competent to dispose of it ; and whether the Additional Judge is or is not competent to dispose of an appeal transferred to him by the District Judge, must depend upon the interpretation to be placed upon sub-S. (2) of S. 8. Consequently, there is a clear conflict of judicial opinion as to the true scope and effect of sub-S. (2) of S. 8.

We may add that we feel no doubt that the view taken in the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2) gives effect to the true intention of the Legislature. It appears to us to be fairly clear that, if it is competent to a District Judge under sub-S. (2) of S. 8 to assign his functions to an Additional Judge in respect of a class of cases, there is no intelligible reason why he should not do so in respect of a particular case comprised within that class. We may further observe that the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2) was not brought to the notice of the Divisional Bench which decided the case of *Muhammad Musa* v. *Abdul Hassan Khan* (1).

In these circumstances, we are constrained, under paragraph 1 of Chapter 5 of the Rules of the High Court, to refer this case for decision by a Full Bench. As the question arises in an appeal from original decree, under R. 3 the question of law alone is referred. The question is—whether in view of the provisions of sub-S. (2) of S. 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to transfer a particular case to an Additional Judge.

Opinion.

The question proposed for our determination is, whether in view of the provisions of sub-S. (2) of S. 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to transfer a particular case to an Additional Judge. We answer the reference in the affirmative, the reasons which induce us to adopt that conclusion are sufficiently set forth in the order of reference and we need not repeat them.

The case will go back to the Divisional Bench for final disposal. The Divisional Bench will deal with the costs of this reference.

V.B./R.K.

Case sent back.

A. I. R. 1916 Calcutta 562

CHATTERJEE AND CHAPMAN, JJ.

Mt Ajiman Bibi and *others*—Plaintiffs.

v.

Reasat Sheikh and *others*—Defendants.

Civil Ref. No. 7 of 1914, decided on 19th January, 1915, made by Munsif, Dibrughur, in Title Suit No. 55 of 1914.

(a) Specific Relief Act (1 of 1877), S. 9—Object of S. 9, is to afford speedy remedy against forcible dispossession.

The object of S. 9 of the Specific Relief Act is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed of it against his will and consent. 14 Cal. 649, foll. [P. 562, C. 2.]

(b) Specific Relief Act (1 of 1877), S. 9—What is to be mainly enquired into is whether dispossession is caused within the prescribed time and in the manner specified.

Under S. 9 of the Specific Relief Act, the main question for determination is whether the plaintiff while in physical possession of property has been dispossessed of the same in the manner and within the time specified in the section. [P. 562, C. 2.]

(c) Specific Relief Act (1 of 1877), S. 9—S. 9 applies to case of joint possession.

A man in joint possession of immovable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole, and such joint possession can as well be physically restored in respect of his share as the possession of the whole can be restored to the entire body of co-sharers. 23 I. C. 618, dist. [P. 562, C. 2 & P. 563, C. 1.]

Judgment.—The object of S. 9 of the Specific Relief Act is "to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent." See *Tarani Mohun Mozumdar* v. *Gunga Prosad Chuckerbutty* (1). The main question for determination, therefore, in a case under this section is whether the plaintiff while in the physical possession of property has been dispossessed of the same in the manner and within the time specified in the section. If he was in physical possession he can be restored to such possession under the decree of the Court. A man in joint possession of immovable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of

(1) (1887) 14 Cal. 649.

the whole and such joint possession can as well be physically restored in respect of his share as the possession of the whole can be restored to the entire body of co-sharers. The case of *Hari Narain Das* v. *Elemjan Bibi* (2) is quite distinguishable from this case, as there the dipossession was of the whole and possession was claimed in respect of a part, so that the Court was called upon to restore quite a different state of things from that which had been disturbed. The learned Judges distinctly say:

"We have treated the case as being one where a party seeks possession of his share only of property from which he himself and his co-sharers have been dispossessed, and it is incompetent for the Court to give possession of the whole of the property in such a case."

The remarks as to exclusive possession in the judgment must be read in reference to the facts of that case and do not stand in the way of that joint physical possession being restored which existed before the disturbance.

The case before the learned Munsif will be decreed if the plaintiff proves his joint physical possession within six months of the suit.

V.B./R.K.

Ordered accordingly.

(2) A. I. R. (1914) Cal. 496=23 I. C. 618.

A. I. R. 1916 Calcutta 563

HOLMWOOD AND WALMSLEY, JJ.

Hiranand Ojha and *another*—Plaintiffs—Appellant.

v.

Satish Chandra Roy and *others*—Defendants—Respondents.

Appeal No. 2611 of 1912, decided on 8th April 1915, from the Appellate Decree of J. C., Chota Nagpur, dated 22nd May, 1912.

(a) Chota Nagpur Encumbered Estates Act (6 of 1876), S. 22—Suit against Manager alone without allegation of malafide is barred.

Where the Manager of an encumbered estate is the principal necessary party and there is no allegation that he, in making the order he did in pursuance of the Chota Nagpur Encumbered Estates Act, was not acting *bona fide*:

Held, that S. 22 of the Act will alone bar the suit. [P. 563, C. 2.]

(b) Chota Nagpur Encumbered Estates Act (6 of 1876), Ss. 3 and 12—Suit by creditors—Court cannot interfere so long as estate is held under the Act—Creditors remedy against manager is by way of appeal to Deputy Commissioner.

It is clear from the provisions of Ss. 3 and 12 and other sections of the Act that during the time that an estate is held by the Revenue Authorities under the Act, a Civil Court has no jurisdiction to interfere on a suit brought by the creditors. The creditors have their remedy against any order of the Manager before the Deputy Commissioner and the Commissioner. [P. 563, C. 2.]

(c) Chota Nagpur Encumbered Estates Act (6 of 1876), S. 18-B—To hold estate under the Act Manager must have power to reduce interest otherwise operation of Act would be infructuous.

Where the Manager finds that the accumulation of interest, whether under a Civil Court decree or under any other kind of debt, would render the estate insolvent, he must at once get the Deputy Commissioner to release the estate.

If, therefore, the Manager does not possess the power to reduce the interest on the original debt as contracted, the operation of the Act would not only frequently but in every case prove infructuous. [P. 564, C. 1.]

Karunamoy Bose—for Appellants.

Kam Charan Mitra—for Respondents.

Holmwood, J.—We have considered every section of the Chota Nagpur Encumbered Estates Act, VI of 1876, and the rules made thereunder, and we are clearly of opinion that this suit is not maintainable. The Manager is the principal necessary party and there is no allegation that he, in making the order he did in pursuance of the Act, was not acting *bona fide*. S. 22, therefore, will alone bar the suit. But it is clear from the provisions of Ss. 3 and 12 and other sections that during the time that the estate is held by the Revenue Authorities under the Act the Civil Court has no jurisdiction to interfere on a suit brought by the creditors. The creditors have their remedy against any order of the Manager before the Deputy Commissioner and before the Commissioner. As a matter of fact in this case they went to the Deputy Commissioner and got the only grievance, which they had urged, removed. The Deputy Commissioner allowed them to retain possession of the portion of the property which they had purchased under a decree for Rs. 1,100.

The other question, which was raised before the Commissioner and which is practically the question before us was that the Manager had no jurisdiction to reduce the interest to 3 per cent. This objection was not pressed before the Deputy Commissioner, who held that the reduction of the interest to 3 per cent. was the only possible means of saving the estate from

insolvency. Now it is obvious that the decree of the Civil Court could not have exceeded the principal of the original debt, except by the accumulation of interest. It was, therefore, the only question that had to be decided, whether the interest which had merged in the decree must be taken to be a part of the principal. That point was apparently argued, but not precisely in that form before the Deputy Commissioner, and it was agreed on all sides that 3 per cent. interest was the only possible basis upon which the creditors could get any relief. If he had not accepted this, the estate would have had to be restored to the owner and then the jurisdiction of the Civil Court undoubtedly would have revived: but, as the Judge points out, that would be flying in the face of the Act and undoing the benefits which the Act has intended to confer, and it is obvious that in every case this must be so: for, if the Manager finds that the accumulation of interest, whether under a Civil Court decree or under any other kind of debt, would render the estate insolvent, then he would have at once to get the Deputy Commissioner to release the estate. If, therefore, he did not possess the power to reduce the interest on the original debt as contracted, the operation of the Act would, as the learned Judicial Commissioner has pointed out, not only frequently but in every case prove infructuous.

The appeal is, therefore, dismissed with costs.

Walmsley, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 564
Special Bench.

JENKINS, C. J., MOOKERJEE AND RICHARDSON, JJ.

Ahmed Musaji Saleji—Petitioner—Appellant.

v.

Mamooji Musaji and *others*—Respondents.

Appeal No. 54 of 1915, decided on 5th July, 1915, from the Original Civil Order of Greaves, J., dated 1st July, 1915.

Practice—Discretion—Power of Appellate Court to interfere with Lower Court's discretion.

The Court of Appeal should be slow to interfere with the exercise of a discretion by a lower Court. [P. 566, C. 2.]

Bagram—for Appellant.

S. P. Sinha—for Respondents.

Greaves, J.—On the 11th May, 1915 of this year I made an order directing the applicant to pay into Court certain sums on certain dates mentioned in the order, in default of which a warrant for his arrest was to issue. That order was appealed against and on appeal it was ordered that the warrant was not to issue until four days after the instalments fell due, in order to enable the applicant, if he so desired, to make an application to me to vary the order that I made on the 11th May, 1915 by extending the time in which the sums mentioned in that order were to be paid into Court. In pursuance of that order the applicant has paid into Court two sums of one lac each and according to my order a further sum of Rs. 1,00,000 falls to be paid into Court to-day. The application that is now made to me is that the applicant may be ordered now to pay into Court Rs. 16,000, as being the balance of the principal payable by him under the original decree in pursuance of which my order was made and that he may be given easier and more lenient terms for payment of the interest due by him under the decree and that the order for the issuing of the warrant of arrest may be suspended. Now by the order of Mr. Justice Fletcher, which as slightly varied by the Appeal Court was confirmed by the Judicial Committee, the applicant had to pay into Court a sum of roughly about Rs. 50,000 together with interest at the rate of 6 per cent. from the 1st July, 1907, which it is admitted, amounts to about a further sum of rupees two lacs, that is to say, the applicant had to pay into Court the sum of Rs. 6,30,000. As before stated he has paid into Court rupees two lacs of this amount and he urges before me that with the exception of the sum of one lac of the interest and a sum of Rs. 18,000 for principal, any further sum that he pays into Court will come back to him ultimately. He says that it would be a hardship on him if he is compelled to pay the whole amount directed by the order of the Judicial Committee to be paid into Court including the sum which he says will come back to him. When

the matter came before me to-day, Counsel on behalf of the applicant made this proposal that he should be directed to pay into Court on the 4th July a sum of Rs. 50,000 and a further sum of Rs. 68,000 on or before the 4th of August, 1915 and that he should be treated with the utmost leniency with regard to the payment of any further sums which, he contends, will come back to him and which he says are really his moneys. Now the amount that will come back to him is disputed by Sir S. P. Sinha on behalf of Mamooji and he urges with considerable force before me that this matter can never be concluded until the whole sum which represents the partnership assets is paid into a Court, when it would be definitely ascertained what is to come back to the parties according to their respective shares in the partnership after discharging the debts and liabilities of the partnership and the costs of the suit. When I originally made the order of the 11th May of this year, the matter of the applicant's ability to pay was fully gone into upon affidavit evidence and I then satisfied myself upon the affidavit evidence placed before me that the applicant was really in a position to pay the sums in question, but to make assurance doubly sure when an application was made to me in June of this year for an extension of the time for making the June payment directed by my order of the 11th May, I directed that the applicant should be cross-examined and he was cross-examined before me for nearly one day with regard to his ability to pay the amount and I think it right to state shortly what the effect of that cross-examination was. He stated that between the 17th May and 1st or 4th June when the application was made, his firm had had large business dealings to the extent of lacs, although of course, they had payments to make. He stated that his firm had not purchased largely but that they had made a large sales for which they had got large sums of money. He was cross-examined with regard to the amounts and the value of goods which they had sent between the 17th May and the 1st June by steamer to Rangoon. After considerable hesitation and considerable pressure and considerable prevarication with regard to certain of the goods, it was extracted from him that between those dates his firm had sent goods to the value of Rs. 50,000 to Rangoon and Akyab. Both with regard to the applicant's own property and with regard to the property of the firm (between which it is somewhat difficult to distinguish) I was not treated with frankness. For example, the applicant told me that he owned a three-annas share in the business, but it afterwards transpired that he really owned a considerably larger share than what he stated and that he and Ismail, Ahmed Mohomedi and Mohommed owned the whole business between them, the applicant's share amounting to six annas.

With regard to the applicant's property and the property of the firm I ascertained that the applicant had three shares in a Company, called the Surti Burabazaar Company, which were worth Rs. 2,500 each: that his firm had shares in a property called the Twinza Oil Company which shares were worth at the market price one lac of rupees. It is true that he stated that these shares were pledged and Ismail in the witness-box gave further information with regard to this, stating that the shares had been pledged to a gentleman in Rangoon named F. K. H. Chetti. It is in evidence that there was no deed or document relating to the pledge of these shares and in the absence of some proof of the pledge of these shares, I am not prepared to believe, as I was asked to believe, that these shares were pledged and if pledged that they were pledged to their full value. It seems to me that the applicant has entirely misapprehended his position. If he comes to the Court to ask for an indulgence, he ought to place before the Court all materials that are in his possession and not have the facts dragged out one by one as was the case here.

In addition to the Twinza Oil shares worth one lac, the applicant stated that he had two houses of his own in King's Road, Howrah, and Mirzapore Street, Calcutta, which he had bought for Rs. 37,500 in all. He valued the houses at Rs. 55,000 and he stated that he could sell these properties at this price if he could get a month to do so; he stated that he would not sell at Rs. 50,000 now as it would not be the proper value, and he was not prepared to sell unless he got full value for the properties, a somewhat extraordinary statement to make in view of his position as a debtor.

Then again he stated that there was a house in Gobind Chandra Dhur's Lane in Calcutta which belonged to the firm and that it was unincumbered. He stated that he had been offered Rs. 65,000 for the house and he was prepared to sell if he could get this sum, but not otherwise ; although it is fair to say that he stated that there was some difficulty with regard to the documents relating to the property. Then he said that since the war, the firm had made a profit to the extent of one lac on sugar. He also stated that from the 19th May to the 1st June his firm had drawn Rs. 1,50,000 or Rs. 1,25,000 from the Chartered Bank and also a further sum of Rs. 10,000 from the Mercantile Bank.

He also stated that he had a share in his father's estate, but that the estate was in the hands of the Receivers, that the estate was worth Rs. 4,00,000 his share being Rs. 3,00,000, that his share in this estate had been made over as security for the money : that it was good security, but the capitalists said that they would not advance money on it as it had already been given as security.

I think these are the principal matters that I need mention with regard to the cross-examination of the applicant before me at the beginning of June and the conclusion I then came to is that he was in a position, if he chose to do so, to pay the sums referred to in the order within the time limited by the order and to comply with the order. No evidence was adduced before me to-day to show any change for the worst in the applicant's position or to lead me to suppose that he cannot comply with the order if he wishes. The result is, I am not prepared to give the applicant any further time than he got under the original order as varied by the Court of Appeal for the payment of the lac payable to-day and I dismiss this application with costs. I will allow one set of costs.

Judgment.

Jenkins, C. J.—We certainly do not decide that there is any right of appeal in this case. But even if there were such a right we would decline to interfere.

The obligation of the defendants is clearly defined by an order of the 11th May, 1915, which fixed certain dates for payment of instalments of the considerable sum of money which their Lordships of the Privy Council directed to be paid into Court. Instead of imposing upon the defendants the obligation, which was strictly theirs, of paying the whole sum at once, a provision was made for this payment by instalments. The matter came before the Court of Appeal not by way of appeal from that order, but from an order for enforcement of payment. As I was a member of the Court of Appeal, I think I can say that I doubt the wisdom of the indulgence that was then granted by the Court. It was an indulgence which was intended to be used properly and we did not anticipate that it would be abused.

Assuming an appeal lies, did Mr. Justice Greaves err in such a way as to justify our interference in appeal when he refused to grant time beyond that limited by the order of the 11th May, 1915 as modified by the order of the Court of Appeal in respect of the July instalment? The learned Judge has dealt with the matter most carefully and with complete knowledge of the facts, for it is not the first application of the kind that has come before him. In the exercise of the discretion he has considered that further time should not be allowed. The Court of Appeal is at all times slow to interfere with the exercise of a discretion and on that ground, it would be enough to say that we refuse to interfere. But apart from that, the presentation of the case by Mr. Bagram, who I am sure, has told all that, could be said on behalf of his client, has failed to convince me that there is anything in the merits that would justify the further indulgence that has been sought. Therefore, in my opinion, this appeal should be dismissed with costs.

Each of the four sets of respondents will get his costs of this appeal.

Mookerjee, J.—I agree.

Richardson, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 566

JENKINS, C.J. AND WOODROFFE, J.

D. N. Ghose—Defendant—Appellant.

v.

Popat Narain—Plaintiff—Respondent.

Appeal No. 68 of 1914, decided on 28th January, 1915, from the Judgment of Chitty, J., dated 7th July, 1914.

Damages—Assessment of — Practice—Where enquiry by Court involves waste of time it may be refused to third person.

Cases should only be referred to other persons for assessing damages where the inquiry involves questions of detail which it would be wasting the time of the Court to investigate.

[P. 567, C. 1.]

A. N. Chaudhuri and *B. K. Ghosh*—for Appellants.

B. L. Mitter and *Bhattacharjee*—for Respondents.

Jenkins, C. J.—This is an appeal which arises out of a suit between a vendor and a purchaser of coal and one which should have been disposed of at the trial both on the question of liability and on the question of damages. However, a reference was directed.

More than once this Bench has protested against a reference being directed in cases of this nature. I wish again to repeat the protest, and I do this in the language of the Court of Appeal in England, when Lord Justice Bowen expressed his desire to protest against the melancholy spectacle which the case before him presented. He said he, "sometimes feared that profane persons might not be entirely wrong in complaining that the Courts of Justice had, at least, some of the attributes of the Circumlocution Office. His Lordship had never said anything disrespectful of the Chancery Division, but it was a melancholy spectacle to see a common law cause which might have been heard in one day transformed and inflated into a Chancery suit which had lasted Heaven knew how long and was going to last Heaven knew how much longer. It must not be taken as a thing in which their Lordships were to acquiesce that in every case in the Chancery Division the Court ought to direct an inquiry as to damages instead of assessing the damages itself. Cases ought only to be referred to other persons to assess the damages where the inquiry involved questions of details which it would be wasting the time of the Court to investigate." The opinion so expressed by Lord Justice Bowen was shared by Lord Justice Cotton and Lord Justice Fry, the latter of whom said that

"he had more than once expressed his fears lest the practice of directing inquiries should lead to two trials when one was sufficient. Sending an action to a Referee might be necessary in some cases, but as a general rule his Lordship objected to the splitting up or the trial into two inquiries—*first*, as to the right, and, *secondly*, as to the amount of damages. This case might have been entirely disposed of by the Judge:"

Wallis v. *Sayers* (1). We share the opinion to which expression is given in *Wallis* v. *Sayers* (1), and this case amply illustrates the undesirability of a needless reference. I have described the nature of the suit. It was commenced a long time back there was a decree establishing the right in 1913, and we are now in 1915 dealing with an appeal on exceptions to the Referee's report as to the *quantum* of damages. I trust that cases of this kind will not be referred to the Referee. It is not merely that this is an error of procedure, but where the question is one between a seller and a purchaser and the point in dispute may be *readiness and willingness to sell*, it is obviously of prime importance to know how the market has gone with reference to the contract price. In this case the matter went before the Referee. It did not take a very direct course, and I am not clear that the real points were properly appreciated, but the result has been that the plaintiff has failed to prove the amount of damages in respect of this particular coal, Lodna rubble, unless he can rely on an allegation in the defendant's statement of facts. But that allegation was made provisionally. The plaintiff never insisted upon it before the Referee as being a correct statement of the market rate, and it is obvious from the course which the case took before the Referee, that both parties gave the go-by to that statement and endeavoured to establish by evidence before him what the market rate was. The plaintiff has failed to prove that the market rate exceeded Rs. 1-12-0. Therefore, I think, Mr. Justice Chitty ought not to have interfered with the conclusion of the Referee.

This appeal is allowed, and the order of Mr. Justice Chitty is set aside with costs of this appeal and the exceptions before Mr. Justice Chitty.

Woodroffe, J.—I agree.

V.B./R.K.

Appeal allowed.

(1) (1890) 6 T. L. R. 356.

A. I. R. 1916 Calcutta 568

FLETCHER AND TEUNON, JJ.

Chandra Mohan Banerjee—Defendant—Appellant.

v.

Satya Kripal Banerjee—Plaintiff and others—Defendants—Respondents.

Appeal No. 10 of 1912, decided on 24th February, 1915, from the Original Decree of Addl. Sub-Judge, Hooghly, dated 16th September, 1911.

Probate and Administration Act (5 of 1881), Ss. 4 and 92—Two executors advanced money on mortgage—On suit by one payment to other was pleaded—Held, that money did not vest under S. 4 but by mortgage deeds and hence endorsement of payment did not amount to discharge under S. 92—It is mortgagor's duty to see that payment is made to right person.

Two of the sons of a deceased testator were made executors of his will. The two sons invested the moneys they had in their hands in mortgages. One of the brothers alone sued to enforce the mortgage security making the other brother defendant. The mortgagor pleaded payment of certain amounts to the other brother, as evidenced by endorsement on the mortgage bond, and claimed to be credited for the amounts.

Held, that notwithstanding that the money in fact formed a portion of the estate of the deceased, it did not vest in the executors as such under S. 4 of the Probate and Administration Act, but vested in them by virtue of the bonds which were given to them by the mortgagor and that, therefore, the endorsement did not amount to a discharge under S. 92 of the Act:

Held, further, that the money was lent on a joint account and it was the duty of the defendant mortgagor in making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. [P. 568, C. 2 & P 569, C. 1.]

Mohendra Nath Roy and *Hiralal Sanyal*—for Appellant.

Dwarka Nath Chakravarti, *Jogendra Nath Mukherji*, *Dwarka Nath Mitter* and *Bijoy Coomar Bhattacharya*—for Respondents.

Fletcher, J.—This is an appeal from a decision of the learned Additional Subordinate Judge of Hooghly dated the 16th September, 1911. The suit out of which the present appeal arises is a suit brought to enforce certain mortgage securities. It appears that one Satya Dayal Banerji, who died as long ago as the 30th May, 1897, left a will, dated the 11th January, 1897, under the terms of which the plaintiff and the defendant No. 2 in this case, who are his sons, were executors. The defendant No. 3 is the only other son of the deceased Satya Dayal Banerji. In accordance with their duties as executors the plaintiff and respondent No. 2 had in their hands certain moneys and these moneys they invested in these mortgage securities, the mortgagor in each case being the defendant No. 1. These mortgages were dated respectively the 6th November, 1898, the 10th February, 1899 and the 20th April, 1899, and the respective principal sums were Rs. 14,000, Rs. 10,000 and Rs. 9,550-8-6. The plaintiff, apparently later on, had disputes with his brother, the defendant No. 2, and the present suit was brought by him to enforce these mortgage securities. He appears as the sole plaintiff in this case and his brothers have been joined as defendants.

The only question that is in dispute in this case is as to certain items that appear endorsed in the mortgage-bonds as having been paid, it is said, to the defendant No. 2 by the defendant No. 1. It is said that this endorsement is a good receipt and that these sums ought to be given credit to the defendant No. 1. In the first place I disagree in the proposition of law that has been put forward by the learned Vakil for the appellant. This is not a case governed by S. 92 of the Probate and Administration Act at all. S. 92 applies to property which the English lawyers say rests in the executor *virtute officii*. That appears from S. 4 of the Probate and Administration Act. It is the property that lies vested in him, that is, the executor as such, that S. 92 applies to. The illustrations to S. 92 make it clear. In a system of law such as exists in England where there is a distinction between real and personal estates, it is a matter of some importance. But here where there is only one class of property, the matter is not of such great importance. Where the executor derives his title to a leasehold by virtue of his office, it is frequently in English law a matter of great importance. When one looks at Illustration (*b*) of S. 92, it will appear that one executor has power to surrender a lease, that is because the lease vests in him as such, as mentioned in S. 4 of the Act. The right under these bonds, notwithstanding that the money did, in fact, form a portion of the estate of the deceased, did not vest in the executors

as such under S. 4 of the Act, but vested in them under and by virtue of the bonds which were given to them by the defendant No. 1. That being so the money was lent on a joint account and it was the duty of the defendant No. 1 on making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. So even if I come to the conclusion that the learned Judge of the Court below was wrong in the findings of fact, I should agree in the result that he has arrived at. The learned Judge, it seems to me in a case like this, was in a far better position than any Appellate Court is in, where the question is purely as to the weight and value to be attached to the evidence of certain witnesses that the Judge had before him and where he was able to appreciate the evidence that was given in his presence. We are not in an equal position and we are not entitled, unless we come to the conclusion that the learned Judge was clearly wrong in the conclusion that he arrived at, to disturb the findings of fact made by him. The learned Judge having these witnesses before him has come to the clear finding that the defendant No. 1 and defendant No. 2 acted in collusion to cheat the estate of the deceased Satya Dayal Banerji. If that be so, no weight can be attached to any statement of either of these witnesses unless it is supported by good and independent evidence. A great deal has been made of the admission by the defendant No. 2 that he was deceived of these sums that are alleged to have been paid by the defendant No. 1, a sum of Rs. 4,939-10-6 payable on the second bond and another sum of Rs. 400 payable on the third bond. But the learned Subordinate Judge has disbelieved the whole of this story. How can we, in appeal, not having seen the witnesses, say that these people were telling the truth, that we should hold that their evidence ought to be believed and that the statements made by these witnesses proving the payments ought to be given a greater weight than the learned Subordinate Judge has given them, and that we ought now to come to the finding that these payments were in fact made? Then, it is said that the learned Subordinate Judge was biassed as against the defendant No. 1, because he was the co-defendant in a divorce case and got off what the learned Judge calls scot-free. But I am satisfied on the judgment that it was not that only that made the learned Judge take an unfavourable view of the evidence given by the two defendants. The real fact is that he had before him the whole of their evidence, he disbelieved that evidence and disbelieved the the genuineness of the endorsements that are on the bonds. I see no reason why we should differ from the findings of fact made by the learned Judge, and I think we ought not to disturb those findings on the evidence as it now stands before us. Far from thinking that the learned Judge has come to a wrong conclusion, so far as I have been able to form an independent estimate of the evidence, I think that if I had been in the position of the learned Judge of the Court below, I would have arrived at a similar conclusion.

The only other point that was raised in this appeal is as to the form of the decree. The learned Subordinate Judge had before him all the parties interested in the estate of the deceased Satya Dayal Banerji, namely the plaintiff, the defendant No. 2 and the defendant No. 3, and thought it proper to give one-third of the mortgage-money to each of them, that being the share which each of them is entitled to, apparently under the terms of the will, although, as a matter of fact, the will has not been given in evidence. The only point raised is that the defendant No. 2 admitted that he had received Rs. 4,939-10-6 and Rs. 400 out of the mortgage-money and had endorsed these payments on the back of the second and third mortgage bonds, and it is said that at any rate the defendant No. 1 should have received credit as against the defendant No. 2 for these two sums so endorsed, which have been admitted by the defendant No. 2 to have been received by him. The learned Judge did not assent to that view and apparently on this ground, namely, that he was not bound by the admission and he disbelieved the admission; and therefore, he thought that he ought to make a decree for the whole amount of the mortgage-money. What has happened as a matter of fact is, that the greater portion of the mortgage-money has been paid into Court by the defendant No. 1 and by an order of the

Court it has been drawn out by the plaintiff, the defendant No. 2 and the defendant 3 in equal shares. So now it would not be convenient for the Court to alter that portion of the decree declaring that the defendant No. 2 should get one-third of the amount realized under the terms of the mortgage-deeds. The defendant No. 1 paid the money into Court, I suppose, on terms as to the stay of execution of the decree that then stood, and he must have known when he did that, that the Court might order that that money should be paid out on the terms of the decree then existing. Any right that he has got against the defendant No. 2 in respect of these sums which the defendant No. 2 says he has received, he will be able to enforce in an independent suit. I think it would not be convenient now to disturb the decree so far as the defendant No. 2 gets ⅓rd share of the mortgage-money, when in fact he has already received a greater portion of his ⅓rd share. On the whole I come to the same conclusion as the learned Subordinate Judge has come to and in my opinion the present appeal fails and must be dismissed with costs to the plaintiff only.

Teunon, J.—I agree.

V.B./R.K

Appeal dismissed.

A. I. R. 1916 Calcutta 570

N. R. CHATTERJEE AND GREAVES, JJ.

Surjamull Agarwala — Plaintiff — Appellant.

v.

Ram Chandra Mistry and *others*—Defendants—Respondents.

Appeal No. 354 of 1913 with Rule No. 796 of 1913, decided on 13th January, 1915, from the Order of Sub-Judge, Pabna and Bogra, dated 16th April, 1913.

Civil P. C. (5 of 1908), O. 21, R. 52—Scope of R. 52—Rule is applicable even when property is in custody of same Court executing the decree—Attachment under R. 52 is to be affected by notice—Previous attachment is not affected by prayer of another formal attachment.

O. 21, R. 52, is not restricted only to cases in which the property sought to be attached is in the custody of a Court other than that executing the decree but also provides for attachment where the property is in the custody of the same Court. [P. 572, C. 2.]

Where the property to be attached is in the custody of any Court, the attachment in the words of O. 21, R. 52, shall be made by a notice to such Court that such property may be held subject to the further order of the Court. 2 All. 345, dist. [P. 573, C. 2.]

If there was an attachment, the mere fact that the respondent by way of abundant caution prayed for formal attachment in strict compliance with the terms of O. 21, R. 52, would not take away the effect of the attachment already made. [P. 574, C. 1.]

Provash Chandra Mitra and *Susil Madhab Mullick*—for Appellant.

C. R. Das and *Hiralal Chakravarti*—for Respondents.

Judgment.—By an indenture of mortgage, dated the 24th January, 1910 and made between Shyamlal Chatterjee of the one part and the respondents to this appeal, Ram Chandra Mistry and others (hereinafter called the mortgagees) of the other part, Shyamlal Chatterjee, in consideration of a previous advance of Rs. 5,178-11-9 made to him by the mortgagees and of further advances to be made to him by them upto Rs. 20,000 (including the said sum of Rs. 5,178-11-9), mortgaged by way of floating charge his beneficial interest in the trade or business of contractor of stone collections, petty contracts and all and every kind of contract works undertaken by him and carried on at Jainti and elsewhere under the Quarrying Division, Lower Ganges Bridge, or wherever the trade or business might be carried on thereafter either under the Quarrying Division, lower Ganges Bridge, or under any one else who employed him, and also all books and other debts then due or thereafter to become due and owing to him on account of the said trade or business either from the Quarrying Division, Lower Ganges Bridge, or from any other source, including all cheques, cash, etc., that he might receive or become entitled to in connection with his said work or business of a contractor that were then existing or which might thereafter be secured by him and all contracts and agreements, benefits and advantages, that had been or might thereafter be entered into with him or which he might or could be entitled on account or in respect of the said trade or business and also all stock in trade, materials, goods, fixtures, etc., present or future, in connection with the contract business. The indenture contained a provision for the payment of interest on all sums advanced or to be advanced at the rate of Rs. 12

per cent. per annum with half-yearly rests and also a provision that Shyamlal Chatterjee would not without the mortgagees' consent in writing charge, hypothecate or mortgage the mortgaged premises.

The mortgage was presented for registration at Darjeeling on the 26th January, 1910 and was registered there on the 2nd February, 1910.

Subsequently by an indenture, dated the 22nd November, 1910 and made between Shyamlal Chatterjee of the one part and Surajamull, the present appellant, of the other part, after reciting that Surjamull had already advanced money to Shyamlal Chatterjee to the extent of about Rs. 8,000 and that Surajmull had agreed to make from time to time further advances not exceeding, with the sum already advanced, Rs. 20,000 at any one time which Shyamlal Chatterjee agreed to re-pay with interest at the rate of Rs. 36 per cent. per annum, and that Shyamlal Chatterjee would execute a power of attorney in favour of Surajmull authorising him to receive all monies which should from time to time be payable to Shyamlal Chatterjee by or from the Eastern Bengal State Railway in respect of the work done by Shyamlal Chatterjee in terms of the contract already secured or to be secured in connection with the left or right bank of the Lower Ganges Bridge and would get the power of attorney registered with the Eastern Bengal State Railway authorities, Shyamlal Chatterjee covenanted with Surajmull to re-pay the sums already advanced with interest at the rate of Rs. 36 per cent. per annum and not to draw or receive from the Eastern Bengal State Railway authorities any money payable in respect of the said work until the advance and interest were re-paid and not to revoke the power of attorney.

Shyamlal Chatterjee executed power-of attorney on the same day in favour of Surajmull, nominating Surajmull his attorney to apply for payment and to receive all sums of money due and payable to Shyamlal Chatterjee from the Eastern Bengal State Railway authorities in respect of any bill or bills of Shyamlal Chatterjee in connection with any work done or to be done by Shyamlal Chatterjee under any contract or contract already secured or to be secured by him and to give proper receipt for the same. It does not appear that this power of attorney was ever registered with the Railway Company.

On the 9th March, 1912, the mortgagees, under the indenture of the 24th January, 1910, recovered judgment against the representatives of the estate of Shyamlal Chatterjee in the Court of the Subordinate Judge at Darjeeling for Rs. 34,388-15-9 and costs, and a declaration of lien was made in their favour over the property covered by the mortgage to the extent of Rs. 20,000. The appellant was made a party to the suit but was subsequently dismissed therefrom, the Judge agreeing with the contention put forward on his behalf that he was not a necessary party and stating that if the appellant had any claim to the property covered by the deed of hypothecation he could put it forward in the execution proceedings.

On the 15th May, 1912, an order was made by the Subordinate Judge of Pabna in the respondents' suit directing the registration and attachment of the money due to the estate of Shyamlal Chatterjee from the Executive Engineer of the Left Bank Division, Paksey and Quarries Division, Lower Ganges Bridge, Paksey, for the work done at Jainti, and on the 28th May, 1912, a letter was written by the Subordinate Judge of Pabna to the Examiner of Accounts, Lower Ganges Bridge, Paksey, stating that the sum of Rs. 4,000 and other money bills due to the heirs of Shyamlal Chatterjee for the works scheduled to the letter were attached by the Court at the instance of the respondents and requesting the Examiner to hold the moneys as per bills or otherwise under attachment until further order of the Court. The appellant on the 28th January 1911 instituted a suit for recovery of the moneys due under the indenture of the 22nd November 1910 and applied for attachment, the order for which was made absolute on the 5th April 1911, and on the 22nd May, 1912 the appellant obtained a decree against the heirs of Shyamlal Chatterjee for Rs. 12,771-5-3 and costs and on the 23rd May, 1912, an order was made in the suit for the registration and attachment of the bills payable to Shyamlal Chatterjee's estate in the office of the Executive Engineer, Left Bank and Quarry Division, Lower Ganges Bridge, Paksey, and on the 30th

May, 1912 and 1st June, 1912, the Officiating Subordinate Judge of Pabna wrote two letters to the Executive Engineer, Quarry Division, Lower Ganges Bridge, Paksey, requesting that two sums of Rs. 4006-8-10 and Rs. 9,970-12-8 be sent to the Court for payment to the appellant. The Examiner of Accounts on the 12th-13th June, 1912 sent Rs. 12,284-5-4 in payment of the amounts referred to in the letters of the 30th May, 1912 to the Subordinate Judge of Pabna, but on the 20th June 1912 an order was made that the appellant was not to receive any payment of the money pending the disposal of the respondents' application for rateable distribution.

The two execution cases eventually came on for hearing together before the Subordinate Judge of Pabna, the respondents asking that the question of title and priority in respect of the money in Court should be decided under O. 21, R. 52, Civil Procedure Code, and that a declaration should be made in their favour that the appellant's right to the money in Court was subject to the charge created in favour of the respondents by the indenture of the 24th January, 1910, and the decree of the 9th March, 1912, of the Darjeeling Court, and in the alternative they asked for rateable distribution under S. 73 of the Code of Civil Procedure. The appellant contended that O. 21, R. 52, did not apply and that the executing Court could not decide the question of priority between rival decree-holders except under S. 73 of the Code of Civil Procedure and that the respondents had no lien on the money and had abandoned their position as charge-holders. The Subordinate Judge decided against the appellant's contentions and found that the respondents had established their lien on the whole of the money in Court. The appellant now appeals against the decision on the following grounds:—(1) That O. 21, R. 52, is not applicable as it only applies when the money is in some other Court than that in which the order for attachment is made, the object of the rule being to prevent a conflict of jurisdiction between two Courts and not to attach property, and that the proper section to proceed under in a case like the present is S. 73 of the Civil Procedure Code; (2) that even if the order is applicable, it is only applicable to a case in which the money is in the custody of the Court before the application for attachment is made and that it does not apply to cases like the present where the money did not come into Court until after the application for attachment was made, and when if in fact any attachment was made the money was not then in Court; (3) that there never was in fact any attachment by the respondents after the money came into Court and that the Court accordingly could not decide the question of priority; (4) that the decree of the respondents was not executed as a mortgage-decree and is in fact only a money decree, and we were referred to the case of *Harsukh* v. *Meghraj* (1). The decree was further attacked on the ground that it contained no direction for sale and that it is too vague to be enforced, as it does not specify the property to be included.

With regard to the first contention, in our opinion, O. 21, R. 52, is clearly applicable to a case like the present and we see no reason to narrow the words of the rule so as to make it applicable only to a case in which the property sought to be attached is in the custody of a Court other than that executing the decree, and there is no other section in the Act providing for attachment where the property is in custody of the same Court. O. 21, R. 46 excepts property deposited in or in the custody of any Court from the operation of the rule and S. 73 relates to rateable distribution.

This really disposes of the appeal, but as the other contentions were argued in considerable detail before us and as we are asked to exercise our revisional jurisdiction under S. 115 of the Code of Civil Procedure, we have considered them and embody our conclusions in this judgment.

With regard to the second and third grounds, the facts appear to be these. The respondent in his application, dated the 16th May, 1912 for execution of his decree, prayed for attachment and sale of the properties of the judgment-debtor, and the Court ordered that the money due to the judgment-debtor from the Executive Engineer might be attached. There is on the record the draft of a letter from the Court to the Examiner of Accounts, informing him that the moneys and bills due to the judgment-debtor

(1) (1878-80) 2 All. 345.

in his hands were attached by the Court, and requesting him to hold the moneys as per bills or otherwise, under attachment until further orders of the Court. It is said that there is nothing to show that the letter was actually sent. But in the respondent's application, dated the 15th June to the Court, he stated that *rubakar* of attachment had been sent. The Court ordered the petition to be put up in the presence of the Pleaders of both parties on the 17th June, and we do not find any exception taken to the said statement in the petition, either by the Court or by the appellant, which indicates that the statement was not correct. The said attachment, however, related to the monies in the hands of the Engineer. They had not then come into Court. The cheques arrived in Court on the 13th June, 1912 in pursuance of the Court's order on the application of the appellant. On the 15th June the respondents presented two petitions to the Court, by one of which he complained that the appellant was trying to take out, in disobedience of the Court's order, the monies and bills and praying that they might be kept under attachment and that a *rubakar* might be sent soon, and by the other petition he prayed that the cheques which had arrived in Court that day and which the appellant was trying to take out, might be kept under attachment by an order under a *rubakar* of the Court and that the same might not be made over to the appellant. He also prayed for criminal prosecution of certain persons for disobedience of the Court's order passed in his execution case. The Court thereupon made the following order:—

"On the application of the decree-holder for withholding the payment of money to Surjamull Agarwala, decree-holder, in Execution Case No. 84 of 1912. Let the prayer be allowed,"

and it appears from the order-sheet in Execution Case No. 84 of 1912 that the appellant was directed not to receive any payment of money deposited into the treasury unless and until the application of the respondent (erroneously described in the order as an application for rateable distribution) was disposed of. It is true the order-sheet merely mentioned the prayer for with-holding the money, but we think the order virtually amounted to an attachment. There is no doubt that the respondent did apply for attachment of the money in the custody of the Court, and though there was not the formal order that the money be attached (that being the ground for the appellant's contention that there was no attachment), the Court ordered the money to be held subject to the orders of the Court. Now, where the property to be attached, is in the custody of any Court, the attachment, in the words of O. 21, R. 52, shall be made by a notice to such Court that such property may be held subject to the further order of the Court, and this was what was done.

On the 4th January, 1913, the Subordinate Judge directed the respondent to put in a petition within two weeks stating the section of the Code under which he could set up a miscellaneous case making the decree-holder in the other execution case as opposite party and try the matter in controversy between them in a regular way, as he was unable to find from the records in the two execution cases

"a regular petition of claim to or objection to the payment of money brought under attachment," and that "till then the money under attachment will be held as it is."

The respondent accordingly on the 11th January, 1913 made an application praying that a formal order of attachment in strict literal compliance with the provisions of O. 21, R. 52, might be made, but he asserted that the application for attachment of the money in Court which was made on the 15th June, 1912, had been granted by the Court and that attachment was in effect made, but that in order to obviate any objections that thereafter might be raised, he applied for a formal order of attachment under O. 21, R. 52.

On the 26th April the respondent applied for amendment of his application for execution of decree. These petitions were rejected on the 10th May, 1913 and on the 16th May, 1913, the Court decided the case in favour of the respondent. The appellant relies upon these petitions and the order rejecting them, and upon the fact that respondent's Counsel pressed for the said amendment and for the attachment of the amount in Court, as showing that no attachment was effected at all. It seems to us, however, that the Court in rejecting the petitions considered them to be unnecessary. In any case if there was an attachment, as we think there was, effected on the 17th June, 1912, the mere fact that the respondent by way

of abundant caution prayed for formal attachment in strict compliance with the terms of O. 21, R. 52, would not take away the effect of the attachment already made. The order of the 4th January, that "till then the money under attachment will be held as it is," shows that the Court also thought that the money was under attachment.

We are accordingly of opinion that there was also an attachment of the money after it came into the custody of the Court.

With regard to the fourth ground urged by the appellant and the form of the decree, we do not see that there was any necessity to direct an account of what was due to the respondents in respect of their mortgage, as the amount due was found by the judgment and is stated in the decree and the property charged is sufficiently identified in the decree and in fact it was not seriously disputed before us that the money in Court was covered by the respondents' charge. With regard to the contention of the appellant that the decree is faulty in form as it contains no order for sale, of course the decree-holder is responsible for getting a decree in such a form that he can enforce it, but we see no difficulty here in the respondents' way on this account. As they have a decree declaring a charge on certain sums of money and other things and as there is now in Court a sum of money which, as above stated, is clearly covered by their charge, we see no reason why once the priority of the charge is established (as in fact has been done) they should not receive payment of this sum. We know of no authority that debars us from so holding on the ground that the mortgage-decree in a case like the present must be in a particular form. With regard to the case of *Harsukh* v. *Meghraj* (1), it does not appear from the report what property was there charged, but the case of *Muluk Fuqueer Baksh* v. *Manohur Das* (2), which was referred to and which is stated in the head-note to have been followed, was a case of a charge upon immovable property, when different considerations apply; accordingly if the property charged in *Harsukh* v. *Meghraj* (1) was immovable property, the decision is not applicable to the present case, but in any case the decree in that case did not as here contain a reference to the property covered by the deed of hypothecation, which is sufficient to distinguish it from the present case. The other cases quoted to us depend on the particular circumstances of the case and do not cover the present case.

There remains for consideration the question of priorities. In the present case, neither party seems to have thought fit to perfect their charge by giving notice to the persons who were to make the payments to their mortgagor and accordingly apart from any question of notice the respondents' charge which is prior in date must prevail. The District Judge, moreover, has fixed the appellants with notice and although in our view this is not clearly established, it is difficult to believe in view of the rate of interest charged that the appellants did not know of the respondents' charge.

The appeal accordingly fails and must be dismissed with costs 10 gold *mohurs*.

No order will be made upon the Rule which will be dismissed.

V.B./R.K.

Appeal dismissed.

(2) (1870) 2 N. W. P. H. C. R. 29.

A. I. R. 1916 Calcutta 574

MOOKERJEE AND BEACHCROFT, JJ.

Safer Ali Mandal and *others*—Plaintiffs and Defendants—Petitioners.

v.

Golam Mandal and *another*—Defendants—Opposite Parties.

Civil Rule No. 1036 of 1914, decided on 21st July, 1915.

(a) Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Cl. 8—Special authorisation entirely personal.

The special authorization contemplated by Clause (8) of the second Schedule to the Provincial Small Cause Courts Act is entirely personal to the presiding Judge. [P. 575, C. 2.]

(b) Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Cl. 8—Scope of—Suits for recovery of rent by Judges expressly authorized contemplated—Construction of statute.

Semble:—By enacting Clause 8 of Schedule II to the Provincial Small Cause Courts Act the Legislature intended that suits for the recovery of rent should be tried under the Small Cause Court procedure only by such Judges as have been expressly authorized to exercise jurisdiction in that behalf: it was not intended that jurisdiction should be conferred by a general order on a particular Small Cause Court, irrespective of the qualifications of the individual officer who may preside therein. [P. 576, C. 1.]

Wahed Hossein—for Petitioners.

Purendu Sundar Banerjee—for Opposite Parties.

Judgment.—We are invited in this Rule to review our judgment in the case of *Golam Mandal* v. *Safer Ali Mandal*. Civil Rule 251 of 1914. That Rule was obtained by the defendants, in a suit for recovery of rent of homestead land, to set aside the decree of the Small Cause Court Judge on the ground that he had no jurisdiction to try the suit. The Rule was heard *ex parte* on the 4th June, 1914 and was made absolute. On the 3rd September, 1914 the plaintiff and two of the defendants applied to us to review our decision on two grounds, namely, *first*, that the notice of the Rule had not been served upon the petitioners, and *secondly*, that materials essential for a correct decision of the question in controversy were not placed before the Court. We accordingly granted the present Rule. The allegation that the notice of the Rule had not been duly served, has not been contradicted by the opposite party. We have consequently allowed the matter to be reargued, and this course was clearly desirable in view of the fact that the question raised is one of jurisdiction, which may affect the decision not merely of the case before us, but also of other similar cases tried by the Small Cause Court Judge.

The plaintiff sued the defendant for recovery of arrears of rent of homestead land. An objection taken by the defendants that the suit was excluded from the cognizance of the Small Cause Court by Article 8 of the second Schedule to the Small Cause Courts Act was overruled by the Judge in the Court below on the ground that a similar suit in respect of this very land had been tried as a Small Cause Court Suit in 1906. We set aside the decree made by the Small Cause Court Judge in favour of the plaintiff, on the ground that there was nothing to show that the Judge had been expressly invested by the Local Government with authority to exercise jurisdiction with respect to suits of this class. We are now invited to review our decision on the ground that the Judge had, as a matter of fact, been duly authorised by the Local Government. In support of this contention reliance has been placed upon the following notification of the Government of Bengal dated the 21st June, 1904:—

"It is hereby notified that the Munsifs of Alipore and Sealdah in the District of 24 Parganas are vested under Clause (8) of the second Schedule of the Provincial Small Cause Courts Act (9 of 1887) with power to try, under the Small Cause Court procedure, suits for the recovery of rent of homestead lands within their respective jurisdictions, when the value does not exceed Rupess fifty."

It has been argued on behalf of the opposite party that this notification is of no avail, and that what is requisite is that the particular Judge who tries the case should have been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto; in other words, that the special authorization contemplated by Clause (8) is entirely personal to the presiding Judge. In our opinion, this contention is well founded.

Clause (8) of the second Schedule to the Provincial Small Cause Courts Act excepts a suit for the recovery of rent other than house rent from the cognizance of a Court of Small Causes, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. Clause (8) of the Schedule must be read along with sub-S. 1 of S. 15, and when they are so read, it becomes obvious that a distinction is drawn by the Legislature between "a Court of Small Causes" and "the Judge of the Court of Small Causes." Clause (8) requires that the Judge should have been expressly invested with authority to exercise jurisdiction, and not that jurisdiction should have been conferred upon the Court. The distinction between the Court as an institution in which the Judge exercises judicial functions and the particular individual who presides in that Court is fundamental and well recognised. (See for instance S. 6 of the Small Cause Courts Act.) As an Illustration reference may be made to the decision of the Full Bench in *Bahadur* v. *Eradatallah* (1), where it was pointed out that the word "Court" implies a sense of continuity notwithstanding a change of officers. On the other hand, when we turn to S. 153 of the Bengal Tenancy Act, we find an instance where a Judicial Officer may be specially empowered to exercise a particular jurisdiction. It is clear, upon a plain reading of Clause (8)

(1) (1910) 37 Cal. 642=6 I. C. 801.

and assigning to the term "Judge" its natural meaning, that the Legislature intended that suits for the recovery of rent should be tried under the Small Cause Court procedure only by such Judges as had been expressly authorised to exercise jurisdiction in that behalf; it was not intended that jurisdiction should be conferred by a general order on a particular Small Cause Court, irrespective of the qualifications of the individual officer who may preside therein. It is not disputed that Babu Tincowri Chaudhuri, who tried this suit, had never been expressly invested by the Local Government with authority to exercise jurisdiction with respect to suits for the recovery of rent. The notification of the 21st June, 1904 is, as we have said, of no avail; what was needed was a notification authorising this particular officer to try suits for the recovery of homestead lands after jurisdiction had been conferred upon him under S. 25 of Act XII of 1887. The order under S. 25 of Act XII of 1887 constituted this officer a Judge of a Court of Small Causes within the meaning of Clause (8) of Act IX of 1887, as explained in the case of *Akshay Kumar Shaha* v. *Hira Ram Dosad* (2). But as he was not expressly invested with authority to try suits for the recovery of homestead land, he has exercised a jurisdiction not vested in him by law: *Sahodora Mudali* v. *Sarbosobha Dasi* (3). It is desirable that matters should be set right by the Local Government on an early date by the issue of notifications from time to time expressly investing particular officers (whether they be Judges of Small Cause Courts under Ss. 6 and 8 of Act IX of 1887 or under S. 25 of Act XII of 1887) with authority to exercise jurisdiction in suits for the recovery of rent of specified classes of land and of specified amounts. But in so far as the present suit is concerned, there is no escape from the position that the decree was made without jurisdiction. We accordingly affirm our previous decision and discharge this Rule; but, in view of the special circumstances of the case, we make no order as to costs.

We direct that a copy of our judgment be forwarded to the Local Government for information and for such action as may be deemed necessary.

V.B./R.K.

Rule discharged; Case remanded.

(2) (1908) 35 Cal. 677.

(3) (1915) 42 Cal. 638=27 I. C. 258.

A. I. R. 1916 Calcutta 576

MOOKERJEE AND ROE, JJ.

Raja Behari Nath and *another*—Defendants—Appellants.

v.

Kailas Chandra Dutt—Plaintiff—Respondent.

Second Appeal No. 462 of 1914, decided on 28th May, 1915, from the Decree of Sub-Judge, Dacca, dated 27th September, 1913.

Transfer of Property Act (4 of 1882), S. 106—Instalment of rent made payable on last days of months of Bengali year—Tenancy is regulated by Bengali calendar—6 months period of notice to quit would be according to Bengali year.

Where rent is made payable in instalments on certain specified dates which are the last days of months of the Bengali year, there is no room for doubt or controversy that the parties intended that the tenancy would be regulated according to the Bengali year.

The six months' notice to quit required by the provisions of the Transfer of Property Act, will be calculated according to the Bengali Calendar, expiring with the end of a year of the tenancy which terminates with the Bengali year. [P. 577, C. 2]

Surendra Chunder Sen—for Appellants.

Rajendra Chunder Guha—for Respondent.

Judgment.—This is an appeal by the defendants in an action in ejectment. The sole question in controversy at this stage is, whether the notice to quit served by the plaintiff on the defendants is sufficient in law to terminate the tenancy. In the decision of this question, the assumption has been made that the defendants are entitled to a six months' notice terminating with a year of their tenancy, provided that it be ultimately found that the defendants hold a tenancy which can at all be legally terminated by a notice to quit. The Subordinate Judge has found on this basis that the notice is sufficient and has remanded the case for adjudication on the merits.

On the 29th *Aswin* 1318, which corresponded to the 16th October, 1911, the plaintiff served the defendants with

notice to quit on the last day of *Chaitra*, 1318, which corresponded to the 13th April, 1912. The defendants maintain that if they are at all liable to be ejected, they are entitled to six months' notice calculated according to the British Calendar. The contention of the plaintiff is that the defendants are entitled to notice of the requisite period calculated according to the Bengali Calendar. In support of the latter view, reliance has been placed upon the cases of *Gopi Nath Chongdar* v. *Abdul Gafur* (1), *Hari Das Tanti* v. *Upendra Narain Shaha* (2) and *Debendra Nath Bhowmik* v. *Syama Prosanna Bhowmik* (3). On behalf of the defendants-appellants, it has been contended that these cases are distinguishable, because in each of them the tenancy had been created before the Transfer of Property Act came into operation and consequently no question arises as to the rights and liabilities of the parties under S. 106 thereof. In the present case, it is said that the tenancy must be deemed, for the decision of the present question at any rate, to have been created on the 11th December, 1885, although it is not disputed that there was a pre-existing tenancy which dated back at least to the 8th March, 1878, if not to an earlier period, and was confirmed on the 16th March, 1879. It is needless to determine whether a new tenancy was or was not created in 1885; we shall assume, for the purposes of the present argument and for that purpose alone, that a new tenancy was then created and that the rights and obligations of the parties in respect of ejectment must be determined according to the provisions of the Transfer of Property Act. The question arises, what is the effect of S. 106?

S. 106 provides that in the absence of a contract or local law, or usage to the contrary, a lease of immovable property for agricultural purposes shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee by six month's notice expiring with the end of a year of the tenancy. On behalf of the appellants it is argued, with reference to S. 4, sub-S. (1), of the General Clauses Act, 1897, read with Clauses (33) and (59) of S. 3, that the terms 'year' and 'month' mean year and month calculated according to the British Calendar. In our opinion this contention is of no avail to the appellants. The terms of the lease of 1885 show that there was an implied contract that the tenancy would be held from year to year according to the Bengali Calendar. The rent is made payable in instalments on certain specified dates which are the last days of months of the Bengali year, and there is no room for doubt or controversy that the parties intended that the tenancy would be regulated according to the Bengali year. If, then, there is a tenancy from year to year on the basis of a year calculated according to the Bengali Calendar, it is impossible to maintain the view that a month of that year must be calculated according to the British Calendar; clearly the month must also be calculated according to the Bengali year. Consequently the defendants are entitled to six months' notice, calculated according to the Bengali Calendar, and expiring with the end of a year of their tenancy, which terminates with the Bengali year. From this point of view, the objection urged by the defendants turns out to be groundless. The notice was served on the 29th *Aswin* 1318 and the defendants were required to quit by the end of *Chaitra* 1318; consequently they had six months' notice terminating with a year of their tenancy. This was strict compliance with the requirements of the law.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1915) 30 I. C. 886.
(2) (1912) 16 I. C. 937.
(3) (1907) 11 C. W. N. 1124.

A. I. R. 1916 Calcutta 577

SHARFUDDIN AND COXE, JJ.

Gajadhar Pershad Sahu—Plaintiff—Appellant.

v.

Bindubashini Pershad — Defendant—Respondent.

Appeal No. 100 of 1913, decided on 12th February, 1915, from Original Order of Sub-Judge, Mozuffarpore, dated 14th December, 1914.

(a) Hindu Law—Debts—Widow—Estate would not be bound for personal debts—To bind the estate allegation of binding nature of debts must be made in plaint.

Where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her.

[P. 579, C. 2.]

(b) Execution—Personal decree—In execution of personal decree against Hindu widow evidence can be adduced about binding nature of debts if alleged in plaint.

In execution of a personal decree against a Hindu woman with a limited interest in the estate obtained upon a plaint expressly alleging the debt to have been incurred for legal necessities, the decree-holder, in order to make the estate liable, is entitled to adduce evidence to prove the necessities for which the debt was contracted. [P. 579, C. 2.]

(c) Hindu Law—Debts—Widow—Necessity—Debts for payment of Government revenue are of necessity and bind the estate.

Government revenue and other Government demands are claims of Government on the land and their payment must be made by the estate and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy these debts. [P. 579, C. 2.]

(d) Civil P. C. (5 of 1908), O. 21, R. 15—One joint decree-holder if not prohibited can execute whole decree.

Any one of the several joint decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. [P. 579, C. 2.]

Umakali Mukerjee, Lakshmi Narain Singh and *Baldeo Narain Singh*—for Appellant.

Mohendra Nath Roy, Bulwant Sahay and *Raghunath Singh*—for Respondent.

Sharfuddin, J.—This is an appeal against the order of the Subordinate Judge of Mozuffarpore, dated the 14th December, 1912. The decree-holders are the appellants.

In order to appreciate the arguments addressed to the Court, I think, it is necessary to refer to the salient facts which resulted in the order appealed against.

One Sant Protap had two daughters, one of them was named Manjhuri. She died after the decree. The other daughter had two sons, named Baranashi and Bindubashini. This daughter died leaving the two sons named above. Baranashi, one of her sons, is also dead. After Sant Protap's death, his surviving daughter was the holder of his estate with the limited interest of a daughter. His reversioner was Bindubashini. Manjhuri, as observed before, died after the present appellants had obtained a decree against her and the only surviving reversioner, namely, Bindubashini succeeded to the estate of Sant Protap.

It appears that Manjhuri, during the period she held the estate of her father, entered into business dealings with the appellants, who advanced to her, from time to time, various sums of money for necessary purposes, at least it is so alleged in the plaint. On the 13th October, 1893, a document, purporting to be a mortgage-deed, was executed by Manjhuri in favour of the appellants in lieu of the previous debts and also for the purpose of meeting with the legal demands against the estate of her father, as for example, Government revenue and other Government demands. The appellants sued her on that bond and obtained a mortgage-decree on the 1st May, 1901. Manjhuri, the judgment-debtor, appealed to this Court. This Court held that the bond could not be treated as a mortgage-bond as no witness was examined to say that Manjhuri had executed that bond in his presence. This Court, on the above ground, gave a personal money-decree against Manjhuri on the 14th June, 1904.

It appears that some of the plaintiffs of the original suit transferred their share of the decree to Mr. Christian, who did not join in the application for execution of the decree.

In Execution Case No. 212 of 1912 Gajadhar Prosad and Mahadeo Prosad, two of the three decree-holders, applied for execution of the decree against Bindubashini, the legal representative of the judgment-debtor, Munjhuri, who died in 1909, and sought to sell the properties which originally belonged to Sant Protap and then held by Bindubashini as the reversioner of Sant Protap. Bindubashini objected to the execution on the ground that the decree having been a personal decree against Manjhuri, the estate of her father was not liable for the satisfaction of the debt incurred by Manjhuri.

The Subordinate Judge held that Manjhuri not having been sued in her representative character and the decree being a personal decree against her, the decree-holders had no right to execute that decree against the reversioner or against the estate left by Sant Protap. He further held that the meaning of S. 50, Civil Procedure Code, was that all the decree-holders should join in the

application for execution and that as Mr. Christian had not so joined, the application was not maintainable. This order was passed on the 14th December, 1912, and it is this order which has been appealed against by the appellants. It appears from the order of the Subordinate Judge that the appellants applied to him to adduce evidence to prove that the debts incurred by Manjhuri were for legal necessities. The Subordinate Judge did not allow this, on the ground that this would be making a new case in the execution department which was not the case in the plaint and that there was no issue framed with regard to legal necessities.

We are asked in this appeal to consider whether any new case was attempted to be set up by the appellant and to hold that the estate of Sant Protap was bound to satisfy the debts, as they were incurred for legal necessities. In order to discuss whether the appellant desired to set up a new case not made out in the plaint we have to advert to the plaint itself. In paragraph 2 of the plaint there is an allegation in most distinct terms that the debts were incurred by Manjhuri to pay off the debts due to other creditors, which Manjhuri contracted for paying the Government revenue and other Government demands and for meeting other necessary and legal expenses. It is, therefore, clear that the question was raised in the plaint, but a plaintiff cannot have questions decided unless the allegations are disputed. Manjhuri had no motive to dispute the allegation. If she had to pay, it made no difference to her whether the estate would have to pay after her death or not. For this very reason it seems that no issue was framed, but the question of legal necessity was no doubt raised in the plaint.

The decree against Manjhuri was a money decree and a personal decree and hence the question resolves itself into this: either Manjhuri borrowed for legal necessities or she did not. If she did, the loan bound the estate and the respondent Bindubashini is her legal representative. If not, the loan was a private loan and the respondent is not her legal representative.

The question whether the respondent is her legal representative or not, comes within the provisions of S. 47, Civil Procedure Code.

This question again turns on the further question whether the loan was for legal necessities. This question has never been decided.

It is settled law that where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who came after her. We have already observed that the suit in the present case was so framed, and the basis of that suit against her was that the estate which she held was bound and that she was compellable to pay not out of her own assets, but out of the estate. This is clear from paragraph 2 of the plaint. A Hindu woman who succeeds as heir, whether to a male or to a female, has not complete dominion over the property inherited by her, so as to enable her to alienate it otherwise than in case of necessity. This is no doubt the law, but there can be no doubt that the Government revenue and other Government demands are claims of Government on the land and the payment must be made by the estate, and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy those debts. In the above circumstances, I am of opinion that the appellants are entitled to adduce evidence to prove the legal necessities for which the debt was contracted.

In disposing the application of the decree-holder the Subordinate Judge has referred to S. 50 of the Civil Procedure Code and has held that all the decree-holders should have joined in the application for execution, but this is not so as O. 21, R. 15, provides that if there are more than one decree-holder, any one of them may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. It is admitted that the execution in the present instance was applied for by two out of three decree-holders for the whole decree.

In the above circumstances, I am of opinion, that this case should be remanded to the lower Court, with a direction that both parties should be

allowed to adduce evidence on the point whether the debt incurred by Manjhuri was or was not for legal necessities. If this is found in the affirmative Bindubashini must be held to be the legal representative and execution must proceed against him. If it is not found in the affirmative, the application must be refused. Costs will abide the result. Hearing fee five gold *mohurs*.

Coxe, J.—I agree.

V.B./R.K.

Case remanded.

A. I. R. 1916 Calcutta 580

JENKINS, C.J. AND WOODROFFE, J.

Kedar Nath Mitter—Defendant—Appellant.

v.

Denobandhu Shaha and *others*—Plaintiffs—Respondents.

Appeal from Original Civil Jurisdiction No. 42 of 1914, decided on 25th March, 1915.

(a) Limitation Act (9 of 1908), S. 20—Payment by cheque saves limitation.

If a cheque be delivered to a payee by way of payment and is received as such by him, it operates as a payment and is an extinguishment to that extent of the debt, subject to the condition that if upon due presentation the cheque is not paid the original debt revives.

Such cheque signed by a debtor and given in part-payment of the principal and received by the creditor as such would save limitation as contemplated by the proviso to S. 20 of the Indian Limitation Act. *Mackenzie* v. *Tiruvengadathan*, 9 Mad. 271, ref. to. [P. 580, C. 2.]

(b) Civil P. C. (5 of 1908), O. 2, R. 2—Cause of action—Continuous account—Whole forms one cause of action and cannot be divided.

Where there are dealings between two parties which give rise to a continuous account so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. *Bousey* v. *Wordsworth*, (1856) 18 C. B. 325, foll.

[P. 580, C. 2 & P. 581, C. 1.]

S. R. Das and *A. Rasul*—for Appellant.

M. Zorab and *B. L. Mitter*—for Respondent.

Jenkins, C. J.—The only question that arises in this appeal is whether a cheque given in part-payment of principal is sufficient to take the case out of the Indian Statute of Limitation having regard to the terms of S. 20 of that Act.

The facts are not in dispute. And if the cheque is sufficient for the purpose of S. 20, then this appeal must fail.

It seems to me clear that if a cheque be delivered to a payee by way of payment and is received as such by him, it operates as payment and is an extinguishment to that extent of the debt, though this is no doubt subject to a condition subsequent that if upon the presentation the cheque is not paid the original debt revives. There is no suggestion in this case that the cheque upon presentation was not paid, in fact, it was: and so there was payment in the fullest sense of the term and thus a part of the principal of the debt has, before expiration of the prescribed period, been paid by the debtor to the creditor.

Then, it is said that the proviso to the section has not been complied with. That proviso is that in the case of a part-payment of the principal of a debt the fact of the payment must appear in the handwriting of the person making the same. If I am right in the view that the cheque actually was a payment, the very payment was in the handwriting of the person making the same, I cannot for a moment suppose that this proviso was inserted as a sort of a trap to enable debtors to escape from the result of what they have done, and yet that would be the practical result of the argument advanced on behalf of the appellant. It seems to me that the words of the Act are amply satisfied by the circumstances of this case, and I say this notwithstanding the decision in the case of *Mackenzie* v. *Tiruvengadathan* (1) which is capable of distinction from the present.

A point was made before us as to the appropriation of payment and the nature of the plaintiffs' claim. This has not been made a ground of appeal. But even if it had been, it seems to me that it is valueless. It rests upon the supposition that where, as here, there is a continuous account, there is a separate cause of action in respect of each item. That seems to me to be quite opposed to the proper character of such accounts. In *Bousey* v. *Wordsworth* (2), it is said on the strength of the previous authorities that "where a tradesman has a bill against a party for any amount, in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to

(1) (1886) 9 Mad. 271.
(2) (1856) 18 C. B. 335=4 W. R. 566.

be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action and cannot be divided."

In my opinion the learned Judge was right in the conclusion at which he arrived. This appeal is dismissed with costs.

Woodroffe, J.—I agree.

V.B/R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 581 (1)

MOOKERJEE AND ROE, JJ.

Haradeb Das Agarwalla and *others*—Plaintiffs—Appellants.

v.

Ananda Sheik and *another*—Defendants—Respondents.

Appeal No. 132 of 1914, decided on 7th May, 1915, from the Order of Sub-Judge, Faridpur, dated 12th January, 1914.

Civil P. C. (5 of 1908), S. 102 and O. 41, R. 23 and O. 43, R. 1 (b)—Suit of Small Cause nature below Rs. 500—Remand order is not appealable.

An appeal does not lie against an order of remand in a suit of the nature cognisable by a Court of Small Causes and valued at less than Rs. 500, because a second appeal is not allowed against the decree of the lower Appellate Court in such a suit. [P. 581, C. 1.]

Phanindra Lal Maitra—for Appellants.

Judgment.— This appeal is clearly incompetent. It is directed against an order of remand, made under R. 23 of O. 41 of the Code, in a suit of a nature cognizable by a Court of Small Causes and valued at less than Rs. 500. If a decree had been made in the suit by the lower Appellate Court that decree would have been non-appealable under S. 102. Consequently, no appeal lies against the order of remand, for Clause (*u*) of R. 1 of O. 43 allows an appeal against an order under R. 23 of O. 41 remanding a case, only where an appeal would lie from the decree of the Appellate Court. It may be observed that the pre-existing law in this respect has been changed by the Code of 1908. Under the Code of 1882, an appeal was allowed against an order of remand by Clause 28 of S. 588, and it was ruled in a long series of decisions that this right of appeal was not restricted by S. 586: *Kirte* v. *Ramjan* (1), *Mathura Nath Ghose* v. *Nobin Chandra Kundu* (2), *Agandh Mahto* v. *Khajah Aliullah* (3), *Collector of Bijnor* v. *Jafar Ali Khan* (4), *Jhanday Lal* v. *Sarman Lal* (5), *Mahadev Narsingh* v. *Ragho Keshav* (6) and *Chinnatambi* v. *Chinnana* (7). Now an appeal does not lie against an order of remand in a suit of a nature cognizable by a Court of Small Causes and valued at less than Rs. 500, because a second appeal is not allowed against the decree of the lower Appellate Court in such a suit.

The result is that this appeal is dismissed.

V.B./R.K.

Appeal dismissed.

(1) (1884) 10 Cal. 523.
(2) (1897) 24 Cal. 774.
(3) (1907) 11 C. W. N. 862.
(4) (1881) 3 All. 18.
(5) (1899) 21 All. 291.
(6) (1883) 7 Bom. 292.
(7) (1896) 19 Mad. 391.

A. I. R. 1916 Calcutta 581 (2)

FLETCHER AND MULLICK, JJ.

Biseshwar Ray Chowdhury—Plaintiff—Appellant.

v.

Judhisthir Nath and *others*—Defendants—Respondents.

Appeal No. 3359 of 1912, decided on 12th February, 1915, from the Appellate Decree of Offg. Sub-Judge, 1st Court, Backerganj, dated 11th July, 1912.

(a) Civil P. C. (5 of 1908), O. 2, R. 2—On 're-settlement' fresh cause of action arises—It is separate from one arising under the old lease.

A 're-settlement,' or new contract of lease, contemplates a new obligation and a new contract to pay new rent and is not the same cause of action as the rent which becomes due under the original contract for letting. [P. 582, C. 1 & 2.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 104-H and 111-A—Record of Rights—Court cannot go behind it to determine nature of tenancy.

It is not open to a Court to go behind the Record of Rights to ascertain what, in fact, is the true nature of the tenancy between the parties. [P. 582, C. 2.]

(c) Bengal Tenancy Act (8 of 1885), Ss. 104-H and 111-A—Record of Rights prepared at settlement are conclusive unless challenged by suit.

A Record of Rights, prepared during the settlement of Government revenue under the provisions of Ss. 104-H and 111-A of the Bengal Tenancy Act, is conclusive, subject to the right of the tenant to bring a suit as mentioned in S. 104-H (3) of the Bengal Tenancy Act. [P. 582, C. 2.]

Brojolal Chakravarti for *Trailokho Nath Ghose*—for Appellant.

Gunada Charan Sen—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, First Court, Backerganj, varying the decree of the Munsif.

The suit was brought by the plaintiff to recover certain arrears of rent in respect of a piece of land situate in the limits of a Government *khas mahal*. The plaintiff obtained from the Government what is known as a settlement of a portion of the land within the *khas mahal*. That settlement, or lease, expired in the year 1313: and then, in accordance with the usual practice, apparently the Government proceeded to re-settle the property with the tenants, and when that was done they granted a fresh settlement to the plaintiff. The settlement to the defendants, who are the tenants, was for an increased rent, and the tenants were entered on the Record of Rights as tenants of one holding. Now the plaintiff in 1316 instituted against the defendants a suit to recover arrears of rent down to 1313. That suit was decreed; then the present suit was instituted in 1318 to recover rents from the date when the re-settlement with the plaintiff from the Government took place, namely, 1314, down to the date of the suit.

The Munsif decreed the suit in full.

On appeal to the learned Subordinate Judge, he varied the decree of the Munsif in two ways. *First* of all he held that the rent that had accrued due up to the year 1316 formed part of the same cause of action as that sued for in the other suit for rent, and that, therefore, under the provisions of R. 2, O. 2, of the first Schedule of the Code of Civil Procedure, the plaintiff must be taken to have abandoned his right to sue for that portion of the rent. He *further* held that there were, in fact, two different tenancies in respect of the land and that the plaintiff was only entitled to recover from the defendant No. 1 the proportionate amount of the rent.

Against that decision the plaintiff has appealed to this Court.

I have no doubt that the learned Subordinate Judge is wrong on both points. What is called the re-settlement, that is, the new contract of lease, contemplates that there was a new obligation and a new contract to pay new and increased rent. That, clearly, is not the same cause of action as the rent which became due under the original contract for letting which expired in 1313. I am unable to agree with the view taken by the learned Subordinate Judge with regard to that.

Then, on the *second* point, the appellant before us has urged, and I think rightly urged, that it was not open to the Subordinate Judge to go behind the Record of Rights prepared in this case. That Record of Rights was prepared during the settlement of the Government revenue; and, under the provisions of S. 104-H and under S. 111-A of the Bengal Tenancy Act, subject to the right of the tenant to bring a suit, as mentioned in S. 104-H (3), the Record of Rights is conclusive. I think the learned Subordinate Judge was wrong when he went behind the Record-of-Rights to ascertain what, in fact, was the true nature of the tenancy between the parties. In my view the variation made by the learned Subordinate Judge in the decree of the Munsif is wrong, and I think we ought to allow this appeal and restore the decree of the Munsif with costs in all the Courts.

Mullick, J.—I agree.

V.B./R.K.

Appeal allowed.

A I. R. 1916 Calcutta 582

JENKINS, C. J., MOOKERJEE AND RICHARDSON, JJ.

Krishen Doyal Gir—Plaintiff—Appellant.

v.

Irshad Ali Khan and *another*—Defendants—Respondents.

Letters Patent Appeal No. 4 of 1913, decided on 30th June, 1915, against the Decree of Walmsley, J., dated 5th December, 1913.

(a) Limitation Act (9 of 1908), Art. 142—Sale of estate in arrear of revenue under Bengal Revenue Sales Act (1859)—Proprietor dispossessed—Suit for recovery of possession—Art. 142 applies.

Where a share of an estate, being in arrear of revenue was sold by the Collector under Act XI of 1859 and was purchased by the defendant, who thereupon dispossessed the proprietor:

Held, (*Per Curiam*), that Article 142 of the Limitation Act, 1908, governed the proprietor's suit for recovery of its possession.

[P. 587, C. 2 & P. 592, C. 2.]

(b) Practice—Admissions—Value of.

Per *Jenkins, C. J.*—The value in fact of that which is in form an admission must depend upon the surrounding circumstances. [P. 586, C. 1.]

(c) Bengal Revenue Sales Act (11 of 1859), S. 33—Sale of estate not in arrear of revenue—Suit to set aside sale not necessary.

Where there is no arrear of revenue in respect of an estate, there is no condition justifying its sale and a suit for setting aside the sale is not necessary. [P. 587, C. 2.]

(d) Letters Patent—Clause 15—"Judgment"—Meaning of.

Per *Mookerjee, J.*—The term "judgment" as used in Clause 15 of the Letters Patent signifies what is now understood by the term "decree" or "order." 11 W. R. 107 and 12 W. R. 458, ref. [P. 588, C. 2.]

(e) Civil P. C. (5 of 1908), S. 98—Appeal—Difference of opinion on some points—Practice.

Where in an appeal the Judges of the Appellate Court are agreed that the decree of the Court below is erroneous to a certain extent, but as to the rest they are equally divided in opinion, the decree appealed from is bound to be reversed to that extent only but as to the rest it is confirmed under S. 98, Civil Procedure Code. Case-law discussed. [P. 588, C. 2.]

(f) Bengal Revenue Sales Act (11 of 1859), S. 33—Applicability—Sale beyond statutory authority cannot prejudice the rights of proprietor.

S. 33 of Act XI of 1859 applies not only where the sale has been irregularly conducted, but also where the sale has been illegal as held in contravention of an express provision for exemption, but the principle has no application where the property sold is not in arrear; the existence of an arrear is a condition precedent to the exercise of statutory authority by the Collector. A sale which is beyond the statutory authority vested in a Collector cannot prejudice the rights of the proprietor. Case law discussed. [P. 592, C. 1.]

(g) Criminal P. C. (5 of 1898), S. 145—Finding in order under S. 145 not admissible in evidence—Order admissible for limited purposes.

A finding in the order of a Criminal Court under S. 145, Criminal Procedure Code, is not admissible in evidence, though the order itself is admissible for a limited purpose, namely, to show the parties in dispute, the land in dispute, and the person declared entitled to retain possession. 29 Cal. 187 (P. C.), rel. on. [P. 592, C. 2.]

Umakali Mukerjee, Atul Chandra Dutt and *Sailendra Nath Palit*—for Appellant.

Joges Chunder Roy and *Mahammad Mustafa Khan*—for Respondents.

Jenkins, C. J.—This suit was instituted by Mohunt Krishna Doyal Gir against Irshad Ali Khan and Ali Nabi, and by the plaint a declaration is sought that the plaintiff is owner of 13 annas of Haria *asli mai dakhili*, Pargana Shergati under *kobalas* dated the 21st February, 1888 and 21st February, 1889, and under an *ijara* of 12th March, 1889 and a *kobala* of the 25th July, 1904 is owner of 1 anna 6 *dams* and 5 *cowris* and *ijaradar* of 1 anna 13 *dams* 15 *cowris*. In other words, he seeks to establish his present right to 16 annas in one capacity or the other and on the strength of this he prays that his possession of the 16 annas may be confirmed or restored to him. This suit was heard by the Subordinate Judge, first Court, Gaya, by whom it was dismissed. The appeal was heard by N.R. Chatterjea and Walmsley, JJ., who agreed so far that they passed a decree in the plaintiff's favour to the extent of the 1 anna 6 *dams* 5 *cowris*. But as to the rest they were at variance, for while Chatterjea, J., was for decreeing the plaintiff's claim in its entirety, Walmsley, J., was for disallowing the rest of his claim. A decree was accordingly drawn up and signed in accordance with the view of Walmsley, J. The plaintiff has appealed from so much of the decree as is not in accordance with the concurrent judgments of both the learned Judges. Certain preliminary objections were overruled and we have heard the case on the merits.

In Pargana Shergati, *Zilla* Gaya, there is a *taluka* named Khaira which belonged in equal shares to Nabi Bukhsh Khan and Mohammed Bukhsh Khan.

On the death of Nabi Bukhsh his 8 annas admittedly devolved or was treated as having devolved as to 5 annas on his daughter Hussaini Bibi and as to 3 annas on Mohammed Bukhsh and his children. It is common ground that the 8 annas of Mohammed in certain villages forming a part of Taluka Khaira passed to the plaintiff under the sale-deed of the 21st February, 1888, that the 5 annas of Hussaini so passed under the sale-deed of the 21st February, 1889, and that the remaining 3 annas passed for a limited interest under the *ijara* of the 12th March, 1889. The plaintiff maintains that among the villages that so passed to him was Harya Manar. This the defendant Irshad Ali Khan contests, and this dispute is the question involved in this litigation. Irshad Ali Khan claims to be the owner of Haria Manar by virtue of a revenue sale to the defendant Ali Nibi as his *benamdar*, and it is not disputed that he acquired this property unless the plaintiff is able to make good his claim that the property was assured to him and that it was included in the separate account opened in the name of his *benamdar*, Bishendhari.

First then I will deal with the question whether Haria Manar did or did not pass to the plaintiff.

This has been treated in the discussion before us as dependant on the true construction of the sale-deeds of 21st February, 1888 and 1889. The parcels are described in the first of these two deeds as follows:—

"8 annas out of 16 annas of each of the Mouzahs, Chuahar, Majhar, Dangrajaribigha, Mairakhap and Jaigir Harya, Pargana Shergati, District Gaya, appertaining to Taluk Khaira *mai* with hamlets Chuck, Chukukats, Tola and Maijra known by distinct names or otherwise the *touzi* number and *jumma suddar* whereof are given below in the *thakbust* map prepared by the compass which has up to date been held and possessed by me without the co-partnership of or interference by any one else."

And then there follow general words that may for the present purpose be disregarded. Then at the foot of the deeds are those words:—

"Mortgaged properties 8 annas out of 16 annas of each of the Mouzahs (1) Chuahar, (2) Majhar, (3) Dangrajaribigha, (4) Mairakhap, and (5) Jaigir Harya *mai* with hamlets, Chucks and Chakukats, known by distinct names or otherwise, Tolas and Maijras appertaining to Taluka Khaira, Pargana Shergati, District Gaya."

Then there is this:—

"Property sold—8 annas out of 16 annas of each of the Mouzahs, Chuahar, Majhar, Dangrajaribigha, Mairakhap and Jaigir Harya appertaining to Taluk Khaira, Pargana Shergati, District Gaya."

The only other matter to which I need refer is the recital of a prior mortgage of "shares of Mouzah Jaigir Harya." Much the same sort of description is to be found in *Musammat* Hussaini Bibi's sale-deed of the 31st July, 1889. There is a recital of negotiations for the sale of 5 annas out of the entire 16 annas of Jaigir Harya and of shares of certain *mouzahs*.

This is followed by a description of the parcels in the operative part of the sale-deed in these terms: "5 annas out of the entire 16 annas of Mouzah Jaigir Harya" and so forth. In the description of the property sold at the foot of the instrument is "Five annas out of the entire 16 annas of Mouzah Jaigir Harya", and so forth. Under the heading of Government Revenue of the property sold is written "Jaigir Harya, Rs. 33-15-0," and the description of the property at foot is "Five annas of Mouza Jaigir Harya." What then is it that passed under the description "Mouzah Jaigir Harya?" To answer this it is necessary first to go back to the Revenue Survey of 1843-44. There we find two separate maps, one of Jaigir and the other of Harya. In these maps each is treated as a *mouzah*, Harya lying to the north and Jaigir to the south.

The full name of Harya according to the map is Harya Bank Unair Churwadee Choor. Its area is shown as 786a. 3r. 22p. The village is described as not inhabited and of the land only 100 *bighas* were cultivated, the rest being jungle. The area of Jaigir in its map is given as 3356, of which 400 *bighas* are said to be cultivated. The village is described as inhabited. In the Mahalwar Register we find grouped together Jaigir Harya, Soonwar *Mai zamin* Pirtabal, and Pukureah *zamin* Churadih Chardaha *suoum hissa* as one unit with an area of 4,515a.-1r. 3p. The composition of this area has become apparent in the course of the discussion before us. Separate maps of Soonwar and Pukureah have been produced by the respondents in which the areas of these two items are shown as 253 and 119 acres respectively and it is thus that the area of 4,516 acres is reached. In a word, then, this is what appears from an examination of the Survey proceedings. Four separate maps are given of Jaigir Harya, Soonwar and Pukureah and to this extent they are treated as 4 distinct *mouzahs*. But it further appears that in the Mahalwar Register they were grouped together as a single composite unit having a single area of 4,516 acres, a figure which corresponds with the sum of the areas of the several items Jaigir Harya, Soonwar and Pukureah. Though Jaigir and Harya are contiguous Soonwar and Pukureah are at some distance away from them, the one lying to the north-west and the other to the south-west of Jaigir Harya.

And it may be observed of these last two that as things stood at the survey, Jaigir was the more important by reason of its larger area and its being inhabited. So far then as the survey materials go they lend themselves to the idea that the expression Jaigir Harya would mean the two items of the composite unit bearing those names, Harya being in the nature of an appanage to Jaigir, the paramount member of the group.

This brings me to certain registration proceedings. On the 26th April, 1877 an

application was preferred by Mohammed Bukhsh Khan for registration and mutation of names. One of the items there mentioned is

"Jaigir Harya Soonwar Bang *zamin* Chowaddih 8 annas—Pukureah Chardaha *zamin* Partapi 8 annas."

On this the record-keeper on the 27th August, 1878 submitted his report, stating that the under-mentioned areas were recorded with separate areas. Among these *mouzahs* was

"Jaigir Harya Soorbang *zamin* Partapi Pukureah *zamin* Jorwadih Khurd 1/6th share 4516a. 1r. 3p."

On the 24th of July, 1878 a joint *hissawari* petition was presented in which Jaigir and Harya Monwar *main zamin* were separately described and it was followed by the Land Registration decree of the 28th April, 1879 in which Mouzah Jaigir and Mouzah Harya Monwar are shown. On the 12th March, 1886 *Musammat* Hussaini Bibi presented a petition for opening a separate account.

Among the items in the Schedule to her petition is the following :

"Mouza Jaigir Harya, Soorbang *zamin* Partapi Pukureah *zamin* of Chorwadih." The Government Revenue of the entire 16 annas is stated to be Rs. 108 *odd* and the applicants' proportionate share Rs. 33-15, while the area is described as 4,516a. 1r. 3p. This statement of the Government Revenue agrees with the description in *Mussammat* Hussaini Bibi's sale-deed while the area includes Harya as well as Jaigir. Moreover it is inconceivable that the application should not have extended to Harya, and yet it only did so if Harya be included in the description "Mouzah Jaigir Harya." On the 10th July, 1888, after the purchase from Mohammad Bukhsh, Bishendhari Gir applied for registration. The name of the *mouzah* is given as Jaigir Harya. The record-keeper's report is that to Mahal Khaira appertained : "Mouzah Jaigir Harya Monwar together with *zamin* and other *mouzahs*."

The order to the record-keeper dated 31st December, 1888 directed entries to be made and the entry as to the proprietary right and share was "8 annas of Mouzah Jaigir Harya Monwar together with *zamin*," a description that appears twice in the Schedule to the order.

On the 7th June, 1889, after the purchase from *Musammat* Hussaini, Bishendhari Gir again applied for registration and mutation of name. There the description is "Mouzah Jaigir Harya" which is repeated by the record-keeper. In a decree of the 9th September, 1889 the specification of interest is "5 annas each Jaigir Harya Dangrajaribigha, &c." In an amended petition of 16th January, 1890 the description is Jaigir Harya Monwar together with *erazi*. The *sadar jama* is given as Rs. 100 odd but the description of the proportionate area is obviously erroneous, and does not tally with the entire area which is correctly described. The error can probably be traced to a misplaced reproduction of what is shown in Hussaini Bibi's petition.

On the 5th June, 1890 it was ordered that separate accounts be opened. This was done after the record-keeper had reported that the petition fulfilled the requirements of S. 70 and that the proportionate amounts of Government Revenue as stated by the petitioner were correct. The *sadar jama* of the joint share was reported to be Rs. 3,393-15-0, and that represents the difference between the Rs. 1,043-5-0 shown in Hussaini Bibi's petition as her proportionate share of Government Revenue and the *sadar jama* of Rs. 4,437-4-0 shown in the endorsement on the back of that petition.

On the 5th August, 1893 Bishendhari Gir preferred a petition for the inclusion of Rs. 1,020-13-0, the *nizamat* for the separated share of *Musammat* Hussaini Bibi and others, in the *ijmali* share and the description there given is "Mouzah Jaigir Harya."

Then there are the Registers of 1900. They are not the originals but transcripts and their value as throwing light on the problem before us is materially discounted by their manifest inaccuracy.

Thus this Collectorate Register gives 79 acres as the area of Jaigir and 4,516 acres as that of Harya though it is known that these areas were 3,356 and 786 acres respectively, Moreover we further know that 4,516 acres was the area of the composite unit Jaigir Harya, Soorbang and Pakureah. Another instance of hopeless error in this new register is furnished by the area attributed to Kahudag.

In view of these matters I am not disposed to place any great reliance on the

fact that in this register there is separate mention of Jaigir Harya Manar and Harya Manar, or to regard it as materially assisting the defendant's case. And I am the more confirmed in this view by the obvious and surer indication of the contents of these earlier registers afforded by the several reports of the record-keepers to which I have alluded. The original registers are not forthcoming for they have been destroyed.

In the proclamation of the 28th April, 1904, Jaigir Harya Manar 3 annas is named and Harya Manar including the land 16 annas, and the same descriptions are found in the plaintiffs' sale certificate of the 22nd September, 1904. But they do not appear to me to add anything to the strength of the case against the plaintiff in view of the earlier matters that I have narrated. If they were taken from the erroneous register as is surmised, the error gains nothing by repetition.

A stronger circumstance, however, in the defendant's favour is to be found in certain execution proceedings to which I will now allude. A suit on a mortgage had been instituted by one Baijnath Singh and others against Mohammed Bukhsh and others, of whom Bishendhari Gir was one, for the mortgage and suit included among other things the properties purchased by him. The suit ended in a compromise under which the properties purchased by Bishendhari were exempted from the operation of the mortgage and the decree was limited to the rest of the properties then in suit. Subsequently, Mohant Krishna Doyal Gir, the plaintiff in this suit obtained an assignment and on the 4th of September, 1907 applied for execution of the mortgage-decree. In his application he included among other items a 9 and odd annas share of Harya Manar *maizamin* notwithstanding the exemption.

This is not unnaturally claimed by the defendant as an admission that the exemption did not extend to Harya though it did to Jaigir, and that it is in form such an admission must, I think, be conceded. But the value in fact of that which is in form an admission, must depend on the surrounding circumstances; and though we have no explanation from the witness-box of how Harya came to be included in this application of the 4th September, 1907 it is significant that the plaint in the present suit which specifically and exclusively contends that Harya had passed to the plaintiff under the sale-deeds, was filed only two days later, on the 6th September, 1907. One may speculate as to the explanation, and wonder whether the inclusion of Harya in the execution application was due to a lack of care or an excess of caution, to an oversight or to a prudent design to have a second string to the Mohant's bow, but the materials before the Court do not permit of any sure conclusion as to this. A comparison, however, of the dates to my mind is destructive of the idea that the execution proceedings amounted to any abandonment of the position asserted by the plaintiff in this suit, or can be regarded as any real admission that Harya had not passed to the plaintiff. At its worst it is an indiscretion. But it is not enough for the plaintiff to show that Harya was assured to him : he must show a separate account in his favour. The Court's decision on this must be largely dependant on the view it may form as to the title. If title is not shown almost of necessity there could be no separate account. But if title be shown, there would in the circumstances of this case be a strong basis in favour of separate account.

I have already described the plaintiff's applications for separate registration in discussing what it was that passed to him. From those proceedings it is apparent that the applications and the orders thereon were appropriate and should have resulted in the separate registration sought and directed. It is, however, contended that the actual entries made related only a Jaigir and not to Harya, and in support of this the defendant points more particularly to the heading "Harya Manar" in the register and the absence of any entry in the plaintiff's favour. But as I have already pointed out, this register does not purport to be more than a transcript of the register in which the original entries were made and is patently incorrect.

And apart from that, even in this register the heading under which the plaintiff's name is entered is village Jaigir Harya Manar, and were it not for the later entry "Village Harya Manar *maizamin*" it could hardly be doubted that the first heading referred to Harya as well as Jaigir and was the appropriate place for making the entries directed. How this

later entry came to made does not clearly appear, though it may be easy to guess. But this at any rate seems clear, that it was not made until 1904 and an examination of the original register shows it was made after the entry of Jaigir Harya Manar. There is oral evidence as to Jaigir being popularly known as Jaigir Harya, but it is far from convincing and cannot be regarded as of the same value as the documentary evidence. This was fully recognized in the presentation of his case by the learned and experienced Vakil who represented the defendant. And after all is said and done the salient facts stands out that apart from the recent register no instance can be pointed out where Jaigir alone is called Jaigir Harya.

The conclusion to which I come is that the opening of a separate account in respect both of Harya and Jaigir was sought and directed, and that this was intended to be carried out and in fact was carried out by opening an account with the heading "Jaigir Harya Manar" or some such composite title. Therefore I hold that the plaintiff has established title to Harya and a separate account commensurate with his title.

I have so far dealt with the title under the two *kobalas* of February 1888 and 1889 and not with that under the *ijara*. And in view of the defendant's admission before us I need not discuss this *ijara* and its operation, for it was conceded by the Vakil for the respondent that the title under the *ijara* would follow that under the *kobalas*. In fact the *ijara* title was in no way discussed by him.

The next point made by the defendant is that the suit is barred by limitation inasmuch as it was not brought within 12 years of the plaintiff's dispossession.

This is essentially a case where the Court's view of possession would naturally be influenced by its view as to title. As the Subordinate Judge and Walmsley, J., thought title had not been established, it followed almost as of course that they considered possession not proved having regard to the circumstances of the case. Chatterjea, J., having come to a different conclusion as to title, differed naturally as to possession. And at this point I would digress for the purpose of pointing out that the parties placed much more ample materials before Chatterjea, J., and Walmsley, J., than before the Subordinate Judge and of this we have reaped the benefit.

There were proceedings under S. 145, Criminal Procedure Code, and it was there held that though the present plaintiff's men realized rent from the village down to the *dasahra* of 1904, the defendant was in possession at the commencement of the proceedings under S. 145. This is the dispossession of which the plaintiff complains.

The position as to possession is a simple one. The defendant does not, and indeed cannot, suggest that he was in possession before his purchase, and that was well within the period of 12 years prior to the institution of this suit. At the same time there is absolutely no evidence that Mohammad Bukhsh and Hussaini were in possession during the period subsequent to the plaintiff's purchase. Such evidence as there is supports the plaintiff's possession and in the view I take this is in accordance with the title.

The Subordinate Judge and Walmsley, J., ascribe much value to the absence of Harya tenants from the plaintiff's side, but they seem to overlook that in the circumstances this was in accordance with their interest.

On the other hand it is, I think, a just and shrewd remark of Chatterjea, J., that the admitted absence of a *cutchery* at Harya Manar for collection of rent is far more important than the evidence of any number of witnesses. And I must say that the evidence of witnesses, who would account for the absence of their rent receipts by the action of the high winds, is not calculated to inspire confidence.

As a final point the defendant suggested that the suit should have been for setting aside the sale and if so framed, it would have been far beyond the statutory period of limitation. And in this connection *Gobind Lal Roy* v. *Ramjanam Misser* (1) was cited to us. But the argument overlooked or disregarded the fundamental distinction between the circumstances of that case and of this, and in particular failed to notice that if, as I hold, the plaintiff has made out his title to any separate account there was no arrear in respect of Harya and no condition justifying a sale.

(1) (1894) 21 Cal. 70=20 I. A. 165 (P. C.).

The result then is that in my opinion the decree of Walmsley, J., should be modified and a decree passed in the plaintiff's favour declaring his title as prayed and establishing his possession. The defendant must pay the costs of the suit and appeals including the costs of, and incidental to, the Collectorate, documents being brought to this Court for the purpose of the hearing of the appeals.

Mookerjee, J.—This is an appeal by plaintiff in a suit for recovery or confirmation of possession of land on declaration of title thereto under three conveyances, dated 21st February, 1888, 21st February, 1889 and 25th July, 1904, and a usufructuary mortgage dated 12th March, 1889. The trial Court dismissed the suit on the ground that the plaintiff had failed to prove his title and possession. On appeal to this Court, Mr. Justice N. Chatterjea held that the plaintiff had proved his title and possession and was entitled to a decree in full. Mr. Justice Walmsley held, on the other hand, that the plaintiff had proved his title by purchase to the extent of 1-anna 6-*dams* 5-*cowris* share only under the conveyance of the 25th July, 1904, and was entitled to a decree in respect thereof. These judgments were delivered on the 4th September, 1913. On the 5th December, 1913, Mr. Justice Chatterjea directed that a decree be drawn up to the effect that the plaintiff do recover possession of 1-anna, 6-*dams*, 5 *cowris* share (as to which both the Judges were agreed that the decision of the primary Court was erroneous), and that the suit do stand dismissed as to the remainder of the claim. On the 22nd December, 1913, the plaintiff preferred the present appeal under Clause 15 of the Letters Patent. When this appeal came on for hearing on the 29th April last, two preliminary points were raised, one on behalf of the respondent, the other on behalf of the appellant. These objections were overruled as untenable. The respondent contended that the appeal had been lodged out of time, as the memorandum had been presented after the expiry of thirty days (the period prescribed in this behalf by the rules of the Court) from the date of the delivery of the judgments, and reference was made to the decision in *In the matter of the petition of Huruck Singh* (2) and *Huruck Singh* v. *Toolsee Ram Sahoo* (3). There is plainly no substance in this contention. The term 'judgment' as used in Clause 15 of the Letters Patent signifies what is now understood by the term 'decree' or 'order.' The decree in the present case was not drawn up till the 5th December, 1913, and the appeal was lodged within thirty days from that date. In any event, this is clearly a case where the Court should, in the exercise of its discretion, extend the period for presentation of the appeal. There is consequently no substance in the preliminary objection taken by the respondent. The preliminary point raised by the appellant turned out on examination to be equally illusory. The appellant contended that the decree should have been drawn up in accordance with the judgment of the senior Judge, and referred to the decisions of *Husaini Begam* v. *Collector of Muzaffarnagar* (4) and *Jehangir* v. *Secretary of State* (5). There is no foundation for this argument. The Judges of the Division Bench were agreed that the decree of the Subordinate Judge was erroneous in respect of the share covered by the conveyance of the 25th July, 1904. With regard to this share, the decree was thus bound to be reversed under sub-S. (1) of S. 98, Civil Procedure Code. In respect of the remaining share, the Judges were equally divided in opinion; Mr. Justice Chatterjea thought that the decree should be reversed while Mr. Justice Walmsley thought that the decree should be affirmed. Consequently there was no majority in favour of a reversal of the decree, and to this extent, the decree was bound to be confirmed under sub-S. (2) of S. 98, Civil Procedure Code, *Appaji Bhivrao* v. *Shivlal Khubchand* (6), *Sri Gridhariji Maharaj Tickait* v. *Purushotum* (7), *Lala Suraja Prasad* v. *Golab Chand* (8), *Ashutosh Roy* v. *Harinarain Singh* (9), *Devachand* v. *Hirachand* (10), *Keshav Pandurang* v. *Vinayak Hari* (11) and *Bammidi Bayya Naidu* v. *Bammidi Paradesi Naidu* (12). There was thus no room for the application of Clause 36 of the Letters Patent

(2) (1869) 11 W. R. 107.

(3) (1869) 12 W. R. 458.
(4) (1889) 11 All. 176.
(5) (1904) 6 Bom. L. R. 131.
(6) (1878-79) 3 Bom. 204.
(7) (1884) 10 Cal. 814.
(8) (1900) 27 Cal. 724.
(9) (1906) 3 C. L. J. 143.
(10) (1889) 13 Bom. 449.
(11) (1894) 18 Bom. 355.
(12) (1912) 35 Mad. 216=10 I. C. 75.

and it follows that the decree has been correctly drawn up. But from another point of view, the objection taken by the appellant is unsubstantial. Even if it were well founded and we directed that a decree be drawn up in accordance with the judgment of the senior Judge, the defendant would forthwith appeal from such decree, and on such appeal, the merits of the controversy would require examination. There is thus no escape ultimately from an investigation of the question in dispute between the parties —and that question in substance is, whether, under the deeds mentioned, the plaintiff purchased only one village Jaigir or two villages Jaigir and Harya and had these included in a separate account opened at his instance under the provisions of the Revenue Sale Law.

The history of the title alleged by the plaintiff may be briefly narrated. On the 21st February, 1888, the plaintiff purchased from Mahomed Bux, one of the admitted proprietors of the disputed property, an eight-annas share in Jaigir Harya. On the 21st February, 1889, he purchased a five-annas share from Hussaini Bibi, another admitted proprietor. On the 12th March, 1889, he took a usufructuary mortgage of three-annas share from Mahomed Bux, who acted in this transaction for himself and on behalf of his infant children, who, it is not disputed, were jointly interested in that share. There were then proceedings before the Revenue Authorities for registration of the name of the plaintiff and the separation of the share acquired by him; to these reference will presently be made. On the 30th May, 1904, the residuary share of the estate was sold for arrears of revenue and was purchased by the defendant in the name of Ali Nabi. On the 25th July, 1904, the plaintiff purchased from Ali Nabi 1-anna 6 *dams* 5-*cowris* share of Jaigir and Harya, and with reference to this share, Chatterjea and Walmsley, JJ., have agreed that the plaintiff is entitled to succeed. No further reference need be made to this share, as there is not and could not have been an appeal by the defendant. The questions in controversy now are, *first*, whether the plaintiff has, under the other transactions mentioned, acquired a good title to 13-annas share as proprietor, and to 1-anna 13-*dams* 15-*cowris* share as usufructuary mortgagee, of both Jaigir and Harya, as the plaintiff asserts, or of Jaigir alone as the defendant contends; and, *secondly*, whether, if the first question is answered in favour of the plaintiff, his share of Harya was constituted into a separate account as he maintains or remained merged in the residuary share as the defendant alleges.

To determine what the vendors and mortgagors of the plaintiff intended to transfer and did transfer to him in 1888 and 1889, we must look to the deeds themselves. The description given there may be compendiously stated as Mouzah 'Jaigir Harya.' To ascertain the meaning of this expression, we must look back to the antecedent transactions in respect of Jaigir and Harya. We have in the first place the Revenue Survey Maps of 1843-44 when the *mouzahs* comprised in Pergana Shergati were surveyed and delineated by Sherwill. We find that at that time there were two *mouzahs*, Jaigir and Harya; the latter lay towards the north of the former. Jaigir was an inhabited village and comprised 3,356 acres (equal to 5,370 *bighas*); only 400 *bighas* were cultivated and the rest were described as hill and jungle. Harya was uninhabited; its area was 786 acres (equal to 1,269 *bighas*); only 100 *bighas* were under cultivation, the remainder was jungle. There is nothing to indicate that Mouzah Jaigir was at that time known by the appellation Jaigir Harya; on the other hand, the map of Harya shows that the southern portion thereof was in different parts known by different local names, Bank Unair Churwadee, Choor, which all appear on the map of Jaigir and in the heading of the map of Harya. We next have proceedings before the Revenue Authorities of the Land Registration Act of 1876 had come into operation. The application by Mahomed Bux for registration of his name, made on the 26th April, 1876, treats Jaigir and Harya as distinct *mouzahs*; but it is noteworthy that these two *mouzahs* are linked with two others, namely, Sowa Bank and Pakuria and the aggregate area of the four *mouzahs* is stated to be 4,516 acres. This has been verified before us and found correct on a reference to the Survey Maps of Sowa Bank (or Sooibang) and Pakuria; the approximate areas of the four villages are 3,356, 786, 253 and 119 acres respectively. No explanation is available at this distance

of time as to how the four *mouzahs* came to be linked together; what had transpired between 1843 and 1877 is absolutely unknown. Two of these villages, namely, Jaigir and Harya, are continuous to each other and may be deemed to lie between one set of boundaries; the other two, however, were distinct and separate parcels situated at some distance one to the north-west, the other to the south-west. But whatever the history of the matter may be, the fact remains that in 1877 Jaigir and Harya were treated as distinct *mouzahs*, though they were linked for revenue purposes with two other villages. The order for registration made by the Collector on the 28th April, 1879 was in accord with the petition and shows Mouzah Harya separately from Mouzah Jaigir. We have not on the record the corresponding application and order for registration in respect of the share of Hussaini Bibi, but we have an application by her, dated the 12th March 1886, for amendment of mistakes in her petition for separate account; this application recites that errors had crept into the registration decree. In this application, the four *mouzahs* already mentioned are linked together and boundaries are given as if they were all comprised within the same set of boundaries—which we now know is not a fact. It may be observed also that the northern boundary of Mouzah Jaigir Harya as given in this petition is at first sight misleading as it is stated to be Harna Chuk. No Harna Chuk is shown on the map of Jaigir at any portion of its northern boundary, but the word Chuk appears on the boundary to the north-west in the map of Mouzah Harya. Whether the northern boundary as given in the petition refers to this Chuk may be a matter for speculation; but this much is clear that the Harya Chuk mentioned as the northern boundary is not Harya. All doubt on this point is removed by an examination of the original; what is given as the northern boundary is either Harya Chuk or Harna Chuk while the *mouzah* whereof the boundary is specified is Jaigir Harya. This petition consequently lends no support to the theory that Mouzah Jaigir Harya meant Mouzah Jaigir alone and that towards the north of it lay Harya. Apart from this and irrespective of mistakes which may have been made in the application for separate account, it is indisputable that the description Mouzah Jaigir Harya could not have been intended to mean Mouzah Jaigir alone, for the area is stated to be 4,516 acres which is the area of all the four villages and not of three alone. Consequently, the order of the Collector dated 24th September, 1886 that separate accounts be opened, admits of one interpretation only, namely, that the separate account should include not Jaigir alone but both Jaigir and Harya. We have now reached a point of time when the transactions with the plaintiff commenced. The conveyance of the 21st February, 1888 describes the property as Jaigir Harya; this, in the light of what had proceeded, must be taken *prima facie* to mean both Jaigir and Harya, and the same interpretation must be placed upon the application of the purchaser, made on the 10th July, 1888, for registration of his name. The order of the Collector dated 31st December, 1888 is consistent with this view. We have next the conveyance by Hussaini Bibi dated 21st February, 1889, which, taken along with her application to the Collector in 1886 and the order thereon, must be deemed to cover both Jaigir and Harya. A different effect cannot be attributed to the application of the purchaser made on the 7th June, 1889 for registration of his name and the order thereon by the Collector dated 9th September, 1889. It is needless to dwell at length on the usufructuary mortgage of the 12th March, 1889, because, it is conceded, that it must be taken in the same sense as that ascribed to the conveyances. There comes next the application of the plaintiff dated 16th January, 1890 to open a separate account. The statement of area comprised in the share of the applicant is incorrect and appears to have been copied out from the previous applications of Hussaini Bibi dated 12th March, 1886 and 21st February, 1889. But it is plain that the plaintiff intended to apply in respect of both Jaigir and Harya and that the order for separate account was made accordingly. A suggestion was faintly put forward that the revenue for the separate account was not correctly calculated; no foundation has been laid in the evidence to support this assertion, nor can the question be raised at this stage by the defendant, who under S. 54 of Act XI of 1859 has not acquired any rights which were not possessed by the

previous owners of the residuary share purchased by him. The distribution of revenue was made after notice to all the proprietors and they did not challenge the order of the Collector by way of appeal to the superior Revenue Authorities or otherwise. The result was that the order for separate account was made and has been given effect to ever since the 5th June, 1890. On the 5th August, 1893, the plaintiff found that the separate account of Hussaini Bibi must be closed; he himself had acquired shares both out of the separate account and the residuary estate, and after his share had been constituted into a separate account, what remained in the separate account of Hussaini Bibi had to be thrown back into the residuary estate. This was done accordingly on the 21st July, 1894. What then was the position of the parties at that time? The plaintiff had, by successive transactions, become the proprietor and the mortgagee of both Jaigir and Harya; on this point, I cannot, on the deeds and on an examination of the history of the title to the property, entertain reasonable doubt. This view is strengthened by the entries in the *Mahalwar* and Mouzawar Registers, and by the *hissawari* petition signed by all the proprietors and presented to the Collector on the 24th July, 1878 in the proceeding by Mahomed Bux for registration of his name. Against all these documents which converge to a conclusion in favour of the plaintiff, we have oral evidence of an unreliable and inconclusive character adduced by the defendant to show that Jaigir was popularly known as Jaigir Harya while Harya was known by its own special name. But the case for the defendant is founded really on what are called the Intermediate Register and the D Register, which it is said show two distinct *mouzahs*, namely, Mouza Jaigir Harya Manar and Mouzah Harya Manar; the former, it is contended, includes Mouzah Jaigir only and the latter Mouzah Harya; the plaintiff is registered in respect of the former but not with regard to the latter. This D Register is unreliable and contains grave errors; it is not the original register, but a copy prepared so late as 1900 from vernacular records which have now been destroyed. The contents of the original papers are unknown, but it is clear that they must have contained entries different from what we find in the present register. The proceedings before the Revenue Authorities from 1877 onwards, particularly the registration decrees and the orders for separate accounts were presumably carried out in the Collectorate. The result of those proceedings is entirely inconsistent with the D. Register as it now stands. No trace can be found in those proceedings or order that Mouzah Jaigir was called Jaigir Harya and that Harya was again separately called by its own name. It would not be right to hold that this register supersedes and nullifies the effect of the long series of proceedings before the Revenue Authorities, specially when we find that it contains serious errors the origin of which cannot be explained. For instance, the statement of area of what is called Jaigir Harya and Harya is in each case entirely wrong; in the former instance, it is 79 acres; in the latter case, it is 4,516 acres which is the area of the four villages previously mentioned. A similar error has been discovered in respect of at least one other *mouzah*; the register shows that Kahudag comprises only 201 acres while the survey map shows its area as 2,009 acres. The truth obviously is that the first entry in the register, namely, Mouzah Jaigir Harya includes both Jaigir and Harya, and that the much later entry about Harya alone must be ignored; how and when the second entry came to be made has been left wholly unexplained. Much stress has also been laid on behalf of the defendant upon an application for execution of a mortgage decree made by the plaintiff two days before the institution of this suit. The plaintiff made this application as assignee of a decree obtained on the 11th August, 1896 by one Baijnath against Mahomed Bux on foot of a mortgage, dated 16th March, 1887. The Schedule to the mortgage included all the *mouzahs* of Taluk Khaira, which admittedly comprises the disputed property. The plaintiff in his application for sale of the mortgaged properties mentioned Harya. On this circumstance the argument is based that Harya could not have belonged to the plaintiff. This contention is fallacious; the fact when taken most strongly against the plaintiff amounts to a statement apparently in conflict with his present claim; how it came to be made, has not been explained in

evidence and one is left to speculate whether it was made by oversight, possibly reproduced from a previous application by the decree-holder or whether it was made deliberately as an ultimate resource in the event of failure of this suit. Whatever the real explanation may be, the statement does not amount to abandonment of his rights by the plaintiff does not negative the effect of the other evidence on the record. It consequently follows that the predecessors of the plaintiff owned both Jaigir and Harya, that they intended to transfer and did transfer both the properties to him, and that at his instance, the *mouzah* was included in a separate account distinct from the residuary share purchased by the defendant at the sale for arrears of revenue. But it has been argued on behalf of the defendant that even if this view be well founded, it was obligatory upon the plaintiff to have the sale set aside within one year from the date thereof, as the proclamation under S. 7 of Act XI of 1859 and the sale-certificate granted on the 22nd September, 1904 show, that the Collector intended to sell and did sell the disputed property. Reliance has in this connection been placed upon the decision of the Judicial Committee in *Gobind Lal Roy* v. *Ramjanam Misser* (1). This argument is clearly fallacious. No doubt, S. 33 of Act XI of 1859 applies not only where the sale has been irregularly conducted but also where the sale has been illegal as held in contravention of an express provision for exemption. But this principle has no application where the property sold is not in arrear; the existence of an arrear is a condition precedent to the exercise of statutory authority by the Collector: *Balkishen Das* v. *Simpson* (13), *Harkhoo Singh* v. *Bunsidhur Singh* (14), *Jogendra Mohan Sen* v. *Uma Nath Guha* (15), *Mahomed Jan* v. *Gunga Bishun Singh* (16), *Ganga Pershad* v. *Irshad Ali* (17), *Hamid Hossein* v. *Mukhdum Raza* (18) and *Indramani Dasya* v. *Priyanath Chakravarti* (19). In the case before us, Mouzah Harya was not in arrear, as it formed no part of the residuary estate. If the officers in the Collectorate erroneously supposed that Harya was comprised in the residuary estate and under this impression, exposed it for sale, the sale was clearly beyond the statutory authority vested in the Collector and could not prejudice the right of the plaintiff.

The question of possession finally requires consideration for the determination of the question of limitation. The case is clearly within the scope of Article 142 of the Schedule to the Indian Limitation Act. The plaintiff must prove that he was in possession within 12 years of the institution of the suit. He relies upon a statement, in an order under S. 145, Criminal Procedure Code, made on the 9th December, 1905 in a proceeding between him and the defendant, to the effect that he was dispossessed in September, 1904. This finding in the order of the Criminal Court is not admissible, though the order itself is admissible for a limited purpose, namely, to show the parties in dispute, the land in dispute and the person declared entitled to retain possession, as explained by Lord Lindley in *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (20). We are accordingly thrown back upon the oral evidence of possession. Here we have oath against oath. The witnesses for the plaintiff seek to prove his possession down to 1904. The defendant does not allege that he was in possession before his title accrued by purchase at the revenue sale in 1904. Consequently we have to see whether the plaintiff was in possession as he asserts or his vendors and mortgagors were in wrongful possession. There is no evidence to show that they had such possession. They had admittedly parted with Jaigir and delivered possession to the plaintiff; if thereafter they retained possession of Harya contrary to their deeds, they would presumably require a *cutchery* in Harya; there is no trace of such a collection office in that village. Stress has been laid on the fact that the tenants of Harya had not been called by the plaintiff; the answer is that they are now under the influence of the defendant, and it does seem probable, as suggested by the plaintiff, that these tenants have paid no rents to either of the claimants since the

(13) (1898) 25 Cal. 833=25 I. A. 151 (P. C.).
(14) (1898) 25 Cal. 876.
(15) (1908) 35 Cal. 636.
(16) (1911) 38 Cal. 537=10 I. C. 272 (P. C.).
(17) (1912) 13 I. C. 959.
(18) (1905) 32 Cal. 229.
(19) A. I. R. 1914 Cal. 58=21 I. C. 953.

(20) (1902) 29 Cal. 187=29 I. A. 24 (P.C.).

dispute broke out. I accept the evidence of the plaintiff that he was in possession till dispossessed by the defendant after the revenue sale of the residuary estate in 1904. The inference follows that the plaintiff has established his title and possession as set out in the plaint. The result is that this appeal must be allowed and the suit decreed with costs both here and in the Court below. The costs in this Court must include the costs of the two hearings and the cost of obtaining the additional evidence from the Collectorate.

Richardson, J.—I have arrived without any hesitation at the same conclusion and for similar reasons.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 593

RICHARDSON AND MULLICK, JJ.

Ambica Charan Das — Defendant — Appellant.

v.

Harinath Das and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 163 and 164 of 1913, decided on 26th March, 1915, against the Decree of Sub-Judge, Khulna, dated 28th November, 1912.

Principal and Agent—Two of five brothers took up management of joint property for improvement under an agreement—Relationship of principal and agent subsists—Manager bound to exercise reasonable care and diligence—Payment of revenue is for upkeep of the estate.

Where by agreement two of the five brothers agreed to take over the management of their joint property for a period of five years for the improvement and upkeep of the estate:

Held, that the relationship of principal and agent created by the agreement must not be overlooked and that the managers are under a legal duty to exercise reasonable care and diligence in the management of the estate.

A payment on account of the Government revenue of an estate is a payment for the upkeep of the estate. [P. 594, C. 1.]

Surendra Chandra Sen and *Hemendra Chandra Sen*—for Appellant.

Nares Chandra Sen Gupta—for Respondents.

Richardson, J.—By an agreement, dated 17th *Chaitra* 1315 B. S., two of five brothers agreed to take over the management of their joint property for a period of five years from the 1st *Baisakh* 1316 to *Chaitra* 1320. The case was argued before us with sole reference to Clause 8 of the agreement. In that clause the management is expressed to be for the "improvement and upkeep" of the estate. The managers were to take two-fifths of the profits and to be liable for two-fifths of the profits and expenses, the remaining three-fifths of the profits and expenses being respectively payable to and by the other three brothers who renounced their rights of management during the period in question. The clause ends as follows:—

"If for the protection of the property the managers are required to pay any money in advance they shall make such payment and protect the property and they will be afterwards entitled to recover the same with interest; if the managers fail to pay the profits in proper time they shall be bound to pay the same with interest."

The plaintiff in this suit is one of the two managers and the defendant No. 2 is the other. It appears that the estate stands in the Collectorate in the name of the plaintiff, and that a certificate having been issued against him he was compelled to pay the sum of Rs. 1,256-6-0 on account of arrears of Government revenue due in respect of the year 1910. The payment was made on the 28th March, 1911 and on the 19th April following he brought this suit for contribution against his brothers. He obtained a decree in the Court of first instance which was confirmed by the learned Subordinate Judge in the Court of Appeal below. Two of the brothers, the defendant No. 1 and the defendant No. 2, have preferred appeals (Nos. 163 and 164 of 1913) to this Court.

For the defendant No. 1 it is argued in effect that the Government revenue was payable in the first instance by the plaintiff and the defendant No. 2 as managers out of collections which they made or ought to have made from the estate and in the circumstances a claim for contribution is untenable. There is undeniable force in this argument. It is not suggested that the agreement of 17th *Chaitra* 1315 was for any reason invalid. As the suit is framed, the plaintiff can only succeed by bringing his case within the terms of S. 69 of the Contract Act:—

"A person who is interested in payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by that other."

No doubt in a sense all the brothers were responsible for the Government

revenue and the payment made by the plaintiff was made on behalf of them all. But the relationship of principal and agent created by the agreement must not be overlooked. The managers were under a legal duty to exercise reasonable care and diligence in the management of the estate. As both Courts below have held, a payment on account of Government revenue is a payment for the upkeep of the estate and it is difficult to see how the managers or either of them can recover anything on account of such a payment unless and until they or he shows that he is entitled as agent to charge his principals. The plaintiff has not attempted to prove anything of the kind. He has simply ignored his obligations under the agreement, as to which the plaint is entirely silent. As between the plaintiff and the defendant No. 1, therefore, it is not shown that the latter was legally bound to make the payment in respect of which contribution is sought. On the contrary the presumption is that as between the parties, the plaintiff and the defendant No. 2 are the persons primarily responsible and no attempt has been made to displace that presumption.

As to the concluding part of Clause 8 of the agreement it is obvious that the payment of arrears of Government revenue cannot be regarded as a payment in advance, at any rate until it is shown that there were no assets from which a payment could have been made in the ordinary course. What seems to have been contemplated by advances was expenditure on account of improvements.

As to the case of defendant No. 2, here again it is difficult to see how a claim for contribution can be maintained on the footing adopted in the plaint. It is impossible to say what the relative rights and obligations of the plaintiff and the defendant No. 2 may be, without reference to what took place under the agreement and such questions as the actual control which both or either had over the assets.

In my opinion no claim for contribution can be maintained in the suit as framed. The appeals, therefore, succeed and the suits must be dismissed with costs here and in the Courts below.

Mullick, J.—I agree.

V.B./R.K.

Appeals allowed.

A. I. R. 1916 Calcutta 594

RICHARDSON AND MULLICK, JJ.

Naboghan Badhai and *others*—Defendants—Appellants.

v.

Raghu Nath Babu and *others*—Plaintiffs—Respondents.

Second Appeal No. 1104 of 1912, decided on 15th April, 1915, against the decision of Dist. Judge, Sambalpur, dated 13th February, 1912.

(a) Limitation Act (9 of 1908), Arts. 14 and 120—Suits under S. 83, C. P. Land Revenue Act of 1881 is governed by Art. 120 and not Art. 14.

A suit under S. 83 of the Central Provinces Land Revenue Act is governed by Art. 120, and not by Art. 14 of the Schedule to the Limitation Act, 1908. [P. 595, C. 2.]

(b) C. P. Land Revenue Act (18 of 1881), Ss. 68, 72 and 83—Suit for amendment of settlement entry showing defendant as permanent tenants instead of mortgagees — Settlement officer must have acted under either S. 68 or 72 and S. 83 applies.

Where a dispute related to an entry made by a Settlement Officer in a Record of Rights prepared under Chapter VI of the Central Provinces Land Revenue Act and the appellants were described as *shikmi gaontias* or permanent tenants under the plaintiffs, who were the *gaontias* of the village, and a suit was instituted by the plaintiffs under S. 83 of the Land Revenue Act to have the entry amended so that the appellants might be described as mortgagees and not as permanent tenants:

Held, that the Settlement Officer acted either under S. 68 or S. 72 of the Act in deciding the question between the parties or in making the disputed entry in the Record of Rights, and that under S. 83, the Civil Court had jurisdiction to review his decision or the entry. [P. 596, C. 1.]

(c) C. P. Land Revenue Act (18 of 1881), Ss. 83, 120 and 152—Scope of—Suit under S. 83 is declaratory and decree cannot be executed—Deputy Commissioner is alone competent to amend settlement entry—Civil Court cannot.

The provision of S. 120 shows that a suit under S. 83 is in the nature of a declaratory suit and that inspite of the express provisions of the section, a Civil Court can only declare that an entry is erroneous and how it should be amended, but it cannot execute its decree by bringing the Record of Rights into Court and altering it. The decree has to be taken to the Deputy Commissioner. This conclusion is confirmed by S. 152, Clause (*b*), which deprives the Civil Court of jurisdiction over certain matters including correction of entries or revision of record under Ss. 120, 121 and 122. 18 Bom. 244; 30 Cal. 20 and 29 Cal. 367, ref. to. [P. 595, C. 2.]

Sarat Chandra Roy Chowdhury and *Dhirendra Krishna Ray* for *Gobinda Chandra Chakravarty*—for Appellants.

Satis Chandra Ghose—for Respondents.

Richardson, J.—This is an appeal from the decree of the District Judge of Sambalpur, confirming the decree of the Subordinate Judge of the same District.

The land in dispute is situated in the District of Sambalpur and in matters pertaining to the land revenue is governed by the Central Provinces Land Revenue Act (XVIII of 1881). The dispute relates to an entry made in a Record of Rights prepared under Chapter VI of that Act. The entry describes the appellants as *shikmi gaontias* or permanent tenants under the plaintiffs, who are the *gaontias* of the village. At this stage of the litigation it is very properly conceded that if it is open to the plaintiffs to contest the correctness of the entry, the entry is wrong, the lease granting the appellants a permanent tenancy having been judicially set aside. On the other hand it is not denied that the appellants are entitled to possession as mortgagees. In substance, therefore, the plaintiffs seek to have the entry amended so that the appellants may be described as mortgagees and not as permanent tenants.

The suit was instituted by the plaintiffs and dealt with by the Courts below as a suit under S. 83 of the Land Revenue Act. On that footing the principal question which arises is, whether a suit under S. 83 is subject, as regards limitation, to Art. 14 or to Art. 120 of the Schedule of the Limitation Act. Article 14 Applies

"to suits to set aside any act or order of an officer of Government in his official capacity"

and the period of limitation provided is one year from the date of the Act or order. Under the omnibus Article 120 the period of limitation is six years from the time when the right to sue accrues. S. 83 enables a suit to be brought to have entries in the Record of Rights relating to certain specific matters "cancelled or amended." We are not concerned with the rest of the enabling clause or with the two provisos. For the appellants it is contended that an entry in a Record of Rights is an "act" or "order" of a Government Officer and that as S. 83 in effect authorises the Civil Court to set aside such act or order in certain cases, the present suit if it falls within the section, must be governed by Art. 14. The argument is directed to the distinction suggested by reported cases between a power on the part of the Civil Court to make a decree which is merely declaratory of the plaintiff's rights and a mere basis for further proceedings before some Revenue or other officer and a power to make a decree which positively sets aside and nullifies something which an officer of Government has done. In illustration reference may be made to *Agin Bindh* v. *Mohan Bikram Shah* (1) and *Parbati Nath* v. *Rajmohun Dutt* (2). The appellants would have it that the decrees made below are decrees of the latter class, and if it be assumed that the disputed entry is an "act" or "order" which has been set aside, the language of S. 83 lends some colour to the contentions advanced. But S. 83 must be read, in my opinion, as the lower Courts have read it, with Ss. 120 and 152. The Record of Rights in question has been made over to the Deputy Commissioner and S. 120 gives the Deputy Commissioner power in such case to correct any entry on certain grounds of which one is the following:—

"(*b*) that by a decree in a suit brought under S. 83, it has been declared to be erroneous."

This provision shows that a suit under S. 83 is in the nature of a declaratory suit and that though the section speaks of a suit under it as a suit to have an entry cancelled or amended, the Civil Court can only declare that the entry is erroneous and how it should be amended, but cannot execute its decree by bringing the Record of Rights into Court and altering it. The decree has to be taken to the Deputy Commissioner. This conclusion is confirmed by S. 152, Clause (*b*), which deprives the Civil Court of jurisdiction over certain matters including

"(12) correction of entries or revision of records under Ss. 120, 121 and 122."

No case precisely in point was cited at the Bar, but perhaps the case most in point is that of *Faki Ghulam Mohidin* v. *Sajnak* (3). In my opinion the suit is not governed by Article 14 but by Article 120 and is within time.

A further point however was taken before us. It was not taken in the Courts below but as it raises a question of jurisdiction we have to notice it. It is now suggested that the suit is not within S. 83 at all and that the Civil Courts had no jurisdiction. Under S. 83 a Civil Court has jurisdiction in respect of

(1) (1903) 30 Cal. 20.
(2) (1902) 29 Cal. 367.
(3) (1894) 18 Bom. 244.

entries as to any matter referred to in S. 78. S. 78 again relates back to a number of sections of which Ss. 68 and 72 may be mentioned. S. 68 directs the Settlement Officer to ascertain the persons who are in possession as proprietors of each *mahal*. "By definition the word 'proprietor' includes for most purposes a '*gaontia*' [S. 4, Clause 8(*a*)] and is also to 'be deemed to include an assignee of proprietary rights' (Explanation II of S. 4-A). An "inferior proprietor is not, as such, a tenant" (S. 4. Clause 14). Now, if a permanent tenure-holder such as a *shikmi gaontia* is in respect of his tenants a proprietor, though, it may be, an inferior proprietor, the question whether the defendants are in possession as permanent tenure-holders or merely as mortgagees, is apparently within the scope of S. 68. It seems reasonable *prima facie* that the section should extend to the ascertainment of the character of the proprietary possession and the language seems sufficiently wide to admit of a construction which would bring such a question within its scope. Under S. 72, again,

"the Settlement Officer is to ascertain and record for each *mahal* the status of all tenants occupying land therein, the lands respectively held by them, the conditions on which they respectively hold such lands, and the rents (if any) payable by them respectively."

Under this section the question whether a particular person is or is not a tenant is a question which must be open to the Settlement Officer in connection with the entries which the S. 72 requires to be made. The determination of that question is a necessary preliminary. If, therefore, a permanent tenure-holder is *qua* the superior landlord a "tenant," the Settlement Officer had jurisdiction to decide for the purpose of the preparation of the Record of Rights whether defendants could properly lay claim to such a status. The conclusion is that in deciding the question between the parties or in making the disputed entry in the Record of Rights the Settlement Officer acted either under S. 68 or S. 72 and his decision, or the entry, was open to review by the Civil Courts under the terms of S. 83. The contention to the contrary urged for the first time in this Court, therefore, fails.

The decrees of the Courts below are in a proper declaratory form and in the result this appeal must be dismissed with costs.

Mullick, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 596

RICHARDSON AND MULLICK, JJ.

Tepu Mahammad—Plaintiff — Appellant.

v.

Tefayit Mahammad and *others*—Defendants – Respondents.

Second Appeal No. 3922 of 1913, decided on 10th February, 1915, against the Decree of Sub-Judge, Jalpaiguri, dated 21st May, 1913.

(a) Practice—Issue—Raising of new issue in appeal is dangerous.

It is always dangerous to allow a new issue to be raised at the appellate stage.

[P. 597, C. 1 & 2.]

(b) Ejectment—Defence—Lease by *de facto* landlord in possession would be good defence to ejectment suit by true owner.

Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner.

[P. 597, C. 1.]

(c) Transfer of Property Act (4 of 1882), S. 107—Encroachment by tenant enures to the benefit of landlord—Tenant continues as tenant of his landlord of the encroached portion—True owner can sue for possession.

Where a tenant of *A* encroaches on the adjoining land of *B*, as between *A* and his tenant, there is a presumption that the encroachment enures to *A's* benefit, and becomes an accretion to the tenant's holding under *A*.

A tenant will ordinarily hold the land upon which he has encroached as tenant of his landlord and in that case the landlord may perhaps be described as his *de facto* landlord. 10 Cal. 820, foll.

But that would not prevent the true owner of the land encroached upon from bringing a suit for the purpose of recovering his possession.

[P. 597, C. 2.]

Jagendra Nath Ghose—for Appellant.

Tarakeshwar Pal Choudhury—for Respondents.

Richardson, J.—This suit relates to two plots of land. It has been found, and is not now disputed, that the plaintiff has a good title to the land as a lessee under the *zemindar*, the Maharaja of Cooch Behar. Defendants Nos. 2 to 4 are *jotedars* and their land adjoins the land in dispute. Defendant No. 1 is admittedly a tenant under defendants

Nos. 2 to 4 in respect of the land comprised within their *jote*. The suit was brought by the plaintiff to eject defendant No. 1 from the disputed plots of which he is in possession. Defendants Nos. 2 to 4 do not contest the plaintiff's claim.

It appears that defendant No. 1 is *prima facie* a trespasser and that the plaintiff is entitled to succeed, unless some such defence as adverse possession for the statutory period can be established. The first Court decided the suit upon the simple consideration that defendant No. 1, not having been in possession for more than five or six years, was a trespasser. The Munsif, therefore, decreed the plaintiff's claim. The learned Subordinate Judge in the Court of Appeal below took a different view. In the first place, he allowed defendant No. 1 to raise a new issue. It is always dangerous to allow a new issue to be raised at the appellate stage. and the learned Subordinate Judge seems in this connection to have been betrayed into error. The new issue runs as follows:

"Having *bona fide* held as tenant of persons who were their *de facto* proprietors, has the defendant acquired any right, occupancy or non-occupancy, in the disputed land?"

The issue was apparently framed with reference to the decision of the Full Bench of this Court in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (1). Some exception, however, may be taken to the mode in which the issue is worded. The question it was intended to raise was not whether the defendants Nos. 2 to 4 were the *de facto* landlords of the defendant No. 1, but whether they were the *de facto* proprietors of the disputed land and in that capacity settled it with that defendant. Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, it may be that *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner, but to carry the principle laid down by the Full Bench to the extent to which it has been carried in this case is to go much too far. There seems, indeed, to have been some confusion in the Subordinate Judge's mind between this principle and another principle on which the Courts have acted. Where a tenant of *A* encroaches on the adjoining land of *B*, no doubt as between *A* and his tenant there is a presumption that the encroachment enures to *A*'s benefit and becomes on accretion to tenant's holding under *A* [*Nuddyarchand Shaha* v. *Meajan* (2)]. The tenant will ordinarily hold the land upon which he has encroached as tenant of *A* and in that case *A* may perhaps be described as his *de facto* landlord. But that is a very different thing from saying that the land was settled with the tenant by *A* as *de facto* proprietor and in such circumstances as those indicated, there would be nothing to prevent *B*, the true owner of the land encroached upon, from bringing a suit for the purpose of recovering possession from *A* and his tenant Similarly in the case before us the learned Subordinate Judge has not found that the disputed land was in fact in the possession of defendants Nos. 2 to 4, nor has he found that the disputed land was included within the area settled with defendant No. 1 by defendants Nos. 2 to 4. No case is made, therefore, for the application of the principle of the Full Bench decision. That principle only applies where *raiyats* are settled upon land by a person in *de facto* possession as landlord, who is afterwards found to have no title. It is not applicable in every boundary dispute or in every case where a question of parcel or no parcel arises. It is obvious that the learned Subordinate Judge was wrong in allowing a new case to be made in appeal and that he had no clear conception of the limitations of the principle on which he founded his decision.

There remains the question of limitation. In the course of his judgment the learned Subordinate Judge says that the defendant No. 1 has been in possession for the last 10 or 15 years. This is an extremely vague finding upon an important question, which should have been the subject of precise decision. It is impossible for us to say upon the judgment, as it stands, whether the learned Subordinate Judge is of opinion that defendant No. 1 had or had not acquired any title upon the footing of adverse possession. This is the subject of the first two issues framed by the first Court and if the Subordinate Judge had confined himself to those two issues and had come to an express finding upon them, his judgment would probably have been more

(1) (1893) 20 Cal. 708.

(2) (1884) 10 Cal. 820.

satisfactory. As the matter stands, in my opinion the judgment and decree appealed from must be set aside and the suit remanded to the lower Appellate Court in order that the appeal thereto may be re-heard upon the issues originally settled.

Costs will abide the result.

Mullick, J.—I agree.

V.B./R.K.

Decree set aside ; Case remanded.

A. I R. 1916 Calcutta 598

MOOKERJEE AND BEACHCROFT, JJ.

Krishna Nath Chakravarti—Defendant—Appellant.

v.

Muhammad Wafiz — Plaintiff — Respondent.

Second Appeal No. 3649 of 1913, decided on 23rd July, 1915, against the Decree of Additional Sub-Judge, Mymensingh, dated 7th June, 1913.

(a) Landlord and tenant—*Raiyat*—**Essentials of.**

In order to make the principle, that 'an agricultural tenant who enters upon land and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as *raiyat*, although the *de facto* proprietor is subsequently proved to be not the real owner,' available in the case of a lease, it is essential that the lessor should be in possession of the leased property as *de facto* landlord and that in good faith he should have inducted into the land a cultivator who has accepted the settlement in good faith.

[P. 598, C. 2 & P. 599, C. 1 & 2.]

(b) Landlord and tenant—*Raiyat*—**Lessee not getting juridical possession not** *raiyat*—**Purchaser in execution of decree against lessor—Lessee was bound down to keep peace—Criminal Procedure Code (1898), S. 107.**

Where, a lessee took his lease from a person who had no title to confer on him and he never obtained juridical possession of the leased property but was, on the other hand, in attempting to take possession, resisted by a person to whom the leased property had already been sold in execution of a decree against the lessor and where as the result of criminal proceedings taken by the purchaser-possessor under S. 107, Criminal Procedure Code, the lessee not having been found in possession, was bound down to keep the peace so that he might not interfere with the possession of the purchaser though he had failed to establish his alleged title:

Held, that under the circumstances the lessee was not entitled to be treated as *raiyat*.

[P. 599, C. 2.]

(c) Evidence — Admissibility — Findings of Criminal Court on question of possession admissible as evidence in Civil suit.

The finding of a Criminal Court on the question of possession is admissible in evidence in a civil proceeding taken for the recovery of possession of the same land, to show what order had been made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession. 29 Cal. 187 (P.C.), foll. [P. 599, C. 2.]

Birendra Kumar Dey—for Appellant.

Jotindra Mohan Chowdhury—for Respondent.

Judgment.—This is an appeal by the defendant in a suit for recovery of possession of land on declaration of title. The disputed property belonged to one Parbaty Sankar Pandey whose interest therein was terminated by a sale in execution of a decree held on the 22nd September, 1910. On the 24th November, 1910, the plaintiff took a lease of the land from Parbaty Sankar Pandey and, in his own words, went to take possession. The result was a dispute with the defendant which culminated in a proceeding under S. 107, Criminal Procedure Code. The Magistrate found on the 22nd March, 1911, that the defendant (then complainant) was in possession and that the accused (now plaintiff) was likely to commit a breach of the peace. He consequently directed that the plaintiff should be bound down and should execute a bond to keep the peace for one year, on the 15th June, 1911. The plaintiff instituted this suit for declaration of his title under the lease from Parbaty Sankar Pandey and for recovery of possession. The Courts below, have concurrently found that the lessor of the plaintiff had no subsisting title on the day the lease was granted to him. But while the Court of first instance held that the plaintiff had acquired no title under the lease, the Subordinate Judge has come to the conclusion that the principle of the decision of the Full Bench in *Binad Lal Pakrashi* v. *Kalu Pramanik* (1), is applicable and that the plaintiff is entitled to a decree for possession as against the defendant, who has failed to establish any title to the property. The question for consideration consequently is, whether this case is governed by the principle of the decision of the Full Bench, namely, that an agricultural tenant who enters upon land, whether it be firm or alluvial [*Nundo Kumar Nasker* v. *Banomali Gayan* (2). *Rajendra Nath Roy* v. *Nanda Lal Guha* (3)],

(1) (1893) 20 Cal. 708.
(2) (1902) 29 Cal. 871.
(3) (1915) 26 I. C. 977.

and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as *raiyat*, although the *de facto* proprietor is subsequently proved to be not the real owner [*Ameer Hossein* v. *Sheo Suhae* (4), *Zoolfun Bibee* v. *Radhica Prosonno Chunder* (5)].

As was pointed out by this Court in the case of *Upendra Narain Bhuttacharjee* v. *Pratap Chunder Pardhan* (6), this principle is an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantee a better title than what he himself possesses [*Durgi Nikarini* v. *Goberdhan Bhose* (7)]; and the Courts have repeatedly ruled that the doctrine must be cautiously applied and is not to be extended. Thus in *Sharoop Dass Mondal* v. *Joggessur Roy* (8) and *Jonab Ali* v. *Rakibuddin* (9), the Court refused to apply this doctrine to *zerait* lands. In *Madan Mohan Singh* v. *Raj Kishore Kumari* (10), the Court refused to apply the principle in derogation of the rule of *lis pendens*. Again, in *Kazi Newaz Khoda* v. *Ram Jadu Dey* (11), *Peary Mohun Mondal* v. *Radhica Mohun Hazra* (12) and *Upendra Narain Bhuttacharjee* v. *Pratap Chunder Pardhan* (6) the Court refused to apply the doctrine to cases where the landlord was not in possession in good faith, and it cannot now be disputed that want of good faith either on the part of the lessor or the lessee, makes the rule inapplicable. This accords with the decision in *Tepu Mahammad* v. *Tefayit Mahammad* (13), that in order to make the principle applicable, the lessor must be the *de facto* landlord in possession and must have placed the lessee in possession of the land. This does not in any way conflict with the cases of *Atal Rishi* v. *Lakshmi Narain Ghose* (14), and *Golam Panja* v. *Hurish Chunder* (15), where the lessee was brought upon the land by an *ijaradar* for a term who had authority to settle the land with cultivators. We have consequently the position that in order to make the principle available, it is essential that the lessor should be in possession of the disputed property as *de facto* landlord and that in good faith, he should have inducted into the land a cultivator who has accepted the settlement in good faith.

Tested in the light of this principle, the plaintiff has no case. It is clear that he took his lease from a person who had no title to confer on him, and he never obtained juridical possession of the disputed property. When he attempted to take possession, he was resisted; the result was a criminal case in which it was found that he was not in possession and that it was necessary to bind him down to keep the peace, so that he might not be free to interfere with the possession of the defendants. In a case of this description, the principle of the rule in *Binad Lal Pakrashi* v. *Kalu Pramanik* (1) can have no possible application.

We may add that it was jointly suggested that no reference was permissible to the finding of the Criminal Court on the question of possession. But in view of the decision of the Judicial Committee in *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (16), it is clear that the judgment, in the criminal case was admissible in evidence to show what order had been made, who the parties to the dispute were, what the land in dispute was, and who was held entitled to possession. But, even apart from that judgment, there is sufficient evidence on this record to show that the plaintiff never obtained such possession of the land as would entitle him to claim the status of a *raiyat* although he had taken settlement from a person who had no title to confer on him. Indeed the deposition of the plaintiff shows that it is not his case that he obtained the requisite possession. We must hold accordingly that the plaintiff has no enforceable claim even as against the defendant, who has failed to establish his alleged title.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

V.B./R.K.

Appeal allowed.

(4) (1873) 19 W. R. 338.
(5) (1877-78) 3 Cal. 560.
(6) (1904) 31 Cal. 703.
(7) A. I. R. (1915) Cal. 64=24 I. C. 183.
(8) (1899) 26 Cal. 564.
(9) (1905) 1 C. L. J. 303.
(10) (1912) 17 Ind. Cas. 1.
(11) (1907) 34 Cal. 109.
(12) (1907) 5 C. L. J. 9.
(13) 1915) 29 Ind. Cas. 216.
(14) (1909) 2 Ind. Cas. 417.
(15) (1872) 17 W. R. 552.
(16) (1902) 29 Cal. 187=29 I. A. 24 (P.C.).

A. I. R. 1916 Calcutta 600

MOOKERJEE AND NEWBOULD, JJ.

Khiroda Sundari Dasi and *another*—Defendants—Appellants.

v.

Nabin Chandra Saha—Plaintiff—Respondent.

Appeal No. 69 of 1913, decided on 8th April, 1915, from the Order of Sub-Judge, Dacca, dated 20th January, 1913.

(a) Civil P. C. (5 of 1903), O. 5, R. 17—When service by affixing summons to outer door in case of *Purdanashin* Lady is held sufficient is stated—Where person to be served is unapproachable by custom he can be said as cannot be found.

Under the provisions of R. 17 of O. 5 of the Code of Civil Procedure, a valid service is effected when the serving office affixes a copy of the summons on the outer door or some other conspicuous part of the house in which a lady ordinarily resides, in case she is a *Purdanashin* lady and is not able to accept service personally, and has no agent empowered to accept service on her behalf and has also no adult male member in her family upon whom service may be effected. [P. 602, C. 1.]

Where, either by reason of the custom of the country or for any other reason, it is impossible for the serving officer to obtain access to the person to be served, the case may, without undue stretch of language, be held to be covered by the description, "where the defendant cannot be found by the serving officer." *Carter* v. *Youngs*, (1877) 42 N. R. Supt. (10 Jones and S.), 169 *MacCarthy* v. *MacCarthy*, (1879) 16 Hun. N. Y. 546, ref. to; *Le Grand* v. *Fairall*, (1892) 86 Iowa 211, dist. [P. 601, C. 2.]

(b) Civil P. C. (5 of 1908), O. 5, R. 17—Court is competent to direct service by registered post or other manner even after service under R. 17.

It is open to a Court, even where there has been a technical compliance with the provisions of R. 17 to order service in another mode, if the Court thinks fit to do so, in the interests of justice. The Court may, in a case of this description, direct the issue of summons to *purdanashin* ladies by means of notice sent by registered post, so that the cover may, in due course, reach the lady herself. [P. 602, C. 1.]

Rash Behary Ghose and *Upendra Lal Roy*—for Appellants.

Sarat Chunder Basak—for Respondent.

Judgment.—This appeal is directed against an order of refusal of the Court below to set aside an *ex parte* decree. The respondent instituted a suit against several persons to recover a large sum of money alleged to be due from them as members of a partnership concern. The suit was decreed *ex parte*. Two of these defendants, now appellants before us, made an application to set aside that decree on the ground that they had no knowledge of the suit and could not appear to defend it. The Subordinate Judge has held that no case has been made out to justify an order to set aside the *ex parte* decree. On the present appeal, the decision of the Subordinate Judge has been assailed on two grounds; namely *first*, that the summonses in the suit were not duly served upon the appellants; and, *secondly*, that they were, at any rate, prevented by sufficient cause from appearing when the suit was called on for hearing.

With regard to the first branch of the contention of the appellants, it is necessary to bear in mind that they are *purdanashin* ladies and are the widows of one Peary Mohan Shah who is alleged to have been a member of the firm. According to their case, they lived separate from the other members of the family to which their husband belonged, and neither their husband nor they themselves had any concern with the partnership. The return of the peon was to the effect that as they could not be found and as there was no authorised agent to receive summonses on their behalf. the copies of the summonses and plaint were affixed on the main gate of their dwelling house. The peon has been examined and his deposition in Court is substantially to the same effect. On behalf of the appellants, it has been contended that there was no valid service of summons upon them; and in support of this view, reliance has been placed upon the decision of the Judicial Committee in *Clark* v. *Rouplaul Mullick* (1) Our attention has also been invited to Rr. 12, 15, 17 and 20 of O. 5 of the Civil Procedure Code of 1908. R. 12 provides that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. In the case before us, it was not practicable to effect service on the appellants in person; as by the custom of the country, the serving officer could not obtain access to them; nor had they an agent empowered to accept service. Consequently it was impossible to comply with the requirements of R. 12. R. 15

(1) (1837-41) 2 M. I. A. 263=3 Moo. P. C. 252.

provides that where, in any suit, the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him. There has been considerable discussion at the Bar as to the meaning of the expression "where the defendant cannot be found" and we have been asked to determine whether the expression can be appropriately applied to a case where the serving officer is not able to obtain access to a *purdanashin* lady, who, it is known, resides in a particular house. We shall presently deal with this question in connection with R. 17. But, apart from this point, it is plain that R. 15 has no application to the circumstances of the present case. The appellants had no agent empowered to accept service of summons on their behalf, nor was there any adult male member of their family who resided with them and could accept service on their behalf. We next come to R. 17 which is in these terms:

"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, *cannot find the defendant*, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

The service, in the case before us, was effected in accordance with R. 17, and the question for consideration is, whether that was valid service. The first portion of R. 17 clearly has no bearing upon the case before us. There was no refusal on the part of the appellants or their agent or any male member of their family to sign the acknowledgment; no question of refusal arises, till the serving officer has delivered or tendered a copy of the summons under R. 16 to the defendant personally or to his agent or other person competent to accept service on his behalf. The question consequently narrows down to this. Is this a case where the serving officer, after using all due and reasonable diligence, "could not find the defendant?" In our opinion, R. 17 is applicable to a case of the description now before us, where the serving officer is not able to obtain access to the *purdanashin* lady who has to be served and cannot deliver or tender a copy of the summons to her. There is no decision in Indian Courts directly in point, and the ruling of the Judicial Committee in *Clark* v. *Rouplaul Mullick* (1) is of no real assistance in the solution of this problem. In the *first* place, the order given in that case was for service upon an agent of the lady concerned, in conformity with the provisions of Ss. 13 and 15 of Regulation III of 1803. In the *second* place, there is no special provision in the present Code of Civil Procedure for service of summons on *purdanashin* ladies as there was in the Regulation mentioned. In our opinion, where it is impossible for the serving officer to obtain access to the person to be served, either by reason of the custom of the country or for any other reason, the case may, without undue stretch of language, be held to be covered by the description "where defendant cannot be found by the serving officer." This view is in accord with the decision in *Carter* v. *Youngs* (2). There the defendant was confined to his house with illness and his wife refused to permit the officer to have access to him. It was ruled that the case was one in "which the defendant could not be found," and substituted service was ordered. To the same effect is the decision in *Mac Carthy* v. *Mac-Carthy* (3), where the father of the lady to be served would not allow her to appear before the serving officer. The case of *LeGrand* v. *Fairall* (4) is clearly distinguishable; there, the statutory provision required that service could be effected by leaving a copy of the summons only if the defendant could "not be found within the country of his residence;" the lady to be served was sick and the serving officer could not see her; it was ruled that the substituted service could not be allowed. We are not unmindful that this view of the law may in some instances render the service

(2) (1877) 42 N. Y. Sup. Ct (10 Jones and S.) 169.

(3) (1879) 16 Hun. N. Y. 546.

(4) (1892) 86 Iowa 211=58 N. W. 115.

practically infructuous and defeat the very object of the service of summons upon the defendant, namely, to apprise him that a suit has been instituted against him in a Court of Justice : *Hope* v. *Hope* (5), and *Kistler* v. *Tettmar* (6). The class of cases we have in view is of the description now before us, namely, where a *purdanashin* lady is not able to accept service personally, has no agent empowered to accept service on her behalf, and has also no adult male member in her family upon whom service may be effected. In such a case as this, valid service is effected under the provisions of R. 17 if the serving officer affixes a copy of the summons on the outer door or some other conspicuous part of the house in which the lady ordinarily resides, and yet the result may be that the person served is really never apprised of the suit. It is plain, however, that a narrow construction cannot be placed upon the terms of R. 17, so as to restrict their operation and to exclude cases clearly covered thereby. But it is worthy of note that there is no real danger of injustice, if the provisions of R. 19 are strictly carried out by the Court. That rule imposes upon the Court the duty to satisfy itself that service has been properly effected, and the Court is authorised either to declare that the summons has been duly served or order such service as it thinks fit. Consequently, it is open to the Court, even where there has been a technical compliance with the provisions of R. 17, to order service in another mode if the Court thinks fit to do so, in the interests of justice. The Court may, in a case of this description, direct the issue of summons to *purdanashin* ladies by means of notice sent by registered post, so that the cover may in due course reach the lady herself. In this view, we are of opinion that the case before us is covered by R. 17 and that as the requirements of that rule have been fulfilled, the appellants cannot succeed on the ground that the summonses were not duly served on them within the meaning of R. 13 of O. 9 of the Code. With regard to the second branch of the contention of the appellants, namely, that they were prevented by sufficient cause from appearing when the suit was called on for hearing, it is material to state that they were examined on commission, when they pledged their oath that they had no knowledge of the suit and consequently could not defend it. The respondent decree-holder seeks to meet this allegation by proof that the ladies must have known of the suit, as they appeared in Court through a Pleader to oppose his application for attachment before judgment. This contention is rested on a *vakalatnama* which purports to bear the signature of one of the appellants, Golap Sundari Dasi. It was also signed on behalf of the other appellant, Khiroda Sundari Dasi, by her officer Kamikhaya Ranjan Dutt. The decree-holder, however, did not take steps in the Court below to prove what purports to be the signature of Golap Sundari Dasi on the *vakalatnama* ; nor did he establish that Khiroda Sundari Dasi had authorised Kamikhaya Rajan Dutt to sign the *vakalatnama* on her behalf. As the ladies were examined on Commission, it was a singular omission on the part of the decree-holder that the *vakalatnama* was not put to either of them. But even if this defect in proof had been remedied, the question would require investigation, under what circumstances and on what representation was the *vakalatnama* signed, and what information, if any, was received by the ladies in respect of the suit instituted against them. The evidence has not been directed to elucidate these vital points, and we have accordingly been pressed by the respondent to allow additional evidence to be taken at his instance at this stage. We are clearly of opinion that we should not accede to this request, as the respondent had ample opportunity to substantiate his case in the Court below. The position consequently is, that the respondent has failed to rebut the allegation on oath made by the ladies that they had no knowledge of the suit. The truth of their assertion appears extremely probable when we remember how the summons is said to have been served on them. There is further the significant circumstance that the ladies had successfully contended before Mr. Justice Fletcher in another proceeding that they were not partners of the firm ; and there is considerable force in the argument that if they had been apprised of the proceedings in this suit, they would undoubtedly have repeated the defence which they

(5) (1854) 4 De G. M. and G. 328.
(6) (1905) 1 K. B. 39.

had previously taken so effectively. The surrounding circumstances all point to the conclusion that the appellants never received actual intimation of the suit.

Finally, it has been argued on behalf of the respondent that as Kamikhaya Ranjan Dutt, an officer of Khiroda Sundari Dasi, was aware of the suit, the ladies had constructive notice thereof. No such contention was raised in the Court below and no foundation has been laid in the evidence for any possible ground on which constructive notice could be imputed to the appellants. We hold accordingly that the ladies have established that they had no knowledge of the suit and that they were prevented by sufficient cause from appearing when it was called on for hearing.

The result is that this appeal is allowed, the order of the Court below is discharged and the application to set aside the *ex parte* decree granted. Under the proviso to R. 13 of O. 9, we direct that the *ex parte* decree be set aside only as against the two ladies who are the appellants before us; the decree will stand as against the other defendants. The suit will be revived as against the present appellants only, and will be tried out on the merits as against them alone. They will have opportunity to file written statements and the case will be tried out in due course. The appellants are entitled to their costs of these proceedings both here and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 603

SHARFUDDIN AND COXE, JJ.

Keshawe Surendra Sahi and *others*—Appellants.

v.

Devendra Bala Dasi and *others*—Respondents.

Appeal No. 311 of 1913, decided on 8th February, 1915, against the Order of Sub-Judge, 1st Court, Saran, dated 4th June, 1913.

Civil P. C. (5 of 1908), O. 21, R. 90 and O. 32, R. 3—Minor legatee and his father representatives of judgment-debtor substituted but no guardian appointed—Decree-holder purchased property in execution—Application by mother as next friend under S. 47 and R. 90 was tenable and sale was vitiated by irregularity.

On the death of a judgment-debtor an application for substitution of the name of the sole legatee of the judgment-debtor, a minor, and his father and others was made. No application was made under O. 32, R. 3 of Civil Procedure Code, for the appointment of a guardian *ad litem*. The father acted throughout and eventually the property was sold and purchased by the decree-holder. The mother, acting as the guardian and next friend of the minor, applied to have the sale set aside under S. 47 and O. 21, R. 90, Civil Procedure Code, alleging fraud and collusion:

Held, that under the circumstances of the case the mother was entitled to make the application and that she should be appointed guardian *ad litem* of the minor. [P. 604, C. 2.]

Held, further, that the sale of the property without appointing such a guardian was in itself an irregularity which would vitiate the sale, if it caused injury to the minor.

Mohendra Nath Roy and *Rajendra Prosad*—for Appellants.

Ghosh and *Girija Prosonna Rai Chowdhury* and *Uma Charan Saha*—for Respondents.

Sharfuddin, J.—In this appeal the appellant is a minor. He had, on the 10th July, 1912, applied under S. 47 and O. 21, R. 90 of the Civil Procedure Code, to set aside the sale of his properties in execution of a decree on the ground of irregularities resulting in inadequacy of the price fetched at the sale. This petition was put in on his behalf by his mother as guardian and next friend of the minor.

The decree that brought about the sale was a mortgage decree, the mortgagor being Baboo Shyam Surendra Sahi, the uncle of the minor. Shortly after the first execution petition the mortgagor died and thereafter on the 22nd March, 1909, an application for substitution was made by the decree-holder. The present appellant is the sole legatee of his uncle, the mortgagor, under a will. The above application was that the name of the minor, along with that of his father, Hari Harendra Sahi, and some others should be substituted. No application, however, was made under O. 32. R. 3, for the appointment of a guardian *ad litem* of the minor. Nor does it appear that any such order was ever made under the above provisions. But on one above application by the decree-holder substitution was made, but the minor was not described in the amended execution petition as being under the guardianship of

his father. The minor in this amended execution petition was simply named and described as a minor. It is admitted, however, that the father began to act as guardian of his minor son and he did act as such in the previous stages of the execution proceedings and the Court allowed him to act as such. The father, as already observed, was himself one of the substituted judgment-debtors. The father of the minor has another son by another wife and this son is married to the sister of the present Maharaj Kumar of Hutwa, and it is the Hatwa Raj which is the purchaser at the sale.

It appears that there were five execution proceedings. The last ended in the sale of the properties.

The sale was fixed for the 3rd June, 1912 which was a public holiday, and the Court was closed on that day. On the 4th June, *i. e.*, on the re-opening day, a petition was put in only on behalf of the father of the minor, under a *vakalatnamah* executed only on behalf of the father. In the body of the petition it is mentioned that by the arrangement suggested in the petition the minor would also be benefited. But it is clear that so far as this petition goes, the minor was not represented. By this petition the Court was informed that the Maharani of Hatwa was willing to purchase the properties at the sale on behalf of her ward, the Maharaj Kumar of Hatwa, and as for that end she had to move the High Court, the sale should be postponed for a week.

This petition also waived the right to demand a fresh proclamation by stating that the sale proclamation had been duly published and served. The sale was postponed and was fixed for the 11th June. The sale proclamation had notified that 48 *mahals* had to be sold. In the ordinary course these *mahals* should have been put up one by one and not in one lot. On the 11th June, before the sale, an application was put in on behalf of the minor alone without stating who acted for him as guardian. The scribe of this petition is one Sridhar Lal, who is an agent of the minor's father (Vide *vakalatnamah*, dated 1st June, and filed on the 4th June). There is a title difference in the name. In the petition he signs as Sridhar Lal and in the *vakalatnamah* as Sridhar Prosad. We have been assured that it is one and the same man. It is a matter for inquiry. Let us now examine this petition of the 11th June, wherein the minors is not at all represented. Contrary to the notification in the proclamation of sale, the prayer in this petition is that all the *mahals* (48 in number) should be sold in one lot because there were big and monied men who wished to purchase the *mahals*. The Subordinate Judge accepted the prayer and all the 48 *mahals* were sold in one lot and purchased by the Hatwa Raj.

On the 10th July, 1912 the mother of the minor, styling herself as the guardian and next friend of her minor son, applied under S. 47 and O. 21, R. 90 of the Code on various allegations of fraud and collusion, but the learned Subordinate Judge rejected that petition on the ground that so long as the minor's father, who had acted as guardian throughout the execution proceedings for four years, is not removed from his office, the mother had no *locus standi* to make the petition.

If the learned Subordinate Judge had only taken the trouble of reading the petitions of the 4th and the 11th June, he would have found that the minor was not at all represented in these petitions.

It is admitted that no application for the appointment of a guardian was ever made and no such order was ever passed. The father was never formerly appointed guardian, and I do not see how one could ask the Court to remove a man from guardianship who was never appointed by the Court. On the application of the decree-holder filed on the 22nd March, 1909, it was the imperative duty of the Subordinate Judge, after making some inquiry, to appoint a proper person as a guardian of the minor to act for him in the execution proceedings. No such thing was done. A number of authorities have been placed before us by the respondents showing that when a person, although not formally appointed, has acted for the minor throughout a proceeding or a suit, the Court ought to hold that the minor was represented. But in the present proceedings the minor was not represented by his father as already pointed out.

We hold that, in the circumstances stated above, the mother was entitled to make this application and that she should be appointed guardian *ad litem* of the minor. The sale of the property without appointing such a guardian is in itself an irregularity, which will vitiate the sale if it has caused injury to the minor. Accordingly we remand the case under

O. 41, R. 23, for disposal on the merits. The Subordinate Judge must decide whether any irregularities, other than that mentioned above, have been proved, and whether, if so, the minor has been injured either by the irregularity to which we have referred or by those found by the Subordinate Judge. Costs will abide the result.

Coxe, J.—I agree.

V.B./R.K.

Case remanded.

A. I. R. 1916 Calcutta 605 (1)

CHAPMAN AND NEWBOULD, JJ.

Icchamoni Dasi—Petitioner.

v.

Prosunno Kumar Mondal and *others*—Opposite Parties.

Rule Nisi No. 1121 of 1914, decided on 16th April, 1915, against the Order of Dist. Judge, 24 Parganas.

Evidence Act (1 of 1872), S. 115—Estoppel—Suit compromised—Application to set aside sale—Party compromising suit can urge setting aside of sale entirely.

A party who enters into a compromise is not estopped f.om contending that a sale in the suit, if set aside at the instance of another party, should be set aside in its entirety.

[P. 605, C. 1.]

Harendra Krishna Sarbadhikari—for Petitioner.

Sarat Chandra Roy Chowdhury and *Dhirendra Krishna Roy*—for Opposite Parties.

Judgment.—We are not satisfied that any question of the exercise of jurisdiction illegally or with material irregularity arises in this case. But it is said that Prosunno having entered into a compromise it was not open to him to file a cross-appeal. It was not contended apparently before the District Judge that Prosunno was estopped. We do not think that he was estopped from taking the argument which was accepted by the District Judge, namely, that if the sale is set aside at all it must be set aside in its entirety.

The Rule is discharged with costs, hearing-fee one gold *mohur*.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 605 (2)

FLETCHER AND TEUNON, JJ.

Hari Krishna Das—Plaintiff—Appellant.

v.

Dinor Kinla and *others*—Defendants—Respondents.

Second Appeal No. 1283 of 1912, decided on 17th February, 1915, against the Decree of Addl. Sub-Judge, Midnapur, dated 10th February, 1912.

(a) Specific Relief Act (1 of 1877), S. 42—Declaration of title without ascertaining its nature should not be granted.

A Court ought not to declare the title of any party to a piece of land without knowing what the nature of that title is.

[P. 605, C. 2 & P. 606, C. 1.]

(b) Civil P. C. (5 of 1908), S. 115 and O. 6, R. 17—Discretion refusing amendment of plaint should not be interfered unless lower Court has come to wrong conclusion.

A High Court ought not to interfere with the discretion deliberately exercised by a lower Appellate Court in refusing to allow a plaintiff to amend his plaint during the progress of the suit, unless it is satisfied that the lower Court came to a wrong conclusion. [P. 606, C. 2.]

Hari Bhusan Mukherjee—for Appellant.

Sarat Chandra Khan and *Hirendra Nath Ganguli*—for Respondents.

Fletcher, J.—This is an appeal from a decision of the learned Subordinate Judge of Midnapur affirming the decision of the Munsif. The suit was brought by the plaintiff for a declaration of his title to 1½ *bighas* of land. The plaintiff has failed in both the Courts below. In the lower Appellate Court he was unsuccessful on the ground that he failed to define what was the nature of the interest in the land for which he asked the Court to make a declaration in his favour. In that, obviously, the learned Subordinate Judge was right. The plaintiff did not inform the Court whether the land which he claimed was held subject to the payment of rent or rent-free or in absolute interest or in any other more limited interest. The reasons are not far to seek when one looks into the judgment of the Court of first instance, because the plaintiff deliberately attempted to shift during the trial of the case the nature of the title which he claimed, and in this suit obviously the Court ought not to declare the title of the plaintiff without knowing what the nature of that title is. It is quite clear that the learned Subordinate Judge exercised a proper discretion when he declined

to declare the plaintiff's title to a piece of land in which he did not know what interest the plaintiff had.

Then it is said that the application made by the plaintiff for amending the plaint ought to have been allowed. This is not the place where in the ordinary course a question of this nature should be decided. That is a matter purely within the discretion of the Judges of the lower Courts and they not having permitted such an amendment, we ought not, in the ordinary course, to interfere with the discretion deliberately exercised by the Judges of the Courts below, unless we are satisfied that they came to a wrong conclusion. From the course the case took in the Court of first instance, it seems to me that these learned Judges exercised a wise discretion in refusing to allow the plaintiff to amend his plaint during the progress of the suit. In that view, the decision arrived at by the learned Subordinate Judge of the lower Appellate Court is correct. The present appeal, therefore, fails and must be dismissed with costs.

Teunon, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 606

CHITTY AND WALMSLEY, JJ.

Sarabjit Pratap Bahadur Sahi—Plaintiff—Appellant.

v.

Bhagwat Koeri and *others*—Defendants—Respondents.

First Appeal No. 273 of 1912, decided on 20th July, 1915, from the Decree of Sub-Judge, Saran, dated 24th July, 1912.

(a) Hindu Law—Alienation—Widow—Reversioner—Alienation by widow or daughter to stranger does not accelerate, reversioner's right of possession.

The estate of a Hindu widow or daughter may be determined in various ways but an alienation in favour of a third party clearly does not have the effect of accelerating the estate and entitling the next reversioner to immediate possession.

[P. 608, C. 1.]

(b) Hindu Law — Relinquishment — Reversioner—Reversioner cannot sue for immediate possession without relinquishment.

Where there has been no relinquishment in favour of a reversioner, nor is any such relinquishment alleged which would accelerate the estate in his favour he cannot successfully maintain a suit for immediate possession of the estates. [P. 608, C. 2.]

(c) Limitation Act (9 of 1908), Art. 120—Reversioner's declaratory suit is governed by Art. 120—Time runs from date when right to sue accrues.

A claim to a declaration of right is governed by Article 120 of the first Schedule to the Limitation Act and the time begins to run from when the right to sue accrues. [P. 608, C. 2.]

(d) Hindu Law—Widow—Waste—Relinquishment by daughters does not amount to waste—Hindu lady can alienate life estate to stranger—Reversioner cannot claim immediate possession on ground of waste.

A relinquishment by daughters of their right of inheritance to their father's estate does not amount to waste of the original estate to justify the Court in considering whether the estate should be taken out of their hands. A Hindu lady, in such a position has an absolute right and full power to alienate the estate for the period of her enjoyment, to an outsider. That will not give a reversioner the right to come in and plead waste and insist on the estate being brought into possession by the Court.

[P. 609, C. 1.]

Umakali Mookerjee, Sarat Chandra Basak, Chandra Sekhar Prosad Singh and *Rishendra Nath Sircar*—for Appellant.

Rash Behari Ghose, Mahendra Nath Roy, M. Muhammad Mustafa Khan, Rajendra Prashad, Harnarayan Proshad and *Sib Chandra Palit*—for Respondents.

Judgment.—This is an appeal by the plaintiff, Sarabjit Pratap Bahadur Sahi, from a decree of the Subordinate Judge of Saran dismissing his suit. The plaintiff sued to recover possession of certain properties as heir of his maternal grandfather, Sri Kishun Singh. The genealogical table attached to the plaint shows the relationship between the parties. Sri Kishun Singh died on 29th July, 1872 leaving a widow. Kamalbas Koeri, and two daughters, Ram Kawal Koeri, defendant No. 3, and Raj Kishori Koeri, defendant No. 4. The plaintiff is one of the sons of Ram Kawal Koeri. His elder brother, Raja Shatrujit Protap Bahadur Sahi, died on 8th October, 1898. Kamalbas Koeri, the grandmother of the plaintiff, died on 9th September, 1899. Raj Kishori Koeri had one son, Ram Narayan Singh, who died on 12th December, 1910. The plaintiff's suit was filed on 2nd September, 1911. During the pendency of the suit, namely, on 25th January, 1913, the plaintiff's mother, defendant No. 3, died. The parties defendant are No. 1 Bhagwat Koeri, the widow of Mahabir Prosad

Singh, No. 2 Babu Ragheswar Inder Sahi, minor son of Babu Harihar Inder Sahi, and defendants Nos. 3 and 4 mother and aunt of the plaintiff.

The case was argued and decided in the Court of first instance on what may be called a "demurrer," that is to say, the learned Subordinate Judge, assuming all the facts alleged by the plaintiff to be correct, decided that the plaintiff's present suit could not succeed. The defendants had put in written statements traversing many of the allegations of fact made in the plaint. It will be unnecessary to go into these questions of fact if the learned Subordinate Judge's decision is correct. The case has been argued in this Court on the same footing.

The claim of the plaintiff as shown by the prayer of his plaint was as follows: (*a*) That it be declared that Babu Sri Kishun Singh died while separate from his brothers, Bachu Singh and Jugal Kishore Singh, and that the plaintiff is the heir of the said Babu Sri Kishun Singh. (*b*) That it be declared that, after the death of Kamalbas Koeri, plaintiff as heir of Babu Sri Kishun Singh is entitled to possession of the disputed properties which appertain to his estate on the ground stated in the plaint, and the possession of the defendants as derived from Babu Bachu Singh and Babu Mahabir Prosad Singh who had no title thereto be declared wrongful and without title. (*c*) That it be declared that the alienations mentioned in paragraphs 38, 39 and 40 of this plaint are invalid in so far as they relate to the estate of Babu Sri Kishun Singh and are of no binding effect on the plaintiff. (*d*) That a decree for recovery of possession of the disputed properties mentioned in Schedule IV-A by ousting the defendants be passed in favour of the plaintiff and the plaintiff be put in possession thereof. (*e*) That in case the Court be pleased to hold that the plaintiff is not entitled to immediate possession of the properties in suit as absolute owner thereof, the same may be reduced into proper possession and the plaintiff be placed in charge of the same as manager during the life-times of the defendants Nos. 3 and 4 and a declaration of plaintiff's right to possession as an absolute owner from such date as under the circumstances of the case the Court thinks proper be made in favour of the plaintiff. (*f*) That leave may be granted to the plaintiff to join the claim for Rs. 45,000 with the claim for the rest of the estate of Babu Sri Kishun Singh and a decree for the said Rs. 45,000, representing the price of *kothis* Bunwar and Basoila mentioned in paragraph 26 of the plaint appertaining to the estate of Babu Sri Kishun Singh and appropriated by the husband of the defendant No. 1, together with interest as detailed in Schedule VI be passed against the defendant No. 1 to be realised from the estate of the defendant No. 1's husband. (*g*) That a decree for Rs. 1,05,494-5-3, being the mesne profits of the disputed properties for three years prior to the institution of the suit as detailed in Schedule VII, and also for the future mesne profits from the date of suit till delivery of possession be passed in favour of the plaintiff against defendants Nos. 1 and 2. (*h*) That the costs of the suit with interest be awarded to the plaintiff. (*i*) That such other appropriate reliefs be granted to the plaintiff to which he, under the circumstances of the case, is entitled to obtain in law and equity.

That is in effect a suit for possession on declaration of the plaintiff's title with an additional prayer that, if the plaintiff be not entitled to immediate possession of the property in suit as the absolute owner thereof, he (the plaintiff) should be given possession as manager during the life-time of defendants Nos. 3 and 4. The case of the plaintiff resolves itself into three claims, *first*, a claim for immediate possession; *secondly*, if he cannot get that, a claim for declaratory relief; and *thirdly*, a claim to be put in possession as manager during the life-time of defendants Nos. 3 and 4.

Now, it is not disputed by the appellant that, under ordinary circumstances, his maternal grandfather's estate would not fall into his possession until the deaths, *first*, of his grandmother, Kamalbas Koeri, and *secondly*, of the daughters of Sri Kishun, namely, defendants Nos. 3 and 4. The plaintiff's suit was brought on 2nd September, 1911, about a week before the twelve years from the death of Kamalbas Koeri expired. He was thus, so far as that lady is concerned, just within time in his suit for possession. But he could not hope or expect to get possession during the life-time of his mother and aunt who would take the estate before him as the daughters of Sri

Kishun Singh. It would be, therefore, necessary for him to show that the estates of these ladies had expired by their deaths or in some other way. They were both alive at the date of the institution of the suit.

The plaintiff, however, alleges that by certain *ekrarnamas*, dated 9th July, 1873, these ladies relinquished their estates in favour of Bachu Singh a brother of Sri Kishun Singh and father-in-law of defendant No. 1. In point of fact the plaintiff alleges, and this is not disputed, that there were three *ekrarnamas* executed on 9th July, 1873, one in respect of the estate of Kamalbas Koeri, one in respect of the estate of Ram Kawal Koeri and the third in respect of the estate of Raj Kishori Koeri. The plaintiff glosses over the fact that, if the *ekrarnamas* of defendants Nos. 3 and 4 operated as a relinquishment of their estates, the *ekrarnama* of his grandmother, Kamalbas Koeri, would have the same effect. However that may be, the allegation is that the execution of those *ekrarnamas* was procured by Babu Bachu Singh with a view to create evidence of his jointness with his brother Sri Kishun Singh, and to prevent these defendants from asserting a claim as heirs of their father, Sri Kishnu Singh. The question whether, Sri Kishun Singh was joint with his brothers, Bachu Singh and Jugal Kishore Singh, at the time of his death is a question of fact which would arise in the suit. We may, however, assume for the purpose of the present argument that Sri Kishun was separate from his brothers. Those *ekrarnamas* were executed about a year after the death of Sri Kishun Singh. The plaintiff alleges that by those *ekrarnamas*, defendants Nos. 3 and 4 relinquished their heritable right and in consequence, accelerated the succession of the plaintiff to the estate of his maternal grandfather. Now, in point of law, this is wholly incorrect. The estate of a Hindu widow or, as in this case, of a daughter might be determined in various ways ; but as these *ekrarnamas* are set out in the plaint, they clearly do not amount to more than an alienation in favour of Bachu Singh. Now an alienation in favour of a third party clearly does not have the effect of accelerating the estate and entitling the next reversioner to immediate possession. The learned Pleader for the appellant in his reply referred us to certain remarks made by the learned Judges in the case of *Debi Prosad Chowdhury* v. *Golap Bhagat* (1). He argued that there had been a disclaimer at the death of Sri Kishun which would put an end to the estates of these ladies. The plaintiff, however, does not allege any such disclaimer in his plaint ; on the contrary, he says that these ladies, well knowing that they had the right of inheritance to their father's estate, gave it up by these *ekrarnamas* a year after their father's death in consideration of certain villages granted to them by Bachu Singh in lieu of maintenance. There has been no relinquishment in favour of the reversioner in this case ; nor is any such relinquishment alleged which would accelerate the estate in favour of the plaintiff as such reversioner. It follows, therefore, that during the lifetime of his mother and aunt, the plaintiff could not successfully maintain a suit for immediate possession of the properties left by his grandfather Sri Kishun Singh. His mother died pending the present appeal ; but his aunt, the defendant No. 4, is still alive and her estate stands in the way of his immediate inheritance.

In the Court below, the learned Pleader for the plaintiff saw the difficulty in which he was placed and endeavoured on the principle, as Sir Rash Behari has put it that "half a loaf is better than no bread," to obtain from the Court a declaration of the plaintiff's right as such reversioner in anticipation of the deaths of his mother and aunt, the defendants Nos. 3 and 4. As above stated, the suit is not, strictly speaking, brought for such a declaratory relief. Assuming, however, that it might be granted on the plaintiff's present prayer and that it would be proper to grant it, the question arises whether the claim in that respect can be said to be in time. In our opinion, it is clearly barred by limitation. The claim to such a declaration would be governed by Article 120 of the first Schedule to the Limitation Act. The time from which the period of limitation begins to run is from when the right to sue accrues. Now, these alienations or acts of the ladies which gave the plaintiff a cause of action took place as long ago as 1873. The plaintiff was

(1) (1913) 40 Cal. 721 = 19 I. C. 273.

then a minor; but, assuming that a certificated guardian was appointed and his minorty would extend until he was 21 years of age, as the learned Subordinate Judge points out, he would have attained majority some time in 1889. Allowing three years from that date, the suit would have had to be brought by 1892. It is thus hopelessly out of time. Even if the time were to run from Komalbas Koeri's death, the suit would be long out of time as she died in 1899 and the suit was not brought until 1911. That disposes of the second point.

As in the Court below the plaintiff fell back upon the right to a declaratory relief on failure of his claim for immediate possession, so here an attempt was made to save the plaintiff's suit by arguing that the question of his appointment as manager should be gone into. Nothing appears to have been said in the Court below with regard to this paragraph of the plaintiff's claim. It seems to have been raised here for the first time. On the allegations of the plaintiff as contained in paragraph 34 of his plaint, it is clear that the relinquishment by defendants Nos. 3 and 4 of their right of inheritance to their father's estate would not amount to waste of the estate of Sri Kishun Singh, which would justify the Court in considering whether the estate should be taken out of their hands. A Hindu lady in that position has an absolute right and full power to alienate the estate for the period of her enjoyment to an outsider. That will not give the reversioner the right to come in and plead waste, and insist on the estate being brought into possession by the Court. There are no allegations in the plaint which point to anything like spoliation of the estate or indicate that the estate has, in any way, suffered or will, in any way, suffer from its being held by defendant No. 1, who is said to be in possession claiming under defendants Nos. 3 and 4. There is, therefore, no possible advantage to be gained by prolonging this litigation and opening up an enquiry which, on the allegations contained in the plaint, must necessarily prove infructuous. This is not one of that class of cases referred to by the learned Pleader for the appellant in his reply in which the denial of her own and the reversioner's title by a Hindu widow may give the reversioner an immediate cause of action, because it is necessary that he should, at the earliest stage, be allowed to support that title by adducing evidence and getting an adjudication of the Court upon it. We are of opinion that the learned Subordinate Judge was right in the course that he took and in the conclusion to which he came.

It was suggested here that the case ought not to have been argued on the preliminary issue without all the issues, both of fact and of law, in the suit having been properly framed. It appears, however, that the course which was adopted was adopted by consent of both the parties and that Pleaders on both sides were taken from Calcutta before the Subordinate Judge to argue the case on these lines. There would have been no possible advantage in framing a number of issues which, in the view that the Subordinate Judge took of the case, would not have to be considered.

Agreeing, therefore, with the Court below, we dismiss the appeal with costs, two sets, to defendant No. 1 and defendant No. 4.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 609

FLETCHER AND RICHARDSON, JJ.

Rash Behari Lal Mandal—Defendant Appellant.

v.

Tiluckdhari Lal and *another*—Plaintiffs—Respondents.

First Appeal No. 350 of 1913, decided on 9th June, 1915, against the Decree of Offg. Sub-Judge, 1st Court, Bhagalpore, dated 28th April, 1913.

(a) Bengal Tenancy Act (8 of 1885), Sch. III, Art. 2—Per *Fletcher, J.*—Lease for agricultural purpose come under Tenancy Act—Rent though acknowledged after it is time barred, cannot be recovered under Art. 2—Non-agricultural leases are not governed by Tenancy Act.

In a suit for arrears of rent the rent that was in arrears and was sued for, was for the year 1313 B. S. under a first *kabuliyat*, and for the years 1313-1318 B. S. under a second *kabul yat*. The defendants estate was taken charge of by the Court of Wards on the 11th November, 1908, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th September, 1910 with respect to the rent now sued for :

Held, per *Fletcher, J.*, that the rent sued for the year 1313 was barred by limitation, as the case came under the Bengal Tenancy Act, and the leases were found to have been granted for agricultural purposes. [P. 611, C. 1.]

The Bengal Tenancy Act does not apply to leases of agricultural land which are not for agricultural purposes. 27 Cal. 205; 23 Cal. 191 and 28 Cal. 744, ref. to. [P. 610, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 107—(Per *Richardson*, J.)—Lease of agricultural land but not for agricultural purpose is governed by S. 107 and not by Tenancy Act—Lease must be registered—Temporary lease of agricultural land granted to middleman is governed by Transfer of Property Act.

Per *Richardson*, J.—Where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act. Such a lease can only be made under S. 107 by a registered instrument.

Where a lease appears to be in substance a temporary lease granted to a rent-farmer or middleman and relates to agricultural lands, there is no question of any conflict between the Bengal Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act. [P. 611, C. 2.]

(c) Limitation Act (9 of 1908), S. 29—Scope of—Local and special laws are saved.

S. 29 of the Limitation Act contains a saving clause in regard to special and local laws. [P. 612, C. 1.]

(d) Bengal Tenancy Act (8 of 1885)—Applicability—It applies to all leases of agricultural land whether for agricultural purpose or otherwise.

Whether a lease of agricultural land is or is not a lease for agricultural purposes the Bengal Tenancy Act applies, and the period of limitation applicable is that provided by that Act. [P. 612, C. 1.]

Dwarka Nath Mitter and *Naresh Chandra Sinha*—for Appellant.

Chandra Sekhar Prosad Singh — for Respondents.

Fletcher, J.—The only question raised in this appeal is whether the period of limitation for a portion of the claim is governed by Article 2 of Schedule III of the Bengal Tenancy Act or Article 116 of the Indian Limitation Act. The suit was brought to recover arrears of rent due under two *kabuliyats*. The first *kabuliyat* was dated the 23rd of May, 1902 and was given in respect of certain properties leased to the defendant for a term of four years (1310-1314) at a rent of Rs. 1,200, per annum. The second *kabuliyat* was dated the 15th of January, 1906 and was given in respect of certain other properties leased to the defendant for a term of eight years (1313-1320) at a rent of Rs. 438 a year.

The rent that was in arrears and was sued for was for the year 1313 under the first *kabuliyat* and under the second *kabuliyat* for the years 1313 to 1318. The defendant's estate was taken charge of by the Court of Wards on the 11th November, 1908, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th September, 1910 with respect to the rent now sued for.

The only question, therefore, that arises is with reference to the rent due for the year 1313, for if the period of limitation applicable to the present suit is that provided under Article 2 of Schedule III to the Bengal Tenancy Act then when the Collector gave the acknowledgment in writing on the 20th September, 1910, the rent for the year 1313 was already barred by limitation. The leases in the present cases are expressed to be *mustajiri* leases. Although a *mustajiri* lease is sometimes and perhaps usually a lease to middleman, yet in Behar the term is applied frequently to temporary leases instead of the word *thika* (*see* Land Laws of Bengal by S. C. Mitra, p. 207). The two clauses in the lease that are chiefly relied upon are first the words:

"I the *mustajir* shall enjoy the *parti* land which may be converted into culturable land in the *jamabandi* of the said *mouza*, which may be increased till the terms of this Settlement."

The translation is not a very happy one, but the meaning seems to be that the tenant may either cultivate the waste land or let it out to tenants and enjoy the increased rental.

The words relied on by the respondent to this appeal are:

"Be it known that that in the said *mouzas* you the proprietors have no *kamat* land,"

that is, lands in the possession of the *zemindars*.

Now the Bengal Tenancy Act does not define the classes of leases to which the Act applies. The local extent of the Act is given in S. 1 (3) of the Act. It has, however, always been held that the Act only applies to agricultural land. A class of cases, however, has grown up in the Courts to the effect that the Act does not apply to leases of agricultural land which are not for agricultural purposes [see *Umrao Bibi* v. *Mahomed Rajabi* (1)].

The case of *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (2) was much relied on in argument. The remarks of Maclean, C. J., in that case are only to the effect that a *putni* was not a lease for

(1) (1900) 27 Cal. 205.
(2) (1901) 28 Cal. 744.

agricultural purposes, and, therefore, the provisions of the Transfer of Property Act applied as to the merger of the *putni* on its being purchased. That some of the provisions of the Bengal Tenancy Act, *viz.*, those as to the period of limitation provided by the Act for recovering arrears of rent from the *patnidar*, apply had already been decided in this Court in the case of *Burna Moyi Dassee* v. *Burna Moyi Chowdhurani* (3). That case remains unaffected by any subsequent decision of this Court. If the period of limitation provided by the Bengal Tenancy Act applies to arrears of *putni* rent, it must also apply to the leases in the present suit even if we accept the construction placed on those leases by the Vakil for the plaintiffs. I think, however, that the leases in the present case, even apart from the decision in *Barna Moyi Dassee's* case (3), come under the Bengal Tenancy Act. One of the purposes for which the leases were granted was to authorise the defendant to bring under cultivation the waste land which, I think, is obviously an "agricultural purpose."

That being so, I think that the rent sued for the year 1313 is barred by limitation. The decree of the lower Court must be varied by deducting from the decretal amount the amount of rent and interest thereon for that year. Subject to that modification the decree appealed against will be affirmed.

As the appellant has only succeeded as regards the rent for 1313 there will be no order as to the costs of this appeal.

The order of the lower Court as to the costs in that Court will remain unaffected.

Richardson, J.—I agree. It is not always easy to ascertain precisely what the purposes of a lease are and in the present case I doubt whether it is necessary to determine, whether the lease in question is or is not a lease for agricultural purposes within the meaning of S. 117 of the Transfer of Property Act. Under Clause (3) of S. 1 of the Bengal Tenancy Act, that Act extends to the whole of Bengal with the exception of certain specified areas, with which we are not now concerned. The lease covers land to which the Act *prima facie* extends. It has been held, however, that there are non-agricultural lands outside the excepted areas to which the provisions of the Act according to their true construction have no application [*Raniganj Coal Association Ltd.* v. *Judoonath Ghose* (4), *Umrao Bibi* v. *Mahomed Rajabi* (1), *Hedayet Ali* v. *Kalanand Singh* (5)]. But the land here is admittedly agricultural land and these authorities, therefore, are not pertinent. On the other hand where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act, which is an Imperial Act, in respect of matters within the scope of that Act (so far as its operation is not excluded by anything in its S. 2). By way of illustration reference may be made to *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (2). Such a lease again can only be made under S. 107 by a registered instrument. In these and other cases the Transfer of Property Act has been held to apply. In other respects, however, the relationship between the parties to such a lease may still be subject to the provisions of the Bengal Tenancy Act. [*Durga Prosad Bundopadhya* v. *Brindabun Roy* (6), *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (7), *Burna Moyi Dassee* v. *Burna Moyi Chowdhurani* (3)]. The Government have not found it necessary to issue any notification in exercise of the power conferred by S. 117 of the Transfer of Property Act and so far as I am aware, the position gives rise to no practical difficulty, except the initial difficulty in some cases of determining whether a particular lease is or is not a lease for agricultural purposes, that is to say, where the question is whether some provision in the Transfer of Property Act is or is not applicable. That question does not really arise in the present case. The lease here appears to me to be in substance a temporary lease granted to a rent-farmer or middleman. It relates, as I have said, to agricultural lands. There is no question of any conflict between the Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act. The point is whether the period of limitation applicable to a suit for arrears of rent due

(3) (1896) 23 Cal. 191.

(4) (1892) 19 Cal. 489.
(5) (1913) 20 I. C. 332.
(6) (1892) 19 Cal. 504.
(7) (1902) 6 C. W. N. 794.

under the lease is that prescribed by the Limitation Act or that prescribed by the Tenancy Act. The argument for the respondents is that the lease is not a lease for agricultural purposes, and is, therefore, subject only to the Transfer of Property Act, and is not governed in any respect by the Tenancy Act. But in the view of the cases cited and of the terms of S. 117 itself, that conclusion by no means follows from the premise. There is no dispute that if the Tenancy Act applies for any purpose, the period of limitation is three years as provided in Article 2 of the Schedule III of the Tenancy Act. S. 29 of the Limitation Act contains a saving clause in regard to special and local laws. In my opinion whether this lease is or is not a lease for agricultural purposes, the Tenancy Act applies and the period of limitation applicable is that provided by that Act.

V.B./R.K.

Decree modified.

A. I. R. 1916 Calcutta 612

RICHARDSON AND IMAM, JJ.

Prasanna Kumar Dutt Purkayastha—Plaintiff—Appellant.

v.

Jananendra Kumar Dutta and *others*—Defendants—Respondents.

Second Appeal No. 2119 of 1912, decided on 26th November, 1915, against the Decree of Sub-Judge, 2nd Court, Sylhet, dated 15th April, 1912.

Limitation Act (9 of 1908), Sch. 1, Art. 121—Adverse possession for statutory period before sale is an encumbrance — Assam Land and Revenue Regulation (1 of 1886), S. 70.

An interest acquired in an estate by adverse possession for the statutory period before its sale under S. 70 of the Assam Land and Revenue Regulation, 1886, is an encumbrance within the meaning of Article 121 of the First Schedule to the Limitation Act, 1908. 22 Cal. 244; 25 Cal. 167, foll.; 12 C. W. N. 528 and 1 I. C. 81, dist.

[P. 612, C. 2 & P 613, C. 1.]

Jadunath Kanjilal and *Birendra Kumar Das*—for Appellant.

Hemendra Kumar Das—for Respondents.

Judgment—In this case, it is conceded that the revenue sale of 1897 under which the plaintiff-appellant claims, became final and conclusive more than twelve years before the date on which the suit was instituted. That being so, we may accept the contention of the appellant's learned Pleader that the finding in the judgment of the lower Appellate Court that the principal defendants were in occupation of the lands in suit as trespassers for more than twelve years before the institution of the suit, refers to adverse possession before the sale. Assuming this in the appellant's favour, the appeal may be decided on a very short ground. The question is one of limitation. Is or is not Art. 121 of the 2nd Schedule to the Limitation Act applicable to this case? It is applicable if the nature of the interest acquired by the principal defendants by adverse possession is an "encumbrance" within the meaning of the words as it is there used. It is a question of terminology. Is such an interest properly described as an encumbrance? It seems to us that in view of the decisions of this Court in *Karmi Khan* v. *Brojo Nath Das* (1) and *Nuffer Chandra Pal Chowdhury* v. *Rajendra Lal Goswami* (2) and of the earlier authorities which were cited and followed in those cases, the questions which we have stated, can admit only of an affirmative answer. The learned Pleader for the appellant contends that the interest is not an encumbrance and cannot properly be described as such. He refers to the cases of *Kumar Kalanand Singh* v. *Syed Sarafat Hossein* (3) and *Rahimuddi Munshi* v. *Nalini Kanta Lahiri* (4). No doubt in those cases, it seems to have been held in regard to S. 54 of the Bengal Land Revenue Sales Act (XI of 1859) that in the expression "subject to all encumbrances" which there occurs, the word "encumbrances" does not include an interest acquired before the date of the sale by adverse possession for the statutory period. On the other hand, it has always been held that the word as used in S. 37 where the expression is "free from all encumbrances," includes such an interest at any rate for the purposes of limitation, and this point as to the meaning of the word in Art. 121 was not considered in the cases of *Kumar Kalanand Singh* v. *Syed Sarafat Hossein* (3) and *Rahimuddi Munshi* v. *Nalini Kanta Lahiri* (4).

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(1) (1895) 22 Cal. 244.
(2) (1898) 25 Cal. 167.
(3) (1908) 12 C. W. N, 528.
(4) (1909) 1 I. C. 81.

In the present case, the sale took place not under Act XI of 1859, but under the Assam Land and Revenue Regulation of 1886. We assume again in the appellant's favour, that the learned Subordinate Judge misapplied S. 71 of the Regulation and that the sale was the sale of an estate under S. 70. But the interest which the defendants acquired, is in our opinion on the authorities an encumbrance within the meaning of Art. 121 and the suit is barred by limitation. The contention of the learned Pleader for the appellant that under Art. 142 or 144, the period of limitation was twelve years from the date when possession was formally given to the purchaser at the sale, cannot be accepted.

We may mention that there are two plots in dispute in this suit. The plaintiff's title to the first plot fails on the facts found by the Subordinate Judge, which cannot be now successfully assailed. His title to the one-half share of the second plot fails on the ground we have indicated.

The result is that the appeal must be dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 613

CHATTERJEE AND CHAPMAN, JJ.

Diljanmihha Bibi—Petitioner.

v.

Hemanta Kumar Roy and *others*—Opposite Party.

Civil Rule No. 733 of 1914, decided on 26th March, 1915, in the matter of the Misc. Case No. 293 of 1913 of Munsif, 2nd Court, Jhenidah.

(a) Civil Procedure Code (5 of 1903), S. 141—Scope of—Does not apply to execution.

S. 141 of the Civil Procedure Code, 1908 does not apply to applications for execution.

[P. 614, C. 1.]

(b) Civil Procedure Code (5 of 1908), S. 47 and O. 21, R. 90—Application to set aside sale is not execution proceedings.

An application for setting aside a sale under S. 47 and O. 21, R. 90, Civil Procedure Code, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party.

[P. 614, C. 1.]

(c) Civil Procedure Code (5 of 1908), S. 47, O. 9, R. 13 and O. 21, R. 90—Application to set aside dismissal for default of an application under R. 90 lies.

Where on the dismissal for default of an application for setting aside an execution sale under S. 47 and under O. 21, R. 90 of the Civil Procedure Code, another application for setting aside that order under O. 9, R. 9, is made :

Held, that O. 9, R. 9, is applicable to cases of this kind. Case law referred. [P. 614, C. 2.]

Manmothanath Mukerjee — for Petitioner.

Surendra Chandra Sen—for Opposite Party.

Judgment.—An application for setting aside an execution sale under S. 47 and O. 21, R. 90 of the Civil Procedure Code, was dismissed for default. The judgment-debtor made an application for setting aside that order under O. 9, R. 9. The learned Munsif rejected the application, holding that O. 9 had no application to the case. This Rule was granted on the opposite party to show cause why the application should not be entertained either under O. 9 or O. 47, or why such other order should not be made as to this Court might seem fit and proper. It is admitted by the learned Vakil for the petitioner that O. 47, is not open to him, as the application was made to the successor of the trying Munsif. He relies upon O. 9 or S. 151 of the Civil Procedure Code. I do not think he is entitled to rely on S. 151. To allow him to do so would be to allow him to apply for a review which is expressly prohibited by the Code. He must stand or fall by O. 9. There is some apparent diversity of opinion as to whether the provisions of O. 9 are applicable to matters arising in execution. In the case of *Safdar Ali* v. *Kishun Lal* (1), it was held that an application for re-hearing a matter arising in execution could be entertained under O. 9, R. 9. This is an express authority on the point. This case was distinguished in the case of *Asim Mandal* v. *Raj Mohan Das* (2) and it was held that all the provisions of O. 9 were not applicable to execution proceedings. That was a case in which an application for execution was dismissed for default and it was held that a fresh application for execution would nevertheless lie as O. 9, R. 9, was not applicable to an application for execution. The matter came under discussion again in the case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) and it was held

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(1) (1910) 7 I. C. 241.
(2) (1911) 11 I C. 385.
(3) A. I. R. (1914) Cal. 126=19 I. C. 683=41 Cal. 1.

that O. 9, R. 13, was not applicable to a proceeding under Rr. 100 and 101 of O. 21. Both these cases rely on the history of S. 647 of the old Code in the course of its transformation into S. 141 of the Civil Procedure Code of 1908. S. 647 of Act 14 of 1882 was :

"The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals."

In consequence of some divergence of opinion between different High Courts as to whether the proceedings named in this section included execution proceedings, an explanation was added by Act VI of 1892 :

"This section does not apply to applications for the execution of decrees which are proceedings in suits."

In 1894 the Judicial Committee held that even without the explanation the section did not apply to applications for execution of decrees, *Thakur Prasad* v. *Fakir Ulla* (4). That was a case in which an application for execution had been struck off at the request of the decree-holder without any permission to apply again, and the question was whether Ss. 373 and 374 barred a fresh application. This objection was overruled by their Lordships. The result of this decision was that the explanation was held to be superfluous. S. 141 of the present Code runs as follows :

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.'

Supposing that the alteration in language is not material, and adopting the construction given by the Privy Council to S. 647 of the old Code, it will follow that S. 141 does not apply to applications for execution.

An application for setting aside a sale under S. 47 and O. 21, R. 90, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party. I do not think that a proceeding of this kind is excluded from the purview of S. 141. I think, therefore, that O. 9, R. 9, is applicable to cases of this kind and the cases of *Asim Mandal* v. *Raj Mohan Dass* (2), *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) have not decided to the contrary. Both these rulings are careful in stating that all the provisions of O. 9, are not applicable. Some of the provisions, therefore, may apply and the judgment of the learned Chief Justice in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) contains a clear indication that the interests of justice must have an important bearing in the matter :

"It is not as though there was any necessity in the interests of justice that the provisions of R. 13, O. 9, should be applicable to proceedings in execution, because the order is not conclusive, but is subject to the right of the person aggrieved to bring a suit."

In the present case, the order is conclusive : there is no regular suit and a review is impossible. The petitioner is, therefore, without any remedy other than O. 9, R. 9, to have an adjudication of her case. I may state that the Madras High Court favours the view contended for by the petitioner in this connection. See *Subbiah Naicker* v. *Ramanathan Chettiar* (5). I would, therefore, make the Rule absolute with costs three gold *mohurs* and direct that the petition of the applicant should be dealt with in due course of law.

V.B./R.K.

Rule made absolute.

(4) (1895) 17 All. 106=22 I. A. 44=6 Sar. 526 (P. C.).

(5) A. I. R. (1914) Mad. 162=22 I. C. 899=37 Mad. 462.

A. I. R. 1916 Calcutta 614

MULLICK, J.

Gopi Sundari Dasi—Plaintiff—Appellant.

v.

Haladhar Mazumdar and *others*—Defendants—Respondents.

Second Appeal No. 1544 of 1913, decided on 7th July, 1915, from the Decree of Sub-Judge, Pabna, dated 13th February, 1913.

Bengal Tenancy Act (8 of 1885), S. 87—What amounts to abandonment under S. 87 is stated.

Where a tenancy in favour of several tenants has not been split up and even one of the original tenants still remains on the land though the others drop away, there is no abandonment within the meaning of S. 87 of the Bengal Tenancy Act. 7 C. W. N. 670, dist. [P. 616, C. 1.]

Jogesh Chandra Roy and *Nanda Lal Banerjee*—for Appellant.

Tarakeswar Pal Chowdhury and *Sasadhar Roy*—for Respondents.

Judgment.—It is admitted that the *bara taraf* and *chota taraf* were two

co-sharer landlords in possession of an occupancy holding measuring 14 *bighas* 5 *cottas* through certain tenants, Torap, Dinu Juman and Jarip. Torap transferred his half share in the holding to Ananda and Dinu's share was inherited by his son, Enait. We next find that Juman and Jarip had somehow dropped out of the holding and that there was some kind of division of the lands of the holding, and that Ananda paid rent separately of his share to the *bara taraf* and Enait for his share to *chota taraf*. We are concerned in the present suit with Ananda's portion of the holding. It is admitted that Ananda by a will bequeathed his land to Bipin, the son of his mistress, Dhonomoni, and that defendant No. 3, Bonalata, the widow of Bipin, made a *dar-jote* settlement in favour of defendant No. 2. The plaintiff, who is the *bara taraf* landlord, sued defendants in this case for ejectment on the allegation that Ananda had no right to bequeath to defendant No. 3 the occupancy holding which is not transferable by custom, and that consequently the other defendants who claim as under-tenants have also no right. The basis of the plaintiff's case is that there was a division of the holding as between the landlords on the one hand and the tenants, Ananda and Enait, on the other, by which a separate non-occupancy-holding was created in favour of Ananda for an area of 7 *bighas* 2½ *cottas* with a rental of Rs. 4-12-0. Defendant No. 2 in his written statement said that he was a *bona fide* tenant and could not be ejected without notice. Defendant No. 1 said that he had no concern with the case and had been wrongly impleaded. Defendant No. 3 said that the tenancy had not been split up and that as the original tenant was still in possession of a part of the holding, she could not be ejected.

The learned Munsif found that there had been a splitting up of the tenancy but that upon the plaint, as framed, no decree for ejectment could be given. It appears that in the plaint the land from which it is sought to eject defendant No. 1 is not described by metes and bounds. It is merely stated that plot No. 1 consists of a certain area out of the total area of 2 *bighas* 8 *cottas*. After the evidences of both sides had been recorded; an application was made for amendment of the plaint by describing by metes and bounds the parcels from which an ejectment was sought. The learned Munsif found that the statements in the application for amendment were inconsistent with the evidence given in the case. For instance, in respect of plots in which according to the application Ananda and Enait were said to be joint, the evidence showed the exclusive possession of one party alone. It was clear, therefore, that even if he allowed the amendment of the plaint, he could not grant ejectment according to the terms, and so he dismissed the plaintiff's suit for that part of the land which is in schedule *ka*. We are not concerned with the lands in schedule *kha* and *ga* in this case. We need not, therefore, refer to them.

In appeal the learned Subordinate Judge found that there had been no splitting up of the tenancy at all. He, therefore, refused to eject the defendants.

The plaintiff prefers this second appeal and the only ground of law taken is that upon the facts found the Court of appeal below was bound to draw the inference that there had been a splitting up of the tenancy. Now what the learned Subordinate Judge found is this. He says that there was a division of the land, but he does not say whether each plot was divided into two equal shares or whether some plots were given to one party and some to another party. Again, he says that for the sake of convenience Ananda paid half share of the rent on account of the *jote* to the plaintiff. But he goes on to say that during certain *punia* ceremonies Enait paid some rent to the *bara taraf*, that is, to the plaintiff. Again he goes on to say that in a certain road-cess return the plaintiff has described Torap, the predecessor of Ananda, and Dinu, the predecessor of Enait, as his tenants; and again that, in a rent suit brought by the *chhotta taraf* for their share of rents, Miru the son of Torap, and Enait, the son of Dinu, were both impleaded as tenants. It also appears even in the present case that Enait has been impleaded as a tenant. Upon all these facts, the learned Subordinate Judge has declined to come to the finding that there was a splitting up of the tenancy and I cannot interfere in second appeal. Reliance has been placed on behalf of the appellants on the following cases:—*Gobind Chandra Pal* v. *Hamidulla Bhuian* (1), *Panchanna Banerji*

(1) (1903) 7 C. W. N. 670.

v. *Raj Kumar Guha* (2), *Bhabatarini Dasi* v. *Ekabar Malita* (3) and *Sailendra Nath Mitter* v. *Karali Charan Singh* (4). These cases do not really touch the point. They merely show that it is open to a tenant, notwithstanding the terms of the S. 188 of the Bengal Tenancy Act, to hold separate tenancies under co-sharer landlords in respect of their shares in the holding. If then the tenancy has not been split and the original tenant still remains on the land, there can be no abandonment within the meaning of the S. 87 of the Bengal Tenancy Act. Therefore, the plaintiff cannot eject the defendants. The appeal is dismissed with costs, only one set of costs is allowed to the different defendants.

V.B./R.K.

Appeal dismissed.

(2) (1892) 19 Cal. 610.
(3) (1907) 5 C. L. J. 235 (F. B.).
(4) (1905) 2 C. L. J. 534.

A. I. R. 1916 Calcutta 616

JENKINS, C. J. AND N. R. CHATTERJEA, J.

Priya Nath Bachher—Plaintiff—Appellant.

v.

Mianjan Sardar and *others*—Defendants—Respondents.

Second Appeal No. 2739 of 1913, decided on 20th May, 1915, against the Decree of Sub-Judge, 1st Court, 24 Parganas, dated 12th May, 1913.

Civil P. C. (5 of 1908), S. 149—What is sufficient compliance with order under S 149 stated—Discretion is not to be interfered in appeal.

A plaint was presented to a Civil Court on the 19th April. On the 29th April an order was made on the plaintiff to pay the deficit Court-fees within a week. This was followed by several other orders providing for payment on later dates. Ultimately there was an order on the 7th August under which the balance was to be paid within five days, but it was paid the next day, the 8th August :

Held, that there was an order and also payment in conformity with that order within the meaning of S. 149, Civil Procedure Code.

[P. 616, C. 2.]

A discretion exercised properly under the section cannot be challenged in appeal.

[P. 616, C. 2.]

Sarat Chandra Roy Chowdury and *Dhirendra K. Roy*—for Appellant.

Jogendra Narayan Mozumdar - for Respondents.

Jenkins, C. J.—This is an appeal from a decision of the Subordinate Judge, first Court, Alipur, affirming the decision of the first Munsif at Sealdah. The suit was for recovery of money, and it was presented in the Small Cause Court at Sealdah on the 18th April, 1911. That Court had no jurisdiction, so it was returned on the 19th. On the same date it was presented to the Munsif's Court. On the 29th of April an order was made on the plaintiff to pay the deficit Court-fees within a week. And this was followed by several other orders providing for payment on later dates. Ultimately there was an order on the 7th August under which the balance was to be paid within five days. In fact it was paid the next day, the 8th August. Notwithstanding this, it has been held that the suit was not within time and must be dismissed. This appears to me to be an erroneous reading of S. 149 of the Code which provides for the power to make up deficiency of Court-fee and for that purpose vests the Court with powers, in its discretion, at any stage to allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee, and upon such payment the document, in respect of which such fee is payable, is to have the same force and effect as if such fee had been paid in the first instance. In this case we have such an order as S. 149 contemplates and there was payment in conformity with the terms of the order. So that I can see no reason why the provisions of S. 149 should not apply.

Some doubt has been suggested as to whether the Judge exercised his discretion in making the various orders to which I have referred. It appears to me impossible to go into a question of that kind. He must be taken on the record, as it stands to have exercised his discretion as provided by S. 149. The result is, in my opinion, the decree of the Subordinate Judge and of the Munsif must be set aside and the case sent back to the Court of first instance in order that it may be heard in accordance with law. Costs hitherto incurred will follow the result.

N. R. Chatterjea, J.—I agree.

V.B./R.K.

Decree set aside.

A. I. R. 1916 Calcutta 617

CHATTERJEE AND CHAPMAN, JJ.

William Graham—Defendant—Appellant.

v.

Phanindra Nath Mitter and *others*—Plaintiffs—Respondents.

Appeal No. 166 of 1911, decided on 11th June, 1915, from the Original Decree of 1st Suo-Judge, 24 Parganas, dated 20th December, 1910.

(a) Evidence Act (1 of 1872), Ss. 13, 35 and 83— *hittas* prepared by Government in proceedings for assessment of rent—*Chittas* were held admissible in evidence.

Where *chittas* were prepared by Government as only part of and in explanation of proceedings which were regularly taken for the assessment of rent upon lands said to be improperly held rent-free and where the whole of the proceedings together with the petition, under which the proceedings were initiated, and the reports of the Collector and the orders of the Board of Revenue were put in evidence:

Held, that all the papers taken together furnished valuable evidence. [P. 618, C. 2.]

Held, also, that the *chittas* were admissible in evidence inasmuch as they were coupled with proceedings which were of the nature of resumption proceedings and the lands therein were identifiable. [P. 618, C. 2.]

(b) Evidence Act (1 of 1872), S. 35—Entry in public registers relevant.

An entry in a register prescribed by law and being a public register kept for the public benefit under the sanction of official duty is relevant under S. 35 of the Evidence Act no matter whether the clerk who wrote the entry had any personal knowledge or whether the register was a copy of a previous register which had become untidy. [P. 620, C. 1.]

(c) Bengal Survey Act (5 of 1875)—Decisions based on survey map not binding on Civil Courts on question of title.

A decision under the Survey Act based upon a survey map made behind the plaintiffs is not binding on the Civil Courts upon the question of title. [P. 619, C. 2.]

Charu Chandra Biswas and *Satyendra Nath Mitter*—for Appellant.

Nilmadhab Bose and *Rupendra Kumar Mitter* for *Hara Kumar Mitter*—for Respondents.

Judgment.—In the suit out of which this appeal arises the plaintiffs claimed a plot of land roughly thirteen *kotas* in area in Kidderpore, a suburb of Calcutta. The plaintiffs derived their title in the following way. At the beginning of the last century the Government constructed a new road in that locality. A survey was made in 1800 and again in 1801 for the purpose of assessing the compensation to be awarded to the persons from whom the lands for the road were taken. It appears that certain side-lands, which had been taken and might subsequently be required for the purposes of the road, were then noted as *dar-i-pin* lands: the lands which had been taken and which lay outside these *dar-i-pin* lands were noted as *be-darkari* or surplus lands and these latter surplus lands were settled with former holders under *lakheraj sanads*. In 1810 the plaintiff's ancestor Ram Bhadra Mitra received such a *sanad* (Exhibit 11) in respect of seven *kotas* of this surplus land. In order apparently to regularise these settlements and to assess rent for land improperly held, a fresh survey was undertaken with the result that in 1837 the heirs of Ram Bhadra Mitra received a notice to the effect that they had been found in possession of 9 *kotas* 9 *chittaks* 10 *gundas* of land and were asked to prove their title to it. The heirs of Ram Bhadra Mitra were invited to take settlement of the excess land found in their possession. In 1840, however, there appears to have been yet another survey and measurement by an *amin*, Kalipada Chatterjee. The Board of Revenue were not satisfied and directed yet another survey. This was carried out by a Deputy Collector, Radha Nath Ganguly in 1846. He found the heirs of Ram Bhudru Mitra in possession of eight *kotas* 7 *chittaks* 12 *gundas* in two plots which were numbered 168 and 169 (Exhibit 8*c*). The Board of Revenue, however, eventually decided that no rent could reasonably be demanded for any of the excess lands reported to be in possession of tenants. The heirs of Ram Bhadra Mitra therefore remained in possession of their two plots Nos. 168 and 169 rent free as before. The plaintiffs claim, and we think reasonably, that their possession of plots Nos. 168 and and 169 can be related back to the *sanad* granted to their ancestor Ram Bhadra Mitra in 1810 (Exhibit 11). It is not disputed that the plaintiffs are the heirs of Ram Bhadra Mitra, the grantee of that *sanad*.

The defendants do not now contest the facts above set forth, except to somewhat faintly suggest that the connection between the *sanad* of 1810 and the plots Nos. 168 and 169 had not been made out. We are satisfied, however, that the

connection has been made out. The questions for our determination, therefore, are:—*First*, whether the land which has been decreed to the plaintiffs has been properly identified with the plots Nos. 168 and 169 above referred to? and *secondly* whether the plaintiffs have been in possession within 12 years of the suit?

It will be observed that 13 *kotas* were claimed in the plaint. But as the case was put before us, the plaintiffs did not claim more than the land which had been identified with the said plots Nos. 168 and 169.

The immediate occasion of the suit was a decision under the Bengal Survey Act, 1875, affirmed by the Commissioner in appeal in July 1908 to the effect that the plaintiffs were in possession of two *kotas* odd only. We shall deal in the proper place with the bearing of this decision on the merits. The present suit was instituted in 1st July, 1909. The suit was decreed in part, that is, a decree was given for the land identified as plots Nos. 168 and 169 above referred to. The defendants appealed to this Court, and the plaintiffs filed a cross-objection averring that they were entitled to the entire 13 *kotas* claimed by them. At the hearing of the appeal the learned Judges observed that the western boundary of the land had not been determined and remanded the case for a finding on this point. A finding has been come to and has been submitted. The whole case has been argued before us *de novo*. The cross-objection by the plaintiffs has not been pressed.

We proceed to consider the *first* question, namely, whether the land which has been decreed to the plaintiffs has been properly identified with plots Nos. 168 and 169 of the survey of 1846. No map of 1846 is forthcoming. What we have is a serial list of holdings (Exhibits 8*a* to 8*e*). The relation of each holding to the holding bearing the previous number is noted. The name of the possessor and a description of the boundaries of each holding is given. The length, breadth and area are also noted. It is also noted whether the land is '*dar-i-pin*,' *i. e.*, within the boundaries of the lands reserved as side-lands for the purposes of the road or whether it is surplus land. The results obtained by the *amin* in 1840 and by the Deputy Collector in 1846 are both given. These lists are called *chittas*. They are more than 30 years old, have been produced from proper custody and can be presumed to be genuine.

It has been argued that these *chittas* cannot be treated as evidence without proof of their accuracy. It is said that they are not public documents within the meaning of S. 83 of the Evidence Act and that the *chittas* having been prepared by the Government for their own private use, they cannot in any case be used as evidence. Among other cases the case of *Ram Chunder Sao* v. *Bunseedhur Naik* (1) is relied on. But in the case now before us the *chittas* are only part of and in explanation of proceedings which were regularly taken for the assessment of rent upon lands said to be improperly held rent free. The whole of the proceedings have been put up in evidence including the petition under which the proceedings were initiated, the reports of the Collector and the orders of the Board of Revenue, all these papers taken together furnish valuable evidence that the Government recognised the right of the plaintiffs' predecessors to hold the land described in the *chittas* as rent free. In the case of *Ram Chunder Sao* v. *Bunseedhur Naik* (1) upon which the appellants relied Garth, C. J., was of opinion that the *chittas* in that case coupled with the resumption proceedings would have been admissible. Here the *chittas* are coupled with proceedings which are of the nature of resumption proceedings. The persons who made the measurements are dead, but there is evidence on the record that measurement was actually made. The appellants have not in fact had the temerity to contend that the *chittas* were prepared without any measurement at all. The report of the Commissioner leaves no doubt in our minds that there was actual measurement. Whether it was sufficiently accurate to make identification of the plots Nos. 168 and 169 possible is a question which we shall proceed next to determine. If that be determined in favour of the *chittas*, the remaining objection to their admissibility must fail.

We proceed then to consider in detail whether plots Nos. 168 and 169 of the *chittas* have been properly identified.

(1) (1883) 9 Cal. 741.

For the preliminary consideration of this question the map recently prepared by Mr. Smart, Superintendent of Survey, may be referred to. A cursory examination of the *chittas* will reveal the fact that they assume that the Circular Garden Reach Road runs due north and that the directions of east and west and south are assumed to correspond. That this is the basis upon which the *chittas* have been prepared has now been conceded in argument. The next point to consider is that there are two landmarks on the map which can reasonably be assumed to have remained unaltered since the time of the *chittas*, one is the Panchanan Tola, an ancient shrine at the corner of Watgunge Street (plot No. 158 of the *chittas*), and the other is the Munshigunge Road (plot No. 166 of the *chittas*). Considerable argument was addressed to us regarding the location of plot No. 158 and the plots intervening between it and the Munshigunge Road. We do not think it necessary to go into this in detail, as the result intended was only to indicate that the *chittas* of these plots were somewhat carelessly prepared. There is nothing to suggest that the location of the Munshigunge Road, plot No. 166, has altered except in the matter of two feet in breadth, which may be neglected. The plots which we are concerned with are on the other side of the Munshigunge Road and their identification is not affected by any carelessness in preparing *chittas* of the plots on the Panchanan Tola side.

The area between the Munshigunge Road and Tolly's Nala is comparatively small. Assuming, as we are entitled to do, that plots Nos. 168 and 169 of the *chittas* are the lands granted by the *sanad* of 1810, the area within which these plots must be found is still further restricted, for according to the *sanad* they must be within 250 feet of the Bridge Road.

Taking the plot next in number to the Munshigunge Road in *chittas* we come to plot No. 167. This is described in the *chittas* as at the corner of the Munshigunge Road and the Bridge Road. There are two plots now at this corner numbered in Mr. Smart's map No. 145 and 145/1 Plot No. 145/1 is at the corner but has been found to be *dar-i-pin* land, *i.e.*, land included in the side-lands of the road. Plot No. 145 has thus been identified as plot No. 167 of the *chittas*. We are satisfied that the finding that plot No. 145/1 is *dar-i-pin* land is correct. From the configuration of the approaches to the road in Mr. Smart's map, it is fairly obvious that it is *dar-i-pin*. It is so described in the official register, and that it is *dar-i-pin* is in accord with the statement in an old official paper (Exhibit C.) (referred to without objection) that 15 feet of *dar-i-pin* land was left on each side of the road after the drain. The actual width of plot No. 145/1 is about 18 feet. If No. 145/1 is *dar-i-pin* land, then plot No. 145 of Mr. Smart's map is certainly plot No. 167 of the *chittas*. The area of plot No. 145 differs from plot No. 167 by five *chittas* odd only and this the Commissioner says can be accounted for, by the recently constructed drains. Plot No. 167 of the *chittas* being thus determined it follows that plots Nos. 168 and 169 must be where they have been located by the decree. The only argument that can be put forward to the contrary is to suggest that the words *purba dakshin* in the description of the boundaries of plot No. 167 in the *chittas* mean south and east, and not south-east as they undoubtedly do and that a portion of plots Nos. 168 and 169 lay directly to the so-called east of plot No. 167 and had been absorbed by the *thakurbari*. We are not prepared to accept the meaning sought to be put on the word *purba dakshin*. There is evidence that the area of the *thakurbari* plot has increased considerably since the time of the *chittas*, but there was room for considerable encroachment towards the road side. There is nothing to indicate encroachment towards plot No. 145; on the contrary, there is evidence that there was formerly a boundary wall on that side (defence witness No. 8). We are satisfied that plots Nos. 168 and 169 have been properly located by the decree. We may say that in the argument in appeal the location of the western boundary was not seriously attacked, except upon general grounds such as those indicated above. Assuming our reasoning to be correct, nothing has been said to lead us to think that the western boundary has not been properly determined. We are satisfied with the grounds given by the Commissioner for his finding on this point.

The decision under the Survey Act was based upon a partition map made behind the backs of the plaintiffs. It is not, of course, binding upon us upon the question

of title. And it does not preclude us from finding that during a period anterior to that decision the plaintiffs were in possession.

It has been argued that the extract from the official register (Exhibit 3), which as will be seen above we relied upon for proof that plot No. 145/1 was *dari-i-pin* land, was not admissible in evidence. The register was produced by a Government Survey Inspector (plaintiff's witness No. 1). It is a register of the Survey Office. Now the registers kept in the Survey Office are prescribed by the Board of Revenue under S. 63 of the Bengal Survey Act, 1875. The register, therefore, appears to have been prescribed by law. In any event, it was a public register kept for the public benefit under the sanction of official duty. It matters not whether the clerk who actually wrote the entries had any personal knowledge or whether the register was a copy of a previous register which had become untidy. The entry was clearly relevant under S. 35 of the Indian Evidence Act.

As regards possession within 12 years of the suit we are satisfied that this has been made out. Defendant No. 2, Khetra Mohan Ghose and his father before him held the land (the plaintiffs say) under them. Khetra Mohan sub-let to defendant No. 3, Shayama Charan and under arrangement with Khetra, Shayama Charan paid Khetra's rent direct to the plaintiffs. The defence case was that only two *kotas* of the land were thus held by Khetra and Shayama Charan under the plaintiffs and that the remainder was held under the defendants. Khetra is in the service of the defendants and his evidence on the point is, therefore, wholly unreliable. The plaintiffs, after giving Khetra and Shayama Charan notice to produce the original rent receipts, themselves produced counterfoils showing that rent was paid to them till well within 12 years of the suit for the entire area in suit. This is supported by the following circumstances. The defendant No. 2 Khetra Mohan, says in his evidence that before Shayama Charan his mother, Hara Sundari was the tenant. In 1902 the principal defendants sued Hara Sundari in ejectment. The suit ended in a compromise in which the principal defendants agreed with Hara Sundari to pay "the rent and tax which is paid to Thakurdas Mitra" (the father of the present plaintiffs). The areas roughly correspond to the areas in dispute in the present suit and the inference is that the principal defendants then admitted that the father of the present plaintiffs was in possession in 1902. The suit, therefore, was not barred by limitation.

We agree with the finding that the attempt to deprive the plaintiffs of the property was engineered by the defendant No. 2, Khetra Mohan Ghose, who was in the service of the principal defendants when he became a tenant of the land under the plaintiffs.

We desire to acknowledge the assistance we have received from the Bar.

The appeal is dismissed with costs. Hearing fee three hundred rupees.

The cross-objection is dismissed.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 620

CHITTY AND WALMSLEY, JJ.

Kiranshashi Debi and *others*—Appellants.

v.

Chandrika Prosad Singh and *another*—Respondents.

Appeal No. 475 of 1913, decided on 21st July, 1915, from the Order of Sub-Judge, Mozafferpore, dated 17th July, 1913.

Limitation Act (9 of 1908), S. 15—Attachment of decree under O. 21, R. 53, Civil P. C. operates as stay of execution and saves limitation.

A judgment-debtor had previously obtained a money-decree against his decree-holder in another Court. In the execution of his decree he got the decree against himself attached under O. 21 R. 53 of the Civil Procedure Code. The execution petition was eventually dismissed for default but on that date the decree against him which had been attached by him was barred by time. The decree-holder applied for the execution of his decree:

Held, that the attachment of the decree operated as stay of the execution by order of Court and the period during which the decree remained attached should be excluded in commutation of the limitation for execution of that decree.

[P. 621, C. 1.]

Atul Krishna Roy—for Appellants.

Ganesh Dutt Singh—for Respondents.

Chitty, J.—This is an appeal by the judgment-debtors against an order of the Subordinate Judge ordering execution of a decree against them. It appears that this decree was passed in the Court of the Subordinate Judge on 16th February,

1910. Before that, the judgment-debtors had obtained a decree also for money in the Munsif's Court for presumably a lesser amount. In execution of that decree, the judgment-debtors, instead of applying as they should have done for a set-off, attached the present decree under O. 21, R. 53, Code of Civil Procedure. The decree being passed by a different Court from that in which the judgment-debtors had obtained their decree, the attachment must have been made under Clause (1) (*b*) of that rule, that is to say, by a notice by the Court which passed the decree sought to be executed requesting the other Court to stay the execution of the decree unless and until the Court which passed the decree sought to be executed cancelled the notice or the decree-holder or the judgment-debtor applied to the Court receiving such notice to execute its own decree. The effect of that attachment would be to stay the execution of this decree unless and until these events happened. Now, in this case those events never did happen and the execution case lasted until 26th July, 1910, when it was dismissed for default. The learned Subordinate Judge has held that this period must be excluded under S. 15 of the Limitation Act; and, if the period be excluded, admittedly the present application for execution of this decree which was made on 18th April, 1913 would be in time.

We are of opinion that the Subordinate Judge was right in the conclusion to which he came. The effect of the attachment was to stay the execution. Is that a stay of the execution by an order of Court as stated in S. 15 of the Act? It is argued for the appellants that that order must be made by the Court which passed the decree In such a case of attachment there is really no necessity for the Court to make any separate order. The stay operates automatically on the receipt of the notice from the Court which attaches the decree. We think that it must be regarded as a stay by order of Court.

So far as the merits of the case are concerned, there are no merits whatever in favour of the appellants. What, of course, should have been done in this case was to set off the decrees of these two parties—the one against the other.

We dismiss the appeal with costs. Hearing fee three gold *mohurs*.

Walmsley, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 621 (1)

JENKINS, C.J. AND N. R. CHATTERJEA, J.

Kuraram Datta—Plaintiff—Appellant.

v.

Banomali Patra and *others*—Defendants—Respondents.

Second Appeal No. 1179 of 1913, decided on 9th June, 1913, against the Decree of Dist. Judge, Bankura, dated 23rd December, 1912.

Decree—Setting aside—Fraud—If decree not set aside plea of fraudulent decree cannot be raised.

A party can rely on fraud even though he has not brought a suit to set aside the decree alleged to have been obtained by fraud.

Shoroshi Charan Mitter—for Appellant.

Rupendra Kumar Mitter—for Respondents.

Judgment.—This case is really concluded by the finding of fact of the lower Appellate Court, and nonetheless so, because that finding may have been very timidly expressed. It is objected that the defendant cannot rely on fraud in the absence of a suit brought by him to set aside the decree. But that does not seem to be a sound appreciation of the position. It has been decided otherwise in the case of *Rangnath Sakharam* v. *Govind Narasinv* (1).

The appeal must, therefore, be dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1904) 28 Bom. 639.

A. I. R. 1916 Calcutta 621 (2)

WOODROFFE AND NEWBOULD, JJ.

Deb Nath Das Bairagi and *others*—Defendants—Petitioners.

v.

Ram Sundar Barman—Plaintiff—Opposite Party.

Civil Rule No. 366 of 1915, decided on 18th June, 1915, from the decision of Munsif, Rangpur, dated 8th January, 1915.

Specific Relief Act (1 of 1877), S. 9—*Adhiar* is a tenant—Suit for possession by *adhiar* maintainable under S. 9—Decision not open to revision—Civil P. C. (1908), S. 115.

An *adhiar* is generally a tenant and as such his possession would be protected under S. 9 of the Specific Relief Act.

Therefore, a decision in favour of an *adhiar* under S. 9 of the Specific Relief Act is not liable to be revised under S. 115 of the Civil Procedure Code, 1908, in the absence of proof that the *adhiar* is not a tenant but a labourer.

Atul Chandra Gupta—for Petitioners.

Jitendra Nath Roy—for Opposite Party.

Judgment.—This is an attempt to revise a decision passed under S. 9 of the Specific Relief Act. The way it is sought to make this application one under S. 115 is as follows:—It is said that the Judge has made a statement as to an alleged admission which is inaccurate. He says in the judgment that the defendants concede, however, that the plaintiff was in possession of the disputed land as a *bhag* tenant. It is said that that is not a fact and that no reference to tenancy is made in the pleadings. That appears to be so. But what was admitted was that the plaintiff was in possession as an *adhiar*. The question which is raised on that point is whether the *adhiar* is a tenant or a labourer. If he is a tenant, then his possession would be protected under S. 9. If a labourer, it would be otherwise. In the first place, there is no affidavit before us that an *adhiar* in this part of the country means a "labourer" and not a "tenant." There is, on the contrary, a statement in the affidavit that the land was "let out" to the plaintiff as *adhiar*, which term is appropriate to the existence of a tenancy. The various books upon the subject which were referred to, show that very largely an *adhiar* is a tenant and the learned Judge who decided this case must be well aware of the meaning of the term in the district in which his Court is. Under those circumstances, a case has not been made out for revision under S. 115 of the Code of Civil Procedure.

The Rule is, accordingly, discharged with costs. We assess the hearing fee at one gold *mohur*.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 622

HOLMWOOD AND WALMSLEY, JJ.

Nagesur Pershad Singh and *others*—Plaintiffs—Appellants.

v.

Bindeshwari Prosad Singh and *others*—Defendants—Respondents.

Second Appeal No. 1444 of 1912, decided on 28th January, 1915, against the decree of the Dist. Judge, Shahabad, dated 1st March, 1912.

Civil Procedure Code (5 of 1908), O. 21. R. 90, —Decree—Execution sale—Setting aside on ground of fraud—Absence of interest at the time of decree bars right to set aside execution sale.

Where the plaintiffs had no interest in the property at the time the mortgage-decree was passed and the property was not ancestral:

Held, that they could not come in execution to set aside the decree. 5 C. L. J. 328, foll.

[P. 623, C. 1 & 2.]

Provash Chandra Mitra and *Surendra Madhab Mullick*—for Appellants.

Umakali Mukherjee and *Raghu Nath Singh*—for Respondents.

Holmwood, J.—These second appeals arise out of suits brought by the plaintiffs to set aside certain mortgage-decrees and sales held in accordance therewith, on the ground that they were tainted with fraud and that they were illegal and the sales were equally so, and that decrees which purported to be against their father did not bind the plaintiffs.

It is conceded that at the time the decrees were passed the plaintiffs were not in existence and, therefore, had no cause of action as regards setting aside the decrees. But the prayers of their plaint show that this is the main ground of their case, the sales being merely subsidiary. The first prayer clumps the decrees and sales together. The second is clearly based on the contention that the decrees being illegal, the sales held under them must also be illegal. On the plaint itself there seem to be many grounds on which the suit is not maintainable. The first we have already stated, that the plaintiffs were not alive at the time the decrees were passed. The second has been stated by the learned Subordinate Judge and not noticed by the Judge in appeal except in general agreement, namely, that on paragraphs 4, 5, 6 and 7 of the plaint it must be held that the reconveyance of the shares of

Bhabhutar and Ganput, whom the plaintiffs claim to represent by means of the *hiba-bil-ewaz*, made the properties the self-acquired properties of Bhabhutar and Ganput and if it ever was ancestral property, which does not seem to be asserted, it ceased to be so. Then there is the ground taken in paragraph 4 of the written statement that the plaintiffs have not specifically mentioned any instance of fraud in their plaint. In dealing with this the learned Judge in the Court below has pointed out that the only allegation in regard to the decree is contained in paragraph 9, and on analysing that in the light of the fact that the plaintiffs were not in existence, he found that that refers to some parties who are not before the Court and it is not known who they are, so that there is substantially no allegation of fraud against the decree which was obtained after contest and which was never contested in execution by the plaintiffs' ancestor. If, therefore, the plaintiffs had no interest in the property at the time the decree was passed and the property was not ancestral property, it is difficult to see how they can seek to come in execution.

It is argued on the authority of the case to which one of us was a party, the case of *Debendra Nath Bhattacharjee* v. *Prasanna Kumar Chakravarti* (1), that they can bring this suit on the basis of the alleged frauds in execution only, and that whether it be treated as an application under S. 47 or as a regular suit is a matter of form and not of substance, as was pointed out in that case. In a passage at the end of the judgment which is *obiter* it was laid down, if there was fraud in the execution proceedings it will be open to the party affected by the fraud to make an application under S. 244, Civil Procedure Code; if instead of an application he presents a plaint in the Court competent to deal with the matter, the defect is one of form rather than of substance and there is no real want of jurisdiction, and this is supported by a large number of authorities, and we have no desire to differ from it in any way, as it has nothing to do with the present case which is based essentially upon the prayer to set aside the decree. As the plaintiffs were not interested in the decree they cannot now come in in execution and that alone is sufficient to show that their suit is not maintainable.

The appeals are, therefore, dismissed with costs.

Walmsley, J.—I agree that the appeals should be dismissed.

V.B./R.K.

Appeals dismissed.

(1) (1907) 5 C. L. J. 328.

B. N. DAR, B. A., LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

A. I. R. 1916 Calcutta 623

MOOKERJEE AND CHAPMAN, JJ.

Shyama Charan Baisya—Petitioner—Appellant.

v.

Prafulla Sundari Gupta—Respondent.

Appeal No. 369 of 1912, decided on 26th April, 1915, from the Original Decree of Sub-Judge, Mymensingh, dated 1st July, 1912.

(a) Probate and Administration Act (5 of 1881), Ss. 50 and 69—Hindu Law reversioner is interested to oppose grant of probate.

A reversioner under the Hindu Law has no present alienable interest in the property left by the deceased but he is substantially interested in the protection or devolution of the estate, and as such is entitled to appear and be heard in a Probate proceeding relating to the deceased's property. 3 I. C. 178, ref. to.

[P. 625, C. 1.]

(b) Probate and Administration Act (5 of 1881), S. 69—Applicant is bound to give correct information about relations of deceased—District Judge has discretion to issue citation to all relation whose interest is affected by the will.

Where an applicant for Probate chooses to make a statement as to the relations of the deceased, the information he gives to the Court must be correct and not misleading.

In a case where a will is propounded which alters the devolution of property the District Judge should, in the exercise of the discretion vested in him by S. 69 of the Probate and Administration Act as to the mode of issuing citations, direct special citations to persons whose rights are immediately affected by the will. 18 Cal. 45, ref. to. [P. 625, C. 1.]

(c) Probate and Administration Act (5 of 1881), Ss. 50 and 69—Where notice to interested person not issued owing to applicants misleading statement—Proceedings are defective.

Where a Court mislead by the untrue statement of an applicant for Probate did not direct the issue of special citation on a relation of the deceased, as it would undoubtedly have done if apprised of his existence:

Held, that the proceeding to obtain the grant was defective in substance, within the meaning of the first clause of the explanation to S. 50 of the Probate and Administration Act.

[P. 625, C. 2.]

(d) Evidence Act (1 of 1872), S. 115.—Person interested with knowledge of proceedings allows his case to be fought by others is bound by result though no party to it—Burden of proof of knowledge is on person alleging it.

If a person knowing what was passing was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re-open the case. [P. 626, C. 1.]

Where a person has full knowledge of the proceedings and has capacity to make himself a party he is bound by proceedings to which he is no party and of which he has received no notice from Court. [P. 626, C. 1.]

Where in answer to an application for revocation by a person on whom citation should have been issued, it is pleaded that he did not intervene though aware of the proceedings, the burden of proof that he had full knowledge is on the person who alleges it, it is not necessary for the party who applies for revocation to prove not only that no special citation was served on him but also that he had no knowledge of the proceedings. 9 C. W. N. 190, ref. to.

[P 626, C. 2.]

(e) Evidence Act (1 of 1872), S. 115—Acquiescence—For acquiescence knowledge of right and infringements is essential—Waiver must be intentional with full knowledge.

There can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement. *Marker* v. *Marker*, (1851) 9 Hare 1, ref. to.

[P. 626, C. 2.]

A person cannot be barred of his remedy on the ground of waiver unless at the time of the alleged waiver he is shown to have been fully cognizant of his right and of the facts of the case. [P. 627, C. 1.]

A waiver must be an intentional act with knowleege. *Duke of Leeds* v. *Amherst*, (1846) 2 Phillips 117; *Darnley* v. *L. C. & D. Railway Company*, (1869) 2 H. L. 43, ref. to.

[P. 627, C. 1.]

Sasankajiban Ray—for Appellant.

Tarakishore Chowdhuri and *Birendra Kumar De*—for Respondent.

Judgment.—This appeal is directed against an order of dismissal of an application for revocation of Probate of an alleged will of one Raj Chandra Baisya. The testator died on the 25th April, 1899, and is said to have made a testamentary disposition of his properties on the 18th April, 1889. He left a widow, Anandamayi, and his nearest male relation alive at the time of his death was the appellant, Shyama Charan Baisya, who would consequently be entitled to succeed as reversionary heir on her death. The will authorised the widow to take a son in adoption and constituted her absolute owner of the estate, if she did not exercise her power of adoption. There were also two legacies, one in favour of Giris Chandra Bhatacharyya, the spiritual guide of the testator, the other in favour of Karunamayi, the daughter of the appellant and the wife of the brother of Anandamayi. No application for Probate was made till the 4th August, 1902, more than three years after the death of the testator. In this application, Anandamayi stated that, besides herself, the deceased had left no other near relation, kindred or heir surviving him. A general citation was issued under S. 69 of the Probate and Administration Act, 1881, on the 7th August, 1902, and is said to have been put up on the north wall of the house of the deceased on the 14th August and on the gate of the Court house on the 18th August. Special citation was also issued on the 13th August, 1902 on the two legatees. The spiritual preceptor, it is said, declined to give a receipt for the notice, and it was accordingly affixed on the wall of his house on the 25th August, 1902. The other legatee was not found in the house of her husband, who declined to receive the notice, which was accordingly affixed on the wall of his house on the 19th August, 1902. The return of service states that the lady had gone to the house of her father; there is, in fact, some evidence to show that she was not on good terms with her husband and had been discarded by him; the statement in the return that she had gone to the house of her father may, accordingly, be accepted as a true version. On the 5th September, 1902, one Biswanath Baisya filed a caveat, but he does not appear to have persisted in his opposition. The result was that the will was formally proved and Probate granted on the 22nd September, 1902. The Probate was not, however, actually issued till the 28th May, 1903. The widow continued in occupation of the estate till her death, which took place on the 2nd December, 1910. She appears to have alienated portions of the estate for alleged necessity on the 14th October, 1903, 4th December, 1905 and 9th October, 1907. According to the petitioner, he attempted to take possession of the estate after the death of the widow, but was opposed by the transferees who set up title by purchase from her as executrix. On the 18th May, 1911, he consequently applied for revocation of Probate on the ground that the will was a forgery and that the Probate had been obtained without notice to him. The application was opposed by the representatives of the spiritual preceptor and by

the transferees from the widow; the other legatee died in 1906. The Subordinate Judge has dismissed the application on the ground that the petitioner was barred by the doctrine of acquiescence. The substantial question in controversy in the present appeal is, whether this view is well-founded.

It has not been disputed that the petitioner was the nearest male relation of the testator at the time of his death and was entitled to succeed as reversionary heir on the demise of the widow. The testator and the petitioner were the sons of two sisters, and were, from the point of view of Hindu Law, near relations. The petitioner was thus clearly a person entitled to intervene in the Probate proceedings. It was ruled by this Court in the cases of *Kamona Soondury Dassee* v. *Hurro Lall Shaha* (1), *Khettramoni* v. *Shyama Churn* (2), *Bepin Behari* v. *Manoda* (3) and *Brindaban Chunder* v. *Sureswar* (4), that although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased, he is substantially interested in the protection or devolution of the estate, and as such is entitled to appear and be heard in a Probate proceeding. This position has not been seriously controverted on behalf of the respondent; but it has been argued that as S. 62, unlike S. 64, does not specifically require that the names and residences of the family or other relatives of the deceased should be stated in the application, omission to furnish such information does not affect the validity of the proceedings. This need not be disputed, but two points are perfectly plain, namely, *first*, that if the applicant for Probate chooses to make a statement as to the relations of the deceased, the information he gives to the Court must be correct and not misleading and *secondly*, that, as observed in the case of *Nistariny* v. *Brahmomoyi* (5), when a will is propounded which alters the devolution of property, the District Judge should, in the exercise of the discretion vested in him by S. 69 of the Probate Act as to the mode of issuing citations, direct special citations to persons whose rights are immediately affected by the will. In the case before us, the petition contained the untrue, statement that, besides the widow, the deceased had left no other near relation, kindred or heirs surviving him. With what motive this statement was made, it is needless to speculate: it is immaterial whether the untrue statement was intentional and fraudulent or was the result of an accidental mistake. The fact remains that the statement was made, and that misled thereby the Court did not direct the issue of special citation on the petitioner, as it would undoubtedly have done if apprised of his existence. Consequently, the proceeding to obtain the grant was defective in substance, within the meaning of the first clause of the explanation to S. 50 of the Probate and Administration Act; reference may, in this connection, be made to Illustration (*b*) appended to that section: *In the goods of Gunga Bissen Mundra* (6) The respondents were, consequently, driven to invoke the aid of the doctrine that mere omission to serve a special citation is not by itself a sufficient ground for revocation, if it is shown that the person on whom the citation should have been served is otherwise aware of the proceedings. Before this principle is applied to the circumstances of this case, it is necessary to examine its scope and precise import.

The leading decision on the subject is the judgment of Sir John Nicholl in *Newell* v. *Weeks* (7) where he observed as follows:

> "The process of citing parties is a convenient one for all suitors, because when that is done, you need not prove actual privity—the law presumes actual privity after the legal process—the *lis pendens* is sufficient notice that persons should appear and protect their own interests—but if you can prove actual privity, the legal process, in point of solid justice and sound reason, is superfluous; though *ex abundanti cautela*, it may still be convenient to resort to it and have it upon record."

To the same effect is a long series of decisions, amongst which may be mentioned, *Hoffman* v. *Norris* (8), *Richardson* v. *Claney* (9), *Bell* v. *Armstrong* (10), *Braham* v. *Burchell* (11), *Blake* v.

(1) (1882) 8 Cal. 570.
(2) (1894) 21 Cal. 539.
(3) (1902) 6 C. W. N. 912.
(4) (1909) 3 I. C. 178.
(5) (1891) 18 Cal. 45.
(6) (1898) 2 C. W. N. 607.
(7) (1814) 2 Phillim. 224.
(8) (1805) 2 Phillim. 230 *note*.
(9) (1802) 2 Phillim. 228.
(10) (1882) 1 Add. 365.
(11) (1826) 3 Addam. 243.

Knight, (12), *Merryweather* v. *Turner* (13), *Ratcliffe* v. *Barnes* (14), *Duffy* v. *Brady* (15), *Wytcherley* v. *Andrews* (16), *Goddard* v. *Smith* (17), *In re Topping* (18), *Young* v. *Holloway* (19), *Mohan* v. *Broughton* (20) and *Williams* v. *Evans* (21). The reason for the rule has been thus summarised by Sir John Nicholl in the case first mentioned:

"Spectators to the whole and privy to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceedings. This right of intervention, coupled with their privity to the proceedings, is decisive to shew that they can have sustained no prejudice by not having been before cited, and not having before given a formal appearance."

To the same effect is the observation of Sir Cresswell in *Ratcliffe* v. *Barnes* (14):

"Where a party has had *full notice*, and has had the opportunity of availing himself of the contest, he will be bound by the decision."

Similarly, Lord Penzance said in *Wytcherley* v. *Andrews* (16):

"If a person knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case."

The rule that a person is bound by proceedings to which he is no party and of which he has received no notice from Court, thus depends on his full knowledge of the proceedings and his capacity to make himself a party. Consequently cases may be found in the reports which show that a next-of-kin or an executor who has acquiesced in a grant of Probate without full knowledge of the proceedings may obtain a revocation of the grant: *Williams* v. *Evans* (21), *Young* v. *Holloway* (19), *Peters* v. *Tilly* (22) and *Ritchie* v. *Malcolm* (23). These principles have been adopted and applied in Indian Courts in a long line of authorities, amongst which may be mentioned, *Komollochun Dutt* v. *Nilruttun* (24), *Nistariny* v. *Brahmomoyi* (5), *Brinda* v. *Radhica* (25), *In re Pitambar Girdhar* (26), *In the goods of Bhuggobutty Dasi* (27), *Rebells* v. *Rebells* (28), *Elokeshi* v. *Hari Prosad* (29), *Kunja Lal* v. *Kailash Chandra* (30), *Nalini Sundari Gupta* v. *Bejoy Kumar Roy* (31) and *Dwijendra Nath* v. *Golok Nath* (32). It is further well-settled that where, in answer to an application for revocation by a person on whom citation should have been issued, it is pleaded that he did not intervene though aware of the proceedings, the burden of proof that he had full knowledge is on the person who alleges it; it is not necessary for the party who applies for revocation to prove not only that no special citation was served on him, but also that he had no knowledge of the proceedings *Prem Chand Das* v. *Surendra Nath Saha* (33). It is thus clear, from what has already been said, that if a person is to be deprived of his right to have the will proved in his presence, on the ground of acquiescene or waiver, he must be proved to have possessed full knowledge of the fact; for it is elementary that there can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement; in the words of Turner, V. C., in *Marker* v. *Marker* (34), parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them. See also *Beauchamp* v. *Winn* (35), *De Bussche* v. *Alt* (36) and *Willmott* v. *Barber* (37). There is further, as Lord Cottenham pointed out in *Duke of Leeds* v. *Amherst* (38), a distinction between a case where the acquiescence alleged occurs while the act acquiesced in is in progress and another where the acquiescence takes place after the act has been

(12) (1843) 3 Curt. 547.
(13) (1844) 3 Curt. 802.
(14) (1862) 2 Sw. & Tr. 486=31 L. J. P. 61.
(15) (1841) Milward (Irish) 582.
(16) (1871) 2 P. & D. 327=40 L. J. P. 57=25 L. T. 134.
(17) (1873) 3 P. & D. 7=42 L. J. P. 14=28 L. T. 141
(18) (1853) 2 Rob. 620.
(19) (1895) P. D. 87=64 L. J. P. 55=11 R. 596.
(20) (1899) P. D. 211=68 L. J. P. 91=81 L.T. 211.
(21) (1911) P. D. 175=80 L. J. P 115=105 L. T. 79.
(22) (1886) 11 P. D. 145=55 L. J. P. 75=35 W. R. 183.
(23) (1902) 2 Ir. R. 403=36 I. L. T. R. 56.
(24) 4 Cal. 360.
(25) 11 Cal. 492.
(26) 5 Bom. 638.
(27) 27 Cal. 927.
(28) 2 C. W. N. 100.
(29) 30 Cal. 528.
(30) 7 I. C. 740.
(31) (1915) 30 I. C. 12.
(32) (1915) 28 I. C. 574.
(33) (1905) 9 C. W. N. 190.
(34) (1851) 9 Hare 1=20 L. J. Ch. 246.
(35) (1873) 6 H. L. 223=22 W. R. 193.
(36) (1878) 8 Ch. D. 286=47 L. J. Ch. 381.
(37) (1880) 15 Ch. D. 96=43 L. T. 95=28 W. R. 911.
(38) (1846) 2 Phillips 117=78 R. R. 47.

completed. In the former case, the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined obviously on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge, has affected or altered the position of his opponent. Similarly, a person cannot be barred of his remedy on the ground of waiver, unless at the time of the alleged waiver he is shown to have been fully cognizant of his right and of the facts of the case; for, as Lord Cranworth said in *Darnley* v. *L. C. & D. Railway Company* (39), a waiver must be an intentional act with knowledge. We shall now proceed to test the case before us in the light of these principles.

The testator died on the 25th April, 1899; the widow remained in occupation of the estate of her husband ostensibly in her character as widow: there is no evidence to show that the will was produced or set up at any time during the three years and a half which elapsed before the application for Probate was made on the 4th August, 1902. There was consequently nothing to put the reversioner on his guard or to rouse his suspicion. When, again, the application for Probate was made, the general citation as also the special citation on the daughter of the appellant were served in a manner not calculated to bring the proceedings to the actual notice of the parties. A caveat was no doubt filed by a distant agnate of the deceased, but for some unexplained reason he did not persist in his opposition. The consequence was that the order was made as in a non-contentious proceeding on the 22nd September, 1902. There is no evidence to show that during the few weeks that the application remained pending, the appellant was in any way apprised thereof. The burden of proof, as we have said, is upon the respondents to establish that he had full and definite knowledge of the proceedings taken in Court; this burden they have not discharged. The evidence is directed to show that the proceedings were known to men in the village or to other members of the community. This is clearly insufficient, for we cannot hold that the appellant is barred by acquiescence or waiver, unless it is proved that he had full knowledge of the facts, such as would enable him to appear and intervene. It is significant that it was not even put in cross-examination to the appellant that he had become aware of the proceedings before they terminated. There is also nothing to show that he was apprised of the order after it had been made; on the other hand, he pledges his oath that he came to know of the will and Probate for the first time when after the death of the widow he attempted to take possession of the estate. The inference follows that the respondents have failed to show that though no special citation was issued to the appellant, he is not entitled to have the will proved in his presence, as he had such knowledge of the proceedings as would have enabled him to intervene therein or to have the Probate revoked earlier. The case thus falls within the general rule and not within the exception.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the Probate revoked. The appellant is entitled to costs both here and in the Court below. We assess the hearing fee in this Court at five gold *mohurs*. We direct that the record be returned to the Court of the District Judge, so that the Probate case may be restored and the objectors allowed an opportunity to prove the will in the presence of the appellant; as the executrix and the legatees are dead, the conduct of the proceedings in support of the will may now be given to such of the representatives of the legatees and the purchasers from the executrix as may desire to carry them on.

V.B/R.K.

Appeal allowed.

(39) (1869) 2 H. L. 43=36 L. J. Ch. 404=16 L. T. 217.

A. I. R. 1916 Calcutta 628

MOOKERJEE AND RICHARDSON, JJ.

Kali Churn Chowdhury and *another*—Defendants—Appellants.

v.

Mohananda Datta and *others*—Plaintiffs—Respondents.

Appeal No. 1567 of 1912, decided on 5th March, 1915, from the Appellate Decree of Sub-Judge, Mymensingh, dated 15th March, 1912.

(a) Partition—Right to—Right to partition by a joint owner cannot be defeated by his holding a subordinate interest over the whole property.

Where *A* and *B* are in joint possession as joint owners, each is ordinarily entitled to claim partition against the other, and it is no valid answer to a claim for partition by *A* that *B* has acquired a subordinate interest over the whole property. 37 Cal. 918 (P.C.), foll. [P. 628, C. 2.]

(b) Co-sharer—Partition—If property held in co-tenancy suit for partition lies.

Property held in co-tenancy may be partitioned by suit and the only essential is that the property sought to be partitioned is held in co-tenancy. [P. 629, C. 1.]

(c) Partition—Effect—Effect of partition is stated.

Partition is the process by which property held by two or more persons in co-tenancy is converted into estates in severalty and thereby divided among them, with the result that the land which before partition was held and enjoyed jointly, is after partition held and enjoyed by the different parties according to the allotments made by Court. [P. 629, C. 1.]

Kritanta Kumar Bose and *Bepin Chandra Bose*--for Appellants.

Birendra Kumar Dey—for Respondents.

Judgment.—This is an appeal by the second and third defendants in a suit for partition of joint property. The land in dispute is comprised in an estate held by the fourth and fifth defendants as proprietors. On the 27th February, 1894, the proprietors granted a lease to the third defendant, apparently for the benefit of himself and his brothers, the first two defendants. On the 31st August, 1904 the fourth defendant gave a lease to the first three defendants in respect of his half share. This lease, it has been alleged, was granted for building purposes. On the 21st February, 1905, the fifth defendant granted a *putni* to the first three defendants in respect of the half share held by him as proprietor. On the 6th December, 1909, the fourth defendant granted a similar *putni* to the plaintiffs in respect of his half share. The *putni* leases, it has not been disputed, were superior to the leases previously granted by the proprietors. On the 2nd June, 1910 the plaintiffs commenced the present suit for partition as against the first three defendants. They also joined the proprietors as fourth and fifth defendants, but no relief was claimed against the latter. The contending defendants have resisted the claim for partition on the ground that the suit is not maintainable. Their argument is that as they are lessees of the entire property under the lease of the 22nd February, 1894, the plaintiffs, as *putnidars* of a half share, are not entitled to claim partition. In our opinion, there is no force in this contention.

It has not been disputed that as the plaintiffs and the first three defendants are *putnidars*, each in respect of one-half share, the plaintiffs are, *prima facie*, entitled to claim partition against the defendants. When *A* and *B* are in joint possession as joint owners, each is ordinarily entitled to claim partition against the other, and it is no valid answer to a claim for partition by *A* that *B* has acquired a subordinate interest over the whole property. We are unable to uphold the contention that as the first three defendants, in addition to their *putni* interest, have also a subordinate interest which extends over the entire property, the right of the plaintiffs to claim partition cannot be enforced. Neither authority nor principle has been adduced in support of this proposition. It was ruled by the Judicial Committee in the case of *Bhagwat Sahai* v. *Bipin Behary Mitter* (1), where their Lordships affirmed the decision of the Full Bench in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (2), that the right of partition exists when two parties are in joint possession of land under permanent titles, even though those titles may not be identical or of co-ordinate degree. In the case before us, the plaintiffs and the first three defendants are both holders of *putni* tenures; they are in possession as *putnidars* and their interests are of the same grade. Consequently, as between them the right of partition exists. There is no intelligible principle on which the

(1) (1910) 37 Cal. 918=7 I. C. 549=37 I. A. 198 (P. C.).

(2) (1897) 24 Cal. 575.

view oan be maintained that the right of the plaintiffs to claim partition has become unenforceable because the defendants have an additional right, namely, right as subordinate tenants. Property held in co-tenancy (subject to exceptions immaterial for our present purpose) may be partitioned by suit and the only essential is that the property sought to be partitioned is held in co-tenancy. This requirement is fulfilled in the case before us. Partition is the process by which property held by two or more persons in co-tenancy is converted into estates in severalty and thereby divided among them, with the result that the land which before partition was held and enjoyed jointly is after partition held and enjoyed by the different parties according to the allotments made by Court. If partition is allowed in the case before us, the result will be that the land will be demarcated. The defendants will, after partition, become tenants under the plaintiffs in one specified half on the basis of their leases of 1894 and 1904, while in the other separated half they will be tenants under themselves. The position, consequently, will be that, after partition, the plaintiffs will be entitled to treat the defendants as their tenants in respect of a specific parcel of land instead of, as now, tenants in respect of one-half share of joint and undivided land. It is not difficult to imagine that after partition has been so effected, the plaintiffs may have advantages which they do not now enjoy ; at the same time, during the continuance of the leases of 1894 and 1904, there will be no interference with the actual enjoyment of the land by the defendants, although they will be in occupation of one demarcated half as their own land and of the other half as tenants under the plaintiffs. We are consequently of opinion that the Courts below have rightly held that the suit is maintainable.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 629

FLETCHER AND ROE, JJ.

Mahendra Nath Maity—Defendant—Appellant.

v.

Girish Chandra Maity and *others*—Plaintiffs—Respondents.

Second Appeal No. 3190 of 1913, decided on 3rd May, 1915, against the Decree of Offg. Sub-Judge, Midnapur, dated 30th June, 1913.

Hindu Law—*Stridhan*—*Ajautuka stridhan*—**Succession—Brother preferential heir to husband—Dayabhaga.**

At the marriage of a Hindu woman governed by the Dayabhaga school of Hindu Law there was a promise by her brother to give some quantity of land as dowry. The property was, however, given to the woman seven years after the marriage. On the death of the woman her brother sued her husband for the property as the rightful heir of the same:

Held, that the property was the woman's *ajautuka stridhan* and that her brother was the preferential heir to her husband. [P. 630, C. 1.]

Jotish Chandra Hazra and *Satkowripati Ray*—for Appellant.

Shib Chandra Palit and *Kshirode Narain Bhuiyan*—for Respondents.

Judgment.—This is an appeal from a decision of the learned Subordinate Judge of Midnapur, dated the 26th June, 1913, affirming the decision of the Munsif. The suit involves the question as to the right of succession to seven *bighas* of land, which formerly belonged to a Hindu woman who is now dead. The contest is between her husband and her brothers. That the property was the *stridhan* property of the deceased woman, there can be no doubt. The question is what was the nature of the *stridhan* that was acquired by this woman. The learned Judge of the Court of Appeal below has found that the property was given to the woman seven years after her marriage and that it was a property not given on the occasion of her marriage. The case for the husband, who is the appellant before us, is that there was a promise to give the property at the time of the marriage and that the gift must be taken as a ratification of the promise. That, of course, is not correct. The promise was one that was not capable of being specifically performed. Any seven *bighas* of land could have been given and there cannot be the slightest doubt that we must take the gift as from the date when it was made to the woman. On the date that

the property was given to the woman, there cannot be any doubt that it was an *ajautuka stridhan* property. There cannot also be the slightest doubt, on the decisions of this Court, that the brother is the preferential heir to the husband. It may be, as has been argued by the learned Vakil for the appellant, that Sreekrishna in his Commentaries says that the husband ought to succeed in preference to the brother when the marriage is accompanied by certain religious ceremonies. That, that view has not been accepted on this Court is sufficiently shown by the decision of Mr. Justice Mookerjee in the case of *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya* (1): There Mr. Justice Mookerjee agreeing with Mr. Justice Rampini accepted the opinion of Jimutavahana in preference to that expressed by Sreekrishna. We are bound by that acceptance of the opinion of Jimutavahana and we must adhere to the view that the form of marriage does not alter the nature of the *stridhan* property. There cannot be any doubt that this property was the *ajautuka stridhan* property of the dead woman and the decisions of this Court are clear with reference to the brother being the preferential heir to the husband. That being so, we agree in the decisions of the learned Subordinate Judge and dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) (1906) 33 Cal. 315.

A. I. R. 1916 Calcutta 630 (1)

MOOKERJEE AND ROE, JJ.

Nazir Peyada—Defendant—Appellant.

v.

Jyatindra Narain Acharyya Chowdhury—Plaintiff—Respondent.

Second Appeal No. 4011 of 1913, decided on 7th May, 1915, against the Decree of Sub-Judge, Mymensingh, dated 17th September, 1913.

Bengal Tenancy Act (8 of 1885), S. 29—S. 29 does not apply where original holding is split up.

S. 29 of the Bengal Tenancy Act is applicable where the holding remains constant but where the original holding is split up into a number of new tenancies no question can arise as to the effect of the section. 30 I. C. 283, ref. to.

[P. 630, C. 2.]

Hit Lal Guha—for Appellant.

B. Chakravarti and *Sushil Madhab Mullick*—for Respondent.

Judgment.—This is an appeal by the defendant in a suit for rent. In 1886, he held 1.1 *puras* of land under the plaintiff at an annual rent of Rs. 40. In 1891, by mutual consent of the parties, some lands were excluded from the holding and the remainder was divided into five parcels.

Five new and distinct tenancies were thereupon created, one to be held thenceforth by the defendant and the other four, by his four brothers respectively. The parties agreed that the rent for each of the new holdings should be Rs. 8 a year. The plaintiff now seeks to recover rent on the basis of the contract of 1891. The defendant contends that the contract was in contravention of S. 29 of the Bengal Tenancy Act. This defence is clearly of no avail. S. 29 provides that the money rent of an occupancy *raiyat* may be enhanced by contract, subject to the condition that the amount must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*. This provision is plainly applicable, only where the holding remains constant [*Raj Kumar* v. *Faizuddi* (1).] Here the original holding was split up into five new tenancies. Consequently no question can arise as to the effect of S. 29 of the Bengal Tenancy Act, on the transaction.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1915) 30 I. C. 283.

A. I. R. 1916 Calcutta 630 (2)

FLETCHER AND RICHARDSON, JJ.

Sabitri Thakurain—Defendant—Appellant.

v.

F. A. Sain—Petitioner and Plaintiff—Respondent.

Appeal No. 555 of 1914, decided on 14th May, 1915, from the Original Decree of Dist. Judge, Bhagalpur, dated 13th November, 1914.

Succession Act (10 of 1865), S. 50—Will scribed by testator—His signature on first page at top of left corner with signatures of 4 attesting witnesses—Remaining pages also signed and attested—Held it satisfies requirements of S. 50.

Where the respondent applied for Probate of a Will and it appeared that the will was wholly in the handwriting of the deceased and bore his

signatures on the various pages thereof, and alongside his signature on the top left hand corner of the 1st page were the signatures of four witnesses and on each of the other three pages the signatures of two out of those four persons:

Held, (1) that the signature of the testator on the first page was the operative signature by which he intended to make the document an effective one; [P. 632, C. 2.]

(2) that the witnesses put their signatures *animo attestandi* and the will was properly executed by the deceased in the manner required by the Indian Succession Act. [P. 632, C. 1.]

Pugh, *Buldeo Narain Singh* and *Baidyanath Narain Singh*—for Appellant.

N. Sarkar, *Sailendra Nath Palit* and *Chandra Sekhar Prasad Singh*—for Respondent.

Fletcher, J.—This is an appeal by the appellant against a judgment of the learned District Judge of Bhagalpur, dated the 13th November, 1914. The respondent in the present appeal presented for Probate to the learned Judge a document which, he alleged, was the last will of one Woogra Mohan Thakur, the alleged will bearing date the 10th May, 1913. The deceased died on the 29th January, 1914 childless, leaving the present appellant him surviving who is his widow. The respondent to the present appeal is one of the executors named in the will, the other executor having renounced Probate thereof. The alleged will had been deposited by the deceased with the Sub-Registrar of Assurances. It is not denied that the Will which is a holograph will is, in fact, wholly in the handwriting of the deceased and it bears many of his signatures on the various pages thereof. The only question raised in this appeal is, whether the will has been executed in the manner provided by S. 50 of the Indian Succession Act, which section has been incorporated into the Hindu Wills Act. We have been given by Mr. Pugh, who appears for the appellant, many cases which turn on the Statute of the English Wills Act, 1837; but the requisites for a valid will under the English Wills Act differ substantially from the provisions of S. 50 of the Indian Succession Act. In express terms, S. 9 of the English Wills Act requires that both the witnesses should be present at the same time and that they should both see the deceased execute the document as his will. S. 50 of the Indian Succession Act, on the other hand, makes different provisions. It is provided by S. 50 of the Indian Succession Act, *first* of all, that the testator shall sign or affix his mark to the will or that the will shall be signed by some other person in the presence of the testator and by his direction. The *second* requisite is that the signature or mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was thereby intended to give effect to the writing as a will; and *thirdly*, it is provided that the attestation should be made either on the testator signing the document in the presence of the two witnesses or acknowledging his signature; but it is expressly provided on the terms of the Act that it is not necessary that both the witnesses should be present at the same time. Substantially the third clause relating to attestation takes the law back to what it was the law as to attestation of wills under the Statute of Frauds. It is not necessary for the witnesses to be present at one and the same time. Then what is the custom in India relating to wills executed, at any rate, outside the Presidency towns by Indian testators? There cannot be the slightest doubt that, at any rate, in the wills in the vernacular, the ordinary place for execution is the top of the document. The English system of executing the document at the foot does not obtain usually amongst Indians. Their custom is to execute the document at the top. Ordinarily, the signature of the executant of a document appears at the top right-hand corner, and when he executes the document himself, and not by an attorney, is accustomed to write "by my own pen." That is the ordinary practice. Now, what do we find in the present case? The deceased Woogra Mohan Thakur was a man of wealth and he was also, to a certain extent, a man of education. He spent some years in England and he was acquainted with the English language. That is manifest from the fact that this holograph will shows that the deceased knew English fairly well. He made former wills and this will that he deposited on the 10th May, 1913 with the Sub-Registrar of Assurances is clearly written throughout by the testator, Woogra Mohan Thakur. The document itself is engrossed on foolscap papers in the manner in which an English document would be engrossed. The document consists of four pages, on each of which the signature of the deceased appears. At the top left-hand corner of the first page the signature is "W. M. Thakur. By my own pen." On the second page, it is signed "W. M. Thakur." On the third page also it is

signed "W. M. Thakur." On the fourth and the last page at the end there appears the signature "Woogra Mohan Thakur, dated the 10th of May, 1913 in the year one thousand nine hundred and thirteen only." Against the signature or alongside the signature of the testator on the margin of the first page, four persons are said to have attested the will and on each of the other three pages there appear the signatures of two of the four persons whose names appear on the first page as the attesting witnesses. The only question is first of all, "which is the operative signature of the deceased"? I feel no doubt that the operative signature is on the first page, "W. M. Thakur. By my own pen." It seems to me clear that the signature of the testator placed there is the signature by which he intended to make the document an effective one. Then the next point is, "Has it been shown that these signatures on the margin of the first page of the persons who are alleged to be the witnesses were subscribed by at least two of these persons *animo attestandi*, namely, attesting the will of the deceased"? One of the signatures that appears on each of the four sheets is the signature of the wife of the deceased. She says that these signatures were obtained from her on the ground that they related to some totally different transaction and that the deceased then wrote his will on the blank sheets of paper on which she had affixed her signatures. There is no evidence to show that that story is true. But it is highly probable that the deceased wished to get the signature of his wife somehow or other to this will, on the ground that the provisions made therein for the wife were extremely small having regard to the value of the estate. But there is other evidence on which, in my opinion, it cannot be doubted that this will was properly executed by the deceased in the manner required by S. 50 of the Indian Succession Act. The first witness on behalf of the plaintiff, the petitioner for Probate, is Balbhadra Thakur. He is a clerk. His evidence is that he having read the will did, at the request of the deceased, affix his signature to all the pages as a witness. It seems to me obvious that he duly attested the will. The next witness is Surja Prosad. He is the Government Pleader of Bhagalpur. He is a man of position and his statement is that, on the morning of the 10th May, 1913 before going to the Registration Office, the deceased brought the will to him, that he read it and suggested that the deceased ought to make a more liberal provision for his wife but that the deceased refusing to do so, he subscribed his name to the will as an attesting witness. The last witness is Harendra Krishna Bagchi. He is also a Pleader. He was consulted by the deceased with reference to the will before its execution. He says that he suggested alterations, by way of making a further provision for the wife, but that the deceased declined to listen to those suggestions. The will was brought to him also on the morning of the 10th of May, 1913 and the testator having acknowledged his signature, Harendra Krishna attested the will as an attesting witness. It seems to me that that amply satisfies the provisions of S. 50 of the Indian Succession Act. The view put forward by the learned Counsel who appears for the appellant that some other course is required than what has been adopted in this case seems to me to be open to doubt on the wording of S. 50. One has not got to comply with the provisions of the third part of S. 50 down to the semicolon and then having done that start afresh from the semicolon. That has been decided in the case of *Mukta Nath Roy Chowdhuri* v. *Jitendra Nath Roy Chowdhuri* (1). On the wording of the section it seems to be amply clear that that is not what is required, I think, whatever be the view we may take as to how the signature of the wife was obtained, there cannot be any doubt on the clear evidence - evidence that cannot be doubted—that the deceased did acknowledge this document as his last will in the presence of those persons whose names appear in the margin of the first page of the document purporting to be his will, and that they then at his request subscribed their names as witnesses to the fact of the will. That is amply sufficient to satisfy the terms of the S. 50. The fact that the deceased took the document and deposited it himself with the Sub-Registrar of Assurances, having endorsed on the cover that it contained his will bearing date the 10th May, 1913, also seems to me to show that the deceased had taken considerable care that his will was in due order I think the learned Judge on the evidence in this case came to the only conclusion that was possible, namely, that the deceased did, in fact, execute this will in the manner required by S. 50 of the Indian Succession Act.

(1) (1915) 27 I. C. 677.

That is the only issue involved in the case. That being so, I am of opinion that we should dismiss the present appeal and direct the appellant to pay to the respondent his costs of this Court. We assess the hearing fee at one thousand rupees.

Richardson, J.—I agree.

V. B./R. K.

Appeal dismissed.

A. I. R. 1916 Calcutta 633

CHITTY AND BEACHCROFT, JJ.

Emperor.

v.

Dwijendra Chandra Mukerjee—Accused—Appellant.

Criminal Ref. No. 22 of 1915 and Criminal Appeal No. 262 of 1915, decided on 17th May, 1915.

(a) Indian Penal Code (45 of 1860), S. 80—Substantive defence of accident—Burden of proof.

If the accused puts forward a substantive defence of accident within the purview of S. 80 of the Indian Penal Code, it is incumbent upon him to prove it. [P. 636, C. 1.]

(b) Evidence—Admissibility—Evidence as to deed done convincing—Motive immaterial.

If the evidence as to the deed done is sufficiently convincing, it is immaterial to consider with what motive it was done. [P. 639, C. 1.]

(c) Indian Penal Code (45 of 1860), S. 80—Defence of accident—Court entitled to full and detailed account.

Per *Beachcroft, J.*—When a theory of accident is set up, the Court is entitled to a full and, so far as possible, detailed account of what happened. [P. 640, C. 2.]

(d) Criminal P. C. (5 of 1898), S. 342—Practice of filing written statement by accused pernicious—Refusal to answer by accused—Adverse inference may be drawn.

The practice of refusing to answer questions in the Sessions Court and of putting in a written statement is a very pernicious practice. There is no provision in the Code for the making of a written statement by an accused and the obvious object of the practice in many cases is to defeat the provisions of S. 342, Criminal Procedure Code, probably based on some idea of the Legal Advisers of the accused that he may give himself away. That section if used intelligently by Judicial Officers, is of great use to accused persons for whose benefit the section was enacted. A written statement drafted by an accused's Legal Adviser can never have the same value as answers coming directly from the accused's mouth. The refusal to answer questions may be attended with great risk to the accused, for the Court is bound to question him and a refusal to answer may involve an adverse inference against him. [P. 641, C. 1.]

J. N. Roy, S. K. Sen and *A. Sen* and *Monmotho Nath Mukerjee* and *Probodh Chandra Chatterjee*—for Accused.

Sultan Ahmad and *Kunja Behari Mukerjee*—for the Crown.

Chitty, J.—In this case the appellant, Dwijendra Chandra Mukerjee, was found guilty of murder by the majority of the Jury (4 to 1) and sentenced to death by the Sessions Judge of Khulna. He has appealed, and the matter comes before us also on a reference under S. 374, Criminal Procedure Code. The petition of appeal contains no less than 27 grounds based on the alleged errors of law and instances of misdirection on the part of the learned Sessions Judge. None of these, however, have been touched upon in the argument before us and it was conceded for the appellant that there had been no want of fairness in the trial. The main facts of the case are not in dispute. The deceased girl, Aparna Debi, was the second daughter of Purna Chandra Bhattacharya of Senhati. Senhati is about five miles from Khulna on the other side of the river. Purna Chandra died some time ago. Aparna was married to Charu Chandra Mukerjee of Pabna near Daultapur. He is the Head Master of the Siddipasa High English School. At the date of her death, 12th November, 1914, Aparna was about 14 years of age. She had attained puberty in the preceding *Chaitra* and had resided with her husband at Pabna, but at the time of her death was living in her father's house. The other inmates of the house were Satish Chandra Bhattacharji, her cousin and the present head of the family, her mother, Bidhu Mukhi, her elder sister, Charubala, her aunt, Birajmohini, Saradindu, a boy of about 12, a cousin, and the infant daughter of Satish aged seven or eight. Another aunt, Monmohini, also lived in the compound but in a separate hut. She was old and infirm and does not appear to have had any knowledge of the occurrence.

Dwijendra, the appellant, is the son of Saroda Charan Mukerjee, who resides at Senhati and is President of the local *punchayet*. The appellant himself was a Head Constable in the Police force at Khulna. He had a gun, a single-barrelled 12 bore breach-loading hammer gun, for which he held a license. It is in evidence that he was fond of shooting and had shot a leopard. He also shot pigs and birds. A number of cartridges were found in his house, some loaded with shot others with

bullets, both lethal and spherical. Some he appears to have loaded himself, using black powder. It is also in evidence that he often carried the gun, especially at night, for his own protection. He had been employed in the Criminal Investigation Department and may have been in some danger from political suspects. He was well acquainted with all the family of Purna Chandra Bhattacharji. Purna Chandra had been the *guru* of his father, Saroda and Bidhumukhi was the preceptor of Saroda's wife. Dwijendra was a frequent visitor at Purna Chandra's house, and it is said that he always treated Charubala and Aparna with the respect due to daughters of his *guru*. There is no evidence of anything approaching impropriety in the relations between Dwijendra and Aparna. There is evidence that there was some dispute between the family of Aparna and that of her husband about money matters, but it does not appear how far Dwijendra was aware of this. On 10th September, 1914, Satish, as head of the family, had written a petition to the Kulna Police complaining of Charu Chandra's ill-treatment of his wife (Exhibit 1). This was given by him to Dwijendra to deliver, but later on he asked him not to deliver it as the matter had been settled. The petition, however, remained with Dwijendra and was found with him after the occurrence. It is also in evidence (though Satish now denies it) that Dwijendra accompanied Satish when he brought Aparna back from her husband's house. The precise date of that is in doubt but it was either at the end of *Bhadra* or beginning of *Assin*, *i.e.*, in the week 12th to 19th September, 1914. Charu Chandra was absent from Pabna when his wife left, and it appears that his absence was secured by a bogus telegram. There is nothing, however, to connect Dwijendra with that telegram. All that can be said to be proved is that Dwijendra knew of the trouble between Aparna and her husband, and of her return to her father's house and the reasons for it.

On the evening of the occurrence, 12th November, 1914, about 7 or 7-30 P. M. Dwijendra was met on the road leading from Sarada's to Purna Chandra's house by the two Kabirajs Bejoy Kumar Sen Gupta and Hementa Sen Gupta. All were going to the north and Dwijendra overtook them. Some remarks passed between him and Bejoy as to some medicine. He was carrying a gun under his arm. He had a *chadar* tied round his head, *galpatta* fashion, and wore a long black coat and slippers. Hementa said to him "you are going out at night armed with a gun. Some accident might happen." To this Dwijendra gave no reply but passed on. The witnesses went to the house of Ambika Charan Sen, their co-sharer.

It should be stated that the plan annexed to the proceedings, shows correctly the buildings, etc., in Purna Chandra's *bari* and also the roads in the locality. There is no question as to its correctness and, therefore, no necessity to describe it in detail.

About or shortly before 8 P. M., the state of things in Purna Chandra's *bari* was as follows:—Birajmohini was in the western kitchen. In that kitchen was a tin lamp by the light of which the boy Saradindu was eating his evening meal. There was also a hurricane lamp on the verandah. Satish was in the eastern kitchen cooking for himself, Bidumukhi, Charubala and Aparna, who messed together. Charubala, who was far advanced in pregnancy, could not cook, and Aparna would not. She had cooked the midday meal, but was offended with her mother, who had slapped her for some trifling offence. Bidhumukhi was giving Satish's daughter her food in the eastern kitchen. Charubala and Aparna had gone to the hut of their other aunt, Monmohini. About that time Satish asked Birajmohini to call them to come and eat their supper. She did so and they returned. Charubala went to, and remained for a short time at, the western kitchen speaking to Saradindu. Aparna went on, passed the eastern kitchen and went into the *dalan* and into the middle room in the northern building from the east. About the same time Dwijendra came into the *bari* from the south. Birajmohini saw him pass her, that is, pass the western kitchen. Bidhumuki also saw him pass along the *rowak* to the east and enter the northern building by the eastern door. Satish's little daughter cried out "Oh grandmother, Dwijen is entering the house with his gun uplifted." Charubala then came to the eastern kitchen and her mother told her to call Buri (the pet name of Aparna) to come there. Charubala then entered the house by the eastern door, which would take her into the eastern room. Almost immediately afterwards came the report of the gun, which was heard not only by the inmates of the *bari* but by others in the village. There is no doubt that Aparna was then and there shot dead by Dwijendra,

whether intentionally or by accident, in the middle room of the northern building. The bullet, which was fired at a very short distance, struck her on the left temple about an inch from the eye, passed through her head and emerged behind the right ear, just above the mastoid process. It struck the eastern wall of the room 22 inches from the ground, *i. e.*, just above the *takhtaposh* and fell to the ground behind the *takhtaposh*, where it was discovered on the 14th by Mr. Cornish, District Superintendent of Police. Charubala cried out "Mother, Buri has gone," and then "Dwijen has shot Buri dead and has gone away." It is undisputed that Dwijendra did run away. He left the northern building by the southern door, and in his haste fell over a heap of firewood which was lying in front of the southern steps. He left his slippers behind in the courtyard and just outside the *bari* he dropped the fore-end of his gun. He was seen running away, within the *bari*, by both Bidhumukhi and Birajmohini, and on the road outside going south by Bejoy and Hemanta. Bejoy was for catching hold of him but Hemanta held him back, saying he might get shot. Dwijen had the gun still in his hand. Both the ladies and Satish went at once to the room where Aparna had been killed. They found her lying on the *takhtaposh* against two pillows. Her head was to the north and her face to the west. Her legs from the knees downwards were over the south end of the *takhtaposh*. The mosquito-curtain, which was hanging by three of its corners from the north and east walls, was alight in two places and Bidhumukhi put out the flame by slapping it with the palms of her hands. Satish appears to have been so overcome with the shock that he swooned. He was revived by pouring water on his head. When he came to senses, he went or was taken to the *baitakkhana*. By this time, a number of the villagers had assembled, including Nepal Chandra Chakravarti, Saroda Charan Mukerjee, Akhoy Dutt, Dr. Amirta Lal Sen, Bhola Nath Chakravarti, Nibaran Chandra Sen, Kanai Lal Sen and three *chowkidars*. Some of these persons depose to hearing the ladies of the house crying "Oh Dwijen, what a calamity (*sarbanash*) have you wrought on us!"

In the *baitakkhana* in the presence of a number of the villagers Satish wrote out a letter to be sent to the Police at Khulna. The first draft (Exhibit 3) was not completed. The wording was slightly altered and the letter re-written and signed by Satish (Exhibit 2). As it is of importance, I set it out in full:—

"To

The High in Dignity, the Officer in charge of the Thana.

A cat used to infest our house, and I asked my disciple, Head Constable Dwijendra Mukherji, to kill that cat. Dwijen came after evening; and chasing the cat he entered into our northern *dardalan* and fired on the cat. But he missed his aim; and my sister Aparna Debi, who was lying on a cot in the *ghar* came to be shot on the head, and died in consequence thereof. I have no enmity with Dwijen, Finis. Dated Senhati, Thursday the 26th Kartick, 1321.

(*Sd.*) Satish Chandra Bhattacharjee,
Senhati."

This was despatched at once by a messenger, but as he could not get a boat to cross the river, it was not recorded at the Police Station until 7 A.M. on the 13th. Meanwhile the body of the girl was left lying as it was found, the room was locked and a *chowkidar* put on guard.

Jai Kumar Chakravarty, Sub-Inspector of Police, who was at Hajigram, heard of the occurrence about 2 A.M., and at once proceeded to Senhati, arriving about 6 A.M. He held an inquest. He has described how he found the body, which was in the same position as it had been left overnight. He also found an ear-ring on the floor. This evidently came from the girl's left ear, as that in the right ear was in place, and had been forcibly removed, as the hasp was straightened out. Dwijendra's slippers the Sub-Inspector found lying some 3 or 4 cubits apart by the southern *rowak*. He sent for Dwijendra, who came at 10 or 10-30 A.M., and explained how he had come to shoot the girl, where he was standing and so forth. Dwijendra's house was searched that afternoon. Nothing much turns upon what was found there.

On the 14th November Mr. Cornish came to Senhati. He too examined the premises and as above stated, found the bullet by the wall beneath the *takhtaposh*. He too questioned Dwijendra and heard his version of how the girl had met with her death.

Thus far the facts are not seriously disputed. There are two alternatives for consideration in this case: (1) Has the prosecution made out a case of deliberate killing? (2) Was the death of Aparna Debi the result, as the accused maintains, of an unfortunate accident? It might, of course,

happen that, while disbelieving the theory of accident, the Court might consider that the prosecution had not made out their case, but that is not the case here. If the accused puts forward a substantive defence of accident within the purview of S. 80 of the Indian Penal Code, it is incumbent upon him to prove it. Here the accused has called no evidence. He relies for proof of any fact upon the oral or documentary evidence put before the Court on behalf of the Crown. As the acceptance of either alternative means the rejection of the other, they may be conveniently considered together. Now, apart from the facts detailed above, there is a considerable body of evidence which, if believed, leaves no doubt that Dwijendra murdered Aparna, and entirely negatives the theory of accident. In the first place, how did he come upon the scene? On behalf of the accused an attempt was made to show that he spoke to Saradindu in passing the western kitchen and also greeted Satish in the eastern kitchen with the words "Thakur Mahashai". It was argued that a man who had gone there with the deliberate intention of murdering the girl would not thus make his presence known to the inmates of the *bari*. Now there is nothing upon the record to show, nor do I understand it to have been the case for the Crown, that the murder was so deliberate and premeditated as that. Whatever may have been his motive for visiting Aparna that evening, there is nothing to show that he had already resolved to kill her. At the same time it is not proved that Dwijendra spoke either to Saradindu or to Satish on his arrival as alleged. Saradindu in the Sessions Court in examination-in-chief said he saw Dwijen pass the kitchen, but made no mention of his calling out. In cross-examination he said he did not remember if he did so, or if he had given evidence before the committing Magistrate to that effect. In the Magistrates's Court, he had said that some one called out "Indu" and that the voice seemed to be that of Dwijen Mukerjee. It was suggested by the defence that this witness had been tampered with. There is no foundation for this suggestion, and if there was any tampering it was from the other side. Of this, there is the evidence of the Sub-Inspector, who saw Akhoy Dutt tutoring Saradindu in the verandah of the Court. The witness is a child of 10 years old and it would be unsafe to rely upon his statements, the more so as pressure was brought to bear upon him with regard to them. It is true that Bidhumukhi says she heard Indu call out who goes there and Dwijendra answered that it was he. On the other hand Birajmohini, who was in the western kitchen with Saradindu, flatly denies that Dwijendra called to him, and we may accept her statement. Then Satish, no doubt, says that while he was cooking some one called out "Thakur Mahashai" to him from the courtyard. Before the Committing Magistrate he had said that some one had called out to him but that he could not make out whose voice it was. Bidhumukhi says that though Dwijendra often called out "Thakur Mahashai," on this occasion he said nothing. We may take it that Dwijendra came through the courtyard and passed into the house without attempting in any way to conceal his arrival, but without speaking to any one.

The next evidence in chronological order is that of Charubala. Now she claims to have been an eye witness of the deed, and if her evidence be accepted, the case for the Crown is proved. She had stopped at the western kitchen, while Aparna had gone on into the house. Charubala followed after a short time entering the northern building from the east. She says:—"I then went to call her (Aparna) from the middle room. I got as far as the door between the middle room and the eastern room. I saw Dwijendra standing in the centre part of the middle room. Seeing me he took something out of his pocket and turned to the west. I told my sister to come and eat her rice as it was ready. As soon as I said this, Dwijen turned round to the east and levelled his gun. I said, 'Dwijen, what are you doing?' He fired his gun and said 'I am giving her something to eat.' The shot killed my sister. When I went to the place, my sister was lying down with her face resting on her right hand. She was not lying flat down, but was reclining against the pillows." Before the Committing Magistrate, Charubala did not claim to have actually seen the shot fired. There she said that she heard the report as she was entering the eastern room by the eastern door, and that she ran into the middle room in time to see Dwijen escaping by the south door with his gun in his hand. She has explained why she did not tell the whole truth on that occasion. Though her reasons on paper may not appear very cogent, I think that what she now says is substantially true. It may fairly be asked why, if it were really and

truly an accident, should Charubala and the other members of Aparna's family combine to perjure themselves and make what was only an accident appear as a crime. It was suggested that they had done so at the instance of Dr. Amrita Lal Sen, who, it was said, was on bad terms with Dwijendra and owed him a grudge. There is no foundation on the record for such a suggestion. It is true that Dr. Amrita Lal Sen from the first declined to believe in the theory of accident, and did not hesitate to let the Police know his opinion. He also recommended and insisted upon a Police investigation. But this any impartially minded man would have done under the circumstances, which, to say the least, were highly suspicious. In my opinion advantage has been taken by the defence of the untimely death of Dr. Amrita Lal Sen to foist upon him much in this case for which he was not in the slightest degree responsible, and in particular the responsibility for the case being pressed against Dwijendra. Dr. Amrita Lal Sen was seized with small-pox about the time of the trial in the Sessions Court and died before the trial was concluded. His evidence before the Committing Magistrate was rightly put in and read at the trial. He had not, however, been cross-examined, though the accused had the opportunity to do so, and the suggestions now made were, of course, not put to him. They are mere suggestions and I see no reason to suppose that the testimony of Satish and the other members of his family or indeed that of any of the witnesses for the prosecution was at all more unfavourable to the accused by reason of any action or influence of Amrita Lal Sen. I can see no other possible reason why the members of Aparna's family should depose falsely against the accused. An important question is what amount of light there was in the middle room at the time when the gun was fired. As to this, the evidence is not absolutely clear, but there appear to have been two lamps in the eastern kitchen which lighted the verandah and the courtyard to the east of the house. There was also an earthenware lamp inside the house. Bidhumukhi says that she had placed it in the eastern room of the *dalan* near the door leading from the eastern to the middle room and that it was so placed in order to light both rooms. Charubala now says that this lamp was in the south window of the middle room. Before the Magistrate she had said that she came into the middle room carrying a lamp, but this she now admits was not the case. She does, however, say that there was a hurricane lamp burning at the south west corner of the bed. Bidhumukhi also says that Charubala immediately after the occurrence had told her of this hurricane lantern, and Bidhumukhi further says that Dwijendra was carrying a lantern, when he came. There seems to be some doubt about this lantern, but the evidence is clear that there were two lamps in the eastern kitchen, which would light up the space between that and the house, and there was a lamp just outside the door between the two rooms which would give light to both. The middle room was certainly not in complete darkness, as was suggested on behalf of the accused. The next question of importance is the position of Aparna when she was shot. The statement of the accused, to which he consistently adhered, was that he was entering the middle room from the closed verandah on the south in pursuit of a cat, which had run into that room, that when he was just on the threshold of the south door towards the west he brought down the gun from his shoulder to point it at the cat, that the gun went off, and the bullet hit and killed Aparna. Now this would be impossible if Aparna was lying, reclining or sitting on the *takhtaposh*. The evidence shows that the muzzle of the gun when fired was within three feet of and probably not more than two feet from her head. This is shown by the fact that her face was scorched, her left eye-brow and hair singed and her clothing burnt in one or two places. Seeing this difficulty, it was suggested that Aparna was not shot on the *takhtaposh*, but while squatting on the floor near its south-west corner; since it was also supposed that there must have been a considerable flow of blood from the wound (as indeed there was) the further wild suggestion was made that there had been a pool of blood on the floor and that Amritla Lal Sen had washed it up. The fact that he was seen washing his hands with ashes shortly before he left the house about 2 A.M. that night was the only foundation for that suggestion. Then it was said that Aparna must have been lifted from the floor on to the *takhtaposh* and this was put to one or two of the witnesses and denied. For this suggestion too there is no foundation in fact. If she was shot while sitting on the floor by a

man standing up, it appears impossible that the bullet should have struck the wall where it did, *i.e.*, four inches above the *takhtaposh* and 22 inches from the ground. The evidence proves conclusively that Aparna was shot as she sat or reclined upon the cot. The pillows were soaked with blood, and there was a pool of blood beneath the *takhtaposh* at the spot where her head lay. The fact that brains and blood were found by the wall shows that her head was somewhere near the wall, while the fact that the bullet struck the wall at right angles indicates that Dwijendra was somewhere in the middle of the room, and not at the south door as he alleges. From his statement to Mr. Cornish, it appears that the cat could not have been much more than two feet from the muzzle of the gun when it went off. This is absolutely inconsistent with the undoubted fact that Aparna's head was about the same distance from the muzzle of the gun at the same moment. In conclusion on this point it is proved beyond all reasonable doubt that the accused entered the house by the eastern door and not from the south verandah. His statement, therefore, about his pursuit of the cat from that direction cannot possibly be true.

It may be well at this point to deal generally with the accused's defence of "accident". It appears to me to have only two circumstances to recommend it, one that there had been some talk in Purna Chandra's house a few days before about driving away or killing a cat, and the other that it was undoubtedly raised at an early stage of the proceedings. There seems to have been some talk about a strange cat which was coming to the compound and causing some annoyance. But the result of the conversation was certainly not such as would justify Dwijendra in coming to the *bari* as he did and without further permission firing at the cat inside a small room 14 feet 6 inches by 9 feet. The ladies had expressed a reluctance to have the cat killed at all. It would have been abhorrent to them to have it killed in a room where they used to sit. But in my opinion it is wildly improbable that had he come with the intention of shooting a cat, Dwijendra, who had a good knowledge of fire arms, should have acted as he did. He would certainly have spoken to Satish or some one about it first, and obtained definite permission. There is nothing but Dwijendra's statement to prove that the cat was there at all that evening. If it was and he did follow it as he says, it is incredible that he should think of shooting it with a 12 bore bullet within a small room in complete darkness. As to the gun going off by accident, that too is highly improbable. The gun was produced in Court. It has a very stiff pull and would be most unlikely to discharge by accident. Then if it was an accident, why did he run away? If this fact stood alone it might not have much weight. But here we have the case of a man who, as he says, by an unfortunate accident has taken the life of a girl friend in a house where all the family were his friends. Is it not more likely that he would remain and express contrition, and do what he could to make amends? Instead of that he bolts away in the darkness like a criminal. In his haste, he drops his slippers, he falls over the heap of firewood, and then allows the fore-end of his gun to drop off. This last implies haste and some violence, as the fore-end is by no means easy to remove. An attempt was made by the defence to prove that when running away Dwijendra cried out "*ki karte ki karilam*", an expression which might indicate a feeling of horror at what had happened. The child Saradindu was the only one who speaks to this. As I have said above, his evidence cannot be trusted. It cannot, therefore, be taken as proved that Dwijendra made use of any such expression. Then we have the letter written by Satish to the Police. Satish says that it was dictated to him and that he was made to write it. Of this, there can be no doubt. His state of mind was such that he could hardly have written it of his own motion; but there is an even more cogent reason than that, which is that it was impossible for Satish to have personal knowledge of the facts narrated. The suggestion that it was dictated by Amrita Lal Sen is absurd. Moreover he did not appear on the scene until the writing was nearly completed. It was clearly inspired by some one who wished to screen Dwijendra. There is evidence that it was Dwijendra's father, Saroda, who dictated the letter, and this I believe to have been the case. Dwijendra presumably ran away to his house, so that he would have seen his father before he came to Purna Chandra's house. They may very well have agreed upon what should be said. Saroda then taking advantage of Satish's weakness got him to write the letter. This reduces the

significance of the 'cat' theory being advanced at an early stage, to nothing at all. The last piece of evidence against the accused is the letter, dated 22nd December, 1914 (Exhibit 7), written by him from jail to his father. This was intercepted by Amirta Lal Sen and by him made over to the Police through his brother, Mohendra. As to the genuineness of the letter there is no question. The request to his father to have the old fore-end of his gun fitted with a new steel piece and stamped with the number and the maker's name, may be susceptible of an explanation compatible with innocence. But in that letter he also asks his father to use all his endeavours to persuade Chota Thakurani (*i.e.*, Bidhumukhi) and Charubala to depose in his favour. Again he says:

"Please tell Satish Thakur Mahashai that if my life be spared it will do him no harm"

and again;

"After consulting the Counsel please win over (or get into your hands) the witnesses of the Thakurbari, otherwise there will be danger."

This does not read as the letter of an innocent, falsely accused man. It is true that in this case there is no evidence, which indicates the motive for the murder. If, however, the evidence as to the deed is sufficiently convincing (and in my opinion it is), it is immaterial to consider with what motive it was done. If, as I find, Dwijendra fired at Aparna at a distance of two or three feet, there can be no doubt that he intended to kill her. It is idle to speculate why he did so. What passed between them in that room is now known only to Dwijendra. There is no need to suppose that the act was premeditated, or that he had gone to the house with a fixed intention to murder the girl. It may have been done on the spur of the moment, the act being facilitated by the fact that he had the gun and cartridges with him. It is nonetheless murder. After giving the case the fullest and most anxious consideration, there is only one conclusion to which I can come, *viz.*, that the accused intentionally killed the girl and that the story of accident cannot possibly be accepted. It is against all the evidence in the case and in its details utterly improbable. It does not appear why the Jurors who brought in the verdict of guilty recommended that the extreme penalty should not be inflicted. I agree with the learned Sessions Judge in my inability to see any extenuating circumstances.

I would dismiss the appeal and confirm the sentence of death.

Beachcroft, J.—This case presents a feature very unusual in cases in this country, *viz.*, an admission of the act which caused death, coupled with a plea of accident. And because it is such an unusual plea, the facts must, I think, be examined with particular care, for it would be lamentable if a candid story were rejected too lightly or from expecting too high a standard of conduct from the accused immediately after the accident, if accident it was.

We have only one person, the accused, who can tell us exactly what happened in that room, for in my opinion we cannot accept the story of Charubala, as told in the Sessions Court, that she actually saw the occurrence. It is possible that she may have seen what she says she saw, but the explanation for not telling the story in the Magistrate's Court, is not to my mind entirely satisfactory; at any rate it would be extremely unsafe to act on evidence so far in advance of the evidence given in the Magistrate's Court.

The accused has this in his favour, that his acts do not suggest a premeditated murder. The slippers which he wore are heavy and without heels and caused a shuffling sound as he walked. They are not the sort of footwear one would expect a man to use who wanted to conceal his presence. The position in which they were found, indicates that they were discarded or fell off as the accused ran away, rather than deliberately taken off before the accused entered the building. If the accused called out to Satish, as Satish says, though Bidhumukhi denies the fact, that does not suggest an intention to conceal his presence. This act is, of course, open to the suggestion that he wished to see if the coast was clear. Apparently Satish did not answer, and there is, therefore, nothing to show that accused knew that anyone of the household was about. Neglect to conceal his presence could, of course, be reconciled with the theory of premeditated murder on the supposition that accused intended to plead accident, but if he had a story of accident ready, his flight from the spot is inexplicable, except on the theory that thinking his presence to have been unobserved, he suddenly abandoned that idea. But I do not understand the Crown to have committed itself to the theory of premeditated murder.

Saradindu's evidence that when accused ran out of the building he cried out

"*ki karte ki karilam*" is strongly pressed in accused's favour. If true, the ejaculation is capable of explanation as one of remorse for an act done intentionally on failure to achieve some object, as well as of an act done unintentionally. Unfortunately Saradindu mentioned this ejaculation of the accused for the first time at the trial and there is good reason to think that attempts were made on the part of the accused to influence the witnesses, though in regard to the Sub-Inspector's evidence that he saw Akhoy Dutt tutoring Saradindu in the Court premises, I feel sceptical. The explanation which he gives for not informing the Public Prosecutor or the Court Inspector, is to my mind insufficient.

The statement of Satish Kandu, that accused said "Buri has been killed by a bullet from my gun," is a statement of the same class, suggesting accident. The witness's evidence in the Sessions Court is an improvement on that given in the Magistrate's Court, where the accused, when asked by the witness who he was, is reported to have said only "I" and nothing more. In this case, however, a statement to the same effect as that made in the Sessions Court had been made by the witness to the Police during the investigation. If true, the accused could not then have been attempting to conceal his identity: it is possible that accused had then realised that Birajmohini had seen him and possibly also that Charubala and Saradindu had, and concealment being useless thought that his safest course was to allege accident.

The strongest point in accused's favour is the apparent absence of motive. The learned Deputy Legal Remembrancer suggests that the motive: though known, was concealed to avoid a scandal. On the evidence there is nothing to support the suggestion, and the absence of motive would be enough to turn the scale in the accused's favour in the absence of any account but his own, if that account were a reasonable and possible one, and not shown to be untrue. I am prepared to accept the story that a strange cat had been a nuisance to the household, that Satish had expressed a wish that it should be made away with and that the accused was prepared to shoot it. On the theory that Satish believed that accused was chasing the cat, learned Counsel for the accused based his explanation of the letter that was sent to the Police giving information of the occurrence. He argued that Satis put two and two together and so sent the letter, which is true in its main detail but not in all the facts, and that Amrita Lal Sen Gupta, whom he made responsible for all accused's troubles, attempted to suppress the letter; but throughout his argument, till reply, repudiated the idea that accused's father, Saroda, had anything to do with it. He then conceded that possibly Saroda brought information to the household that it was an accident.

I am not prepared to accept the theory that the information was guess work on the part of Satish, a guess that happened to be correct in its main detail. If it had been merely a matter of inference, it is highly improbable that he would have stated it as a definite fact. It is not suggested that any one in the house saw the cat that evening. Saroda was early on the scene and it seems to me not only in the highest degree probable in any event that he brought the story of firing at a cat which Satish was willing to accept, but if the defence set up by the accused is true, it seems to me that that is the most natural thing to have happened, for if accused was afraid to face the household, it was very natural for his father to go and explain matters. But that line has not been taken: it would have made Saroda's appearance in the witness-box an absolute necessity on behalf of the defence, and the defence must for some reason or other have been unwilling to risk that.

I am not prepared to accept the suggestion, made on no sound basis, against Amrita Lal that he got up the case against the accused. If Amrita Lal was responsible for the members of the household giving false evidence or suppressing the truth, he would not have openly stated in his evidence that he told the *chowkidar* to inform the Police that he did not believe in the theory of cat-killing and have requested the presence of the Superintendent of Police. That he did send this message is supported by the formal information drawn up by the Sub-Inspector on the morning of the 13th.

I have said that we must not too lightly reject a candid story of accident. Equally, we must not too lightly accept a story to which by reason of its apparent candour we naturally incline. When a theory of accident is set up, we are entitled to a full and, so far as possible, detailed account of what happened. In this case we do not get it. The accused was ill advised enough to give equivocal answers to the Committing Magistrate and some of his statements were untrue. This does not matter much as to the

fact of his alleging accident, for he had alleged that long before, but it was the first opportunity he had, in the course of the enquiry, of disclosing the facts to a Judicial Officer. Then in the Sessions Court he put in a written statement, which alleges that he could not see whether there was any one in the room when he began to aim at the cat, because there was no lamp in the room, but omits to explain what is extremely important, how he came to know, after the gun had gone, off, that he had killed Aparna.

This practice of refusing to answer questions in the Sessions Court and of putting in a written statement, which it may be said has now become almost universal in the Province, but which is largely a growth of recent years, is a very pernicious practice and in my opinion the sooner it is put an end to the better. There is no provision in the Code for the making of a written statement by an accused and the obvious object of the practice in many cases is to defeat the provisions of S. 342, Criminal Procedure Code, probably based on some idea of the Legal Advisers of the accused that he may give himself away. That section if used intelligently by Judicial Officers, is of great use to accused persons, for whose benefit the section was enacted. A written statement drafted by an accused's Legal Adviser can never have the same value as answers coming directly from the accused's mouth, and it cannot anticipate the points on which the presiding officer considers explanation desirable. It frequently happens that verbal explanation is refused and the promised written statement never filed. The refusal to answer questions may be attended with great risk to the accused, for the Court is bound to question him and a refusal to answer may involve an adverse inference against him.

In this case, the putting in of a written statement instead of answering questions is particularly to be deplored, for it is clear that on a story of accident many questions naturally arise. Four obvious questions are, how did accused know that he had killed Aparna, why did he use ball cartridge to shoot a cat, how did a gun with so stiff a pull go off accidentally, and why did he run away. The first of these is particularly important, as I shall show later. I am willing to assume that a possible explanation could be found for the other three facts, which are *prima facie* suspicious.

One extremely important point against the accused is the statement of Bidhumukhi that she saw accused enter the building by the east door. If believed, that statement at once stamps accused's story as untrue. As is natural there are some statements in her evidence in the Sessions Court, which are not to be found in her evidence before the Magistrate Any difference that there may be between the two depositions is not of great importance, but this particular statement was made in the Magistrate's Court and inspite of its importance, there was no cross-examination on it. No doubt the accused had already indicated his defence which was inconsistent with that statement, but the witness ought to have been pressed on that, which is perhaps the most important statement in her evidence. If failure to cross-examine on it was an accidental omission, which is improbable in Counsel of Mr. Roy's experience, it was a most unfortunate one.

The accused pointed out to the various Police Officers engaged in the investigation, the spot at which, he said, he was when the gun went off. His statements do not appear to be consistent. Mr. Cornish says the distance was about four yards from where the woman was. This is rather an inaccurate method of description. If it means four yards from her feet there is a great difference between the spot shown to Mr. Cornish and that shown to Sub-Inspector Jai Kumar Chakravarti, to whom the spot shown was 8 or 8½ cubits from deceased's head. If Mr. Cornish referred to the deceased's head, and the language will hardly bear that construction, the two places are the same. The difference involved in Mr. Cornish's looseness of description is practically the whole length of the girl's body. The spot pointed out to the Deputy Superintendent is stated by him to be 3½ cubits to the south-west of the door. He did not measure the distance till six weeks later. In the circumstances the accuracy of his memory as to the exact spot, may be questioned, though evidently it was not quite the same spot as that pointed out to Jai Kumar.

It might possibly be suggested that the difference in the spots pointed out to the different Police Officers, could be explained on the supposition that the accused's attention was more centred on the pointing out of the direction of his fire than the exact the spot at which he stood. This supposition would hardly explain the varying positions given by him to the cat.

But let that pass; there might be some confusion as to the exact position of an animal of rapid movement such as a cat, and let us assume for the purpose of argument the position most favourable to the accused, the one pointed out by him to Jai Kumar. That would be just by the south-east corner of the westernmost of the two door pillars. That point is 12 feet from the point where the bullet hole in the wall was found and 6 feet 3 inches from the edge of the *takhtaposh*.

From that spot, the girl could not have been shot in the position in which she was found lying in the bed. Nor could she possibly have been shot, if, as suggested, squatting on the floor at the foot of the bed. The position of the hole in the wall, if nothing else, makes that impossible.

Now comes the importance of having a statement from the accused how he knew the girl had been killed when he had not seen her before. Death must have been instantaneous, she could not have cried out and hardly have moved. We must therefore, have seen her. Accused's suggestion practically commits him to the case that the girl was sitting on the floor or fell on the floor, and that must be untrue, for I have no doubt that she was found on the bed by the first person who entered the room after the gun was fired.

Now, it is a rather curious thing that a shot fired from the place shown by the accused at 5 feet from the ground—I take 5 feet as about the probable height of accused's shoulder as it is argued he was a tall man—directly at the hole in the wall would pass the edge of the *takhtaposh* 2 feet 6 inches above it, which would be about the height, the girl's head might be expected to be if she were sitting at or near the edge of the *takhtaposh*. Exactitude is impossible for we do'nt know the height of the girl; she is said to have been about the same height as Charubala and was apparently tall for her years as the Civil Surgeon seems to have over-estimated her age—he puts her down as aged about 16 whereas in fact she was about 14. If she had been shot when sitting on the *takhtaposh* near the edge, it is possible that she would have fallen in the position in which she was found. This was not a theory advanced on behalf of the accused, but one which I thought ought to be considered in view of accused's allegation that he did not see the girl before his gun went off.

There are two difficulties to accepting such a position. In the *first* place, assuming accused's contention to be correct that there was no lamp in the room, that would have been a background of light, for the light from the lamp in the eastern room must have fallen across the *takhtaposh* though the south-west corner would have been outside its rays, and the accused could hardly have failed to see the girl with the background of light. In the *second*, there is the more serious difficulty that if there had been any scorching at all, it would not have been to the extent observed in this case. The distance from the accused's shoulder to the girl's head would have been not less than 6 feet 9 inches and from the muzzle of the gun to her head not less than 2 feet 11 inches. In the experiments made by Mr. Cornish, there appeared to him to be no scorching at 3 feet, while in the present case there was a great deal of scorching on the face and head.

Added to this, is the fact that the shape of the hole in the wall made by the bullet led Mr. Cornish to the opinion that the bullet had been fired at right angles.

The physical appearances then contradict the accused's story; and it is disproved at the start by the evidence that accused entered the building by the east door.

I have most anxiously considered the case, giving the accused the advantage of every possible theory for the points left unexplained in his story even when that story ought to have been explicit, and I can come to no other conclusion but that the girl's death was not due to any such accident as described by him.

I, therefore, agree in thinking that we ought to dismiss the appeal and confirm the sentence of death.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 642

JENKINS, C. J., MOOKERJEE AND RICHARDSON, JJ.

Baijnath Mistri and *others*—Plaintiffs—Appellants.

v.

Jung Bahadur — Defendant—Respondent.

Letters Patent Appeal No. 2 of 1912, decided on 2nd July, 1915, from the decision of Stephen and Chatterjee, JJ., dated 29th January, 1912.

Letters Patent (Cal.), Cl. 15—Rule issued under S. 115, Civil P. C. discharged by Bench on opinion of senior Judge, Bench being divided—Order of discharge not appealable.

Where a rule issued under S. 115 of the Code of Civil Procedure, 1908, was discharged by a Bench of the High Court in accordance with the opinion of the senior Judge, the Court being divided in its opinion on the question of its jurisdiction to interfere in revision :

Held, that the order was not appealable under Clause 15 of the Letters Patent. [P. 644, C. 1.]

H. N. Sen and *Rajendra Chandra Guha* - for Appellants

Nares Chandra Sinha—for Respondent.

Stephen, J.—This suit is brought on a promissory note executed in favour of the plaintiff by the second defendant, who was then the *Dewan* of the father of the first defendant. The consideration for the note was an advance of money to the second defendant to enable him to pay road-cess on behalf of the father of the first defendant. In the Munsif's Court it was held that the second defendant had an implied authority from the father of the first defendant to raise the money and that his action had been ratified by the first defendant. The suit was accordingly decreed against the first defendant. On appeal to the Judicial Commissioner, this decree was set aside, on the finding that the second defendant had no authority to borrow money on behalf of the first defendant, and that the acts necessary to constitute a ratification of the second defendant's action by the first did not occur. A Rule has been issued calling on defendant No. 1 to show cause why this order should not be set aside. The question whether defendant No. 2 had authority to bind defendant No. 1 is one which the Court had jurisdiction to decide and we cannot interfere with its decision on revision. It is argued before us, however, that the question of ratification was an issue in the case, and that the Judicial Commissioner failed to exercise his jurisdiction to decide it. The question of ratification was not expressly set out as an issue, but as it is independent of the question of the authority of the second defendant, it must be regarded as an issue by itself. The finding of the trying Court is that on demand being made of the first defendant he told the second defendant to pay the amount claimed out of his rent collections. The Appellate Court found that the question whether this occurred was immaterial, that there would have been ratification if certain circumstances had occurred which did not, in fact, occur, and that the facts found by the first Court constituted no admission that the money ordered to be paid was to come out of the pocket of the first defendant. The law laid down by the Judicial Commissioner cannot be accepted as correct, but looking at the facts of the case I cannot doubt that he had the question of ratification before his mind, and that he in fact decided it adversely to the petitioner. I am of opinion, therefore, that he has not declined jurisdiction in this matter, and that he has not acted with material irregularily within the meaning of S. 115 of the Code, and consequently that this Rule should be discharged.

The Court being divided in its opinion, the opinion of the senior Judge prevails.

The Rule is discharged. No order as to costs.

D. Chatterjee, J.—I regret very much that I am unable to agree with my learned colleague in the view he has taken of this case.

The plaintiff expressly alleged in his plaint that the defendant No. 1 had admitted the debt after the death of his father. This was denied by the defendant No. 1. The case of the plaintiff was that even if the defendant No. 2 had no initial authority to bind the Raja, the latter had, when a demand was made of him for the debt, directed his servant, defendant No. 2, to re-pay the debt, from the collections of his estate. The learned Munsif found that this was so and that there had been a clear ratification or admission of the debt. The learned Judge thinks that this issue of ratification was immaterial and does not come to any finding upon it. The reason given is that it would have been ratification if the Raja had directed payment from his pocket, but would not be ratification as the money was directed to be paid from the collections of his estate. This view of law is decidedly erroneous, but that alone would not perhaps by itself give us jurisdiction to interfere in revision. Here, however, the learned Judge has not come to a decision on the facts alleged to have occurred, and has thereby left undecided the most important issue in the case. He has, I think, by so doing, not only acted with material irregularity, but virtually refused to exercise a jurisdiction vested in him by law. The decision of the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) has been relied on as negativing

(1) (1885) 11 Cal. 6=11 I. A. 237 (P. C.).

our jurisdiction to interfere in this case. Their Lordships held in that case that a Court deciding a question of law wrongly does not exercise jurisdiction illegally or with material irregularity. The judgment of the Judicial Committee does not furnish any test, however, for determining under what circumstances a Court may be said to have acted illegally or with material irregularity. See *Dwarka Nath Sen* v. *Kisori Lal Gosain* (2). In the case of *Sidharathrai Soojanrai* v. *Anantram Baldeodas* (3), the Bombay High Court (Jenkins, C. J. and Aston, J.) held that where a Court refuses to set aside an *ex parte* decree on an erroneous view of the law of limitation, it fails to exercise a jurisdiction vested in it by law. In the case of *Rudrappa* v. *Narasingrao* (4) the same Court (Jenkins, C. J. and Batchelor, J.) held that where the only issue tried by the lower Court is not an issue upon which the dispute could be adjudicated upon, it is an exercise of jurisdiction with material irregularity. So the returning of a plaint without warrant of law has been held to be an acting illegally in the exercise of jurisdiction: *Zamiran* v. *Fateh Ali* (5).

I think these are sufficient authorities on which we can hold that the action of the Court below is within the mischief of S. 115 of the Civil Procedure Code.

I would, therefore, make the Rule absolute and send the case back to the lower Court for a proper decision of the issue of ratification.

Against the above decision an appeal was preferred under Cl. 15 of the Letters Patent.

Judgment.—Though we have heard Mr. Sen and listened to an interesting and careful argument, we certainly do not mean to hold that he was entitled to be heard and that an appeal lies. But it is enough for us to say that notwithstanding what he urged, it is clear that there was no case for revision under S. 115 of the Code.

We must, therefore, dismiss the appeal with costs.

We assess the hearing fee at one gold *mohur*.

V.B./R.K.

Appeal dismissed.

(2) (1910) 6 I. C. 549.
(3) (1906) 8 Bom. L. R. 567.
(4) (1905) 29 Bom. 213.
(5) (1905) 32 Cal. 146.

A. I. R. 1916 Calcutta 644

SHARFUDDIN AND COXE, JJ.

Ram Chandra Marwari — Defendant —Appellant.

v.

Gopi Nath Chowdhuri and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2207 of 1912, decided on 10th March, 1915, against the Decree of Dist. Judge, Mozafferpore, dated 13th May, 1912.

(a) Transfer of Property Act (4 of 1882), Ss. 10 and 12—Conditions in restraint of transfer of life-interest is void—Compromise of suit of maintenance—Widow given some property with condition not to transfer her life-interest—Condition was held invalid.

A life-interest is just as much property as an absolute interest and any condition absolutely restraining the transferee from disposing of that property is void. [P. 644, C. 2.]

Where the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance but that she should not be able to alienate it.

Held, that the restriction on the defendant No. 2's right to alienate the property was contrary to Ss. 10 and 12 of the Transfer of Property Act and, therefore, void. [P. 645, C. 1.]

(b) Transfer of Property Act (4 of 1882), S. 6 (d)—Right of maintenance is not transferable—But property in lieu of maintenance is.

A right to maintenance cannot be transferred under S. 6 (*d*), Transfer of Property Act, 1882, but specified property given in lieu of maintenance can be transferred. [P. 645, C. 1.]

Shorashi Charan Mitra for Appellant.
Gour Chandra Pal for Respondents.

Coxe, J.—In this case the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance, but that she should not be able to alienate it. She has alienated it to the defendant No. 1 and the plaintiffs accordingly have brought this suit to recover possession.

This suit has been decreed by the Courts below and the defendant No. 1 appeals. It is contended on his behalf that the restriction on the defendant No. 2's right to alienate the property is contrary to Ss. 10 and 12 of the Transfer of Property Act.

It appears to me that this contention must succeed. The property transferred to the defendant No. 2 appears to have been a life-interest. That, however, is just as much property as an absolute interest, and any condition absolutely restraining the transferee from disposing of that interest is, in my opinion, void.

The lower Court has relied on the case of *Kuldip Singh* v. *Khetrani Koer* (1). But though in that case there was a condition that the widow with the life-interest should not be empowered to execute any sort of document, yet the clause which was really considered by the learned Judge was a stipulation that transfers by either of the parties should not be valid unless consented to by both. It seems clear that this was the only clause that was considered. We sent for the original paper-book and find that this was the clause referred to in the judgment of the Court below. It is the only clause referred to in the head-note of the case and I may observe that it is in this light that the case is regarded in Mr. Gour's commentary on the Transfer of Property Act, S. 379. A clause of that kind would certainly not amount, in my opinion, to an absolute restraint on the transferee from parting with the property ; and as the decision in the case cited proceeded exclusively on that clause, it does not, in my opinion, bind us to hold that the restriction in the present case, which is of a very different nature, does not come within the scope of Ss. 10 and 12 of the Transfer of Property Act.

It has been contended that what was given to the defendant No. 2 was merely a right to maintenance and could not be transferred under S. 6, Clause (*d*) of that Act. But this clearly is not so. No doubt a right to maintenance cannot be transferred; but here specified property was given to the lady in lieu of her maintenance.

It is contended that Ss. 10 and 12 do not apply by reason of the provisions of S. 2, Clause (*d*). I do not think, however, that this can be regarded as coming within that section.

The transfer was certainly not a transfer by the operation of law or in execution of a decree. Was it then a transfer by a decree? The compromise was embodied in the decree. It has been laid before us, and it shows that the parties had settled their dispute and that the present plaintiff had agreed to give to the second defendant the property in question. The plaint says that the defendant, second party, received the property under the said decree, or, to use the words of paragraph 5, "on the basis of the said decree." It can, therefore, I think, be rightly said that the decree itself transferred the property to the defendant No. 2.

In my opinion, the appeal succeeds and the suit must be dismissed with costs throughout.

Sharfuddin, J.—I agree.

V. B./R. K.

Appeal allowed.

(1) (1898) 25 Cal. 869.

A. I. R. 1916 Calcutta 645

MOOKERJEE AND NEWBOULD, JJ.

Atrabannessa Bibi — Plaintiff — Appellant.

v.

Safatullah Mia and *others*—Defendants —Respondents.

Second Appeal No. 2673 of 1912, decided on 7th July, 1915, against the Decree of Dist. Judge, Mymensingh, dated 5th March, 1912.

(a) *Benamidar*—**Right to sue.**

A *benamidar* cannot maintain a suit for partition of joint immovable property. [P. 647, C. 1.]

(b) *Benamidar*—**Right to sue—Suits for land and suits for money claims—Distinction between.**

Semble:—A distinction has been recognised in the Calcutta High Court between suits for land and suits for money claims in the determination of the question of the competence of a *benamidar* to maintain a suit: in the former class of cases the right has been denied; in the latter class of cases the right has been sustained. [P. 646, C. 2.]

(c) Partition—Effect of.

The essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property. [P. 646, C. 2.]

(d) Partition—Nature of—Enforcement of money claim distinguished.

No analogy can be established between partition and the enforcement of a money claim, even when such claim is associated with land, as in the case of a *benami* mortgage or of a *benami* lease, though as regards leases and mortgages, there is apparently some divergence of judicial opinion. [P. 646, C. 2 & P. 647, C. 1.]

Ram Chunder Mozumdar and *Dhirendra Lal Kastgir*—for Appellant.

Dwarka Nath Chakrabarti and *Nuruddin Ahmed*—for Respondents.

Judgment.—A question of law of first impression has been raised in this appeal, which has been preferred by the plaintiff in a suit for partition of joint immovable property. On the 30th April, 1906 the plaintiff took a conveyance in respect of a share of the disputed land from her brother. On the 28th September, 1909 the plaintiff instituted this suit for partition and joined her vendor as *pro forma* defendant. The contesting

defendants resisted the claim on the ground, amongst others, that the sale was a fictitious transaction and that the plaintiff as the nominal owner was not entitled to maintain the suit. The Courts below have concurrently found upon the facts in favour of the defendants and have dismissed the suit. The question thus arises whether a *benamidar* can maintain a suit for partition of joint immovable property.

On behalf of the appellant reference has been made to the cases of *Basi Poddar* v. *Ram Krishna Poddar* (1) and *Baburam Mandar* v. *Ram Sahai Sahoo* (2), where the right of a *benamidar* to apply for reversal of an execution sale of land under S. 310-A of the Code of 1882 was sustained, as also to the decision in *Sreenath Nag* v. *Chundernath Ghose* (3), *Bhoobunessur Roy* v. *Juggessuree* (4), *Sachitananda Mohapatra* v. *Baloram Gorain* (5), *Hara Gobinda Saha* v. *Purna Chandra Saha* (6), *Alikjan Bibi* v. *Rambaran Shah* (7) and *Kirtibash Das* v. *Gopal Jeo* (8), where the right of a nominal mortgagee to enforce the security was recognised. On behalf of the respondents, on the other hand, reliance has been placed upon the doctrine now well settled in this Court, that a *benamidar* is not competent to maintain a suit for possession of immovable property: *Meheroenissa Bibi* v. *Hur Churn Bose* (9), *Fuzeelun Beebee* v. *Omdah Beebee* (10). *Kalee Prosunno* v. *Dinonath* (11), *Tamaoonnissa* v. *Woojjulmonee Dossee* (12), *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (13), *Issur Chandra Dutt* v. *Gopal Chandra Das* (14), *Baroda Sundari Ghose* v. *Dino Bandhu Khan* (15) and *Mohendra Nath* v. *Kali Proshad* (16). This doctrine is in accord with the pronouncement of the Madras High Court in *Kuthaperumal Rajali* v. *Secretary of State* (17), though possibly a discordant note is sounded in the still later case of *Venkatachala Asari* v. *Subramania Chetty* (18); while a contrary view has been adopted in Bombay: *Dagdu* v. *Balvant Ramachandra Natu* (19), *Ravji Appaji Kulkarni* v. *Mahadev Bapuji Kulkarni* (20) and in Allahabad: *Nand Kishore Lal* v. *Ahmad Ata* (21) and *Yad Ram* v. *Umrao Singh* (22). These cases indicate that a distinction has been recognised in this Court between suits for land and suits for money claims, in the determination of the question of the competence of a *benamidar* to maintain a suit: in the former class of cases the right has been denied; in the latter class of cases the right has been sustained. The substantial question in controversy is, within which of these classes does a suit for partition of land fall. In our opinion a suit for partition of immovable property should, for our present purpose, be included in the same category as a suit for possession of land. The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons of joint lands, which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him; the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property. No intelligible principle has been suggested whereby an analogy can be established between the process thus described and the enforcement of a money claim, even when such claim is associated with land, as in the case of a *benami* mortgage or of a *benami* lease, though it may be observed that even as regards leases, [*Donzelle* v. *Kedarnath Chuckerbutty* (23), *Kedarnath Chuckerbutty* v. *Donzelle* (24), *Inderbuttee* v. *Muhboob Ali* (25), *Jainarayan Bose* v. *Kadumbini Dasi* (26), *Purnia* v. *Torab* (27) and *Bogar* v. *Karam Singh* (28)] as also

(1) (1897) 1 C. W. N. 135.
(2) (1908) 8 C. L. J. 305.
(3) (1872) 17 W. R. 192.
(4) (1874) 22 W. R. 413.
(5) (1897) 24 Cal. 644.
(6) (1909) 1 I. C. 522.
(7) (1910) 7 I. C. 166.
(8) (1913) 20 I. C. 499.
(9) (1868) 10 W. R. 220.
(10) (1868) 10 W. R. 469.
(11) (1873) 19 W. R. 434.
(12) (1873) 20 W. R. 72.
(13) (1889) 16 Cal. 364.
(14) (1898) 25 Cal. 98.
(15) (1898) 25 Cal. 874.
(16) (1903) 30 Cal. 265.
(17) (1907) 30 Mad. 245.
(18) (1910) 8 I. C. 264.
(19) (1898) 22 Bom. 820.
(20) (1898) 22 Bom. 672.
(21) (1896) 18 All. 69.
(22) (1899) 21 All. 380.
(23) (1871) 16 W. R. 186.
(24) (1873) 20 W. R. 352.
(25) (1875) 24 W. R. 44.
(26) (1871) 7 B. L. R. 723 *n*.
(27) (1865) Wyman 14.
(28) (1906) 141 P. R. 1906 = 13 P. W. R. 1907

as regards mortgages, [*Alikjan Bibi* v. *Rambaran Shah* (7), *Munshi Basiruddin* v. *Mahomed Jalish* (29)], there is apparently some divergence of judicial opinion. We accordingly hold that the plaintiff as *benamidar* is not entitled to maintain a suit for partition of the joint property in dispute.

It has finally been argued on the authority of the decision in *Ram Bhurosee Singh* v. *Bissesser Narain Mahata* (30), that the defendants should not have been allowed to object that the plaintiff was not the real owner. There is no foundation for this contention. The defendants allege that the vendor of the plaintiff was a party to a prior partition suit instituted in 1907 and that the present suit had been instituted at his instance and on his behalf by his *benamidar* with a view to enable him to escape from the effects of the decree in the earlier litigation. This, if established, is a complete answer to the suit as framed, and the defendants were undoubtedly competent to urge this defence, as they have successfully done. This also meets another objection taken by the defendants, namely, that the proper procedure was not to dismiss the suit but to direct that the beneficial owner be made a joint plaintiff—a course commended in *Sita Nath Saha* v. *Nobin Chunder Roy* (31), *Gopi Nath Chobey* v. *Bhugwat Pershad* (32), *Kallee Prosonno* v. *Dinonath* (11), *Bhola Pershad* v. *Ram Lal* (33). In the present case the procedure now suggested cannot possibly be adopted. In the *first* place the vendor of the plaintiff cannot be joined as a co-plaintiff without his consent. In the *second* place if he was so joined, it would be of no avail as the relief claimed must be refused on the ground that the suit is barred by the decree in the prior partition suit.

As a last resort the plaintiff has relied upon her *jote* right, but we are of opinion that the District Judge has very properly left the matter open for adjudication in a separate suit appropriately framed in that behalf.

Tht result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(29) (1908) 12 C. W. N. 409.
(30) (1872) 18 W. R. 454.
(31) (1880) 5 C. L. R. 102.
(32) (1884) 10 Cal. 697.
(33) (1897) 24 Cal. 34.

A. I. R. 1916 Calcutta 647

MOOKERJEE AND RICHARDSON, JJ.

Akhil Chandra Shaha and *others*—Plaintiffs—Appellants.

v.

India General Navigation and *Railway Company, Ltd.* and *River Steam Navigation Company, Ltd.*—Defendants—Respondents.

Second Appeal No. 2679 of 1912, decided on 4th March, 1915, against the Decree of the Dist. Judge, Backergunj, dated 19th July, 1912.

(a) Carriers Act (3 of 1865)—Carriers liability is akin to an insurer's—His liability for loss is only subject to act of God or King's enemy—Liability can be varied by contract.

A common carrier in India is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract. 10 Cal. 166; 18 Cal. 620 (P.C.) and 38 Cal. 28, foll.

[P. 648, C. 1.]

(b) Common Carrier—Negligence—Burden of proof—Loss is *prima facie* proof of negligence and hence burden of proof of absence of negligence is on carrier.

The burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence. 24 Cal. 786; 26 Cal. 398, (P.C.); 17 Mad. 445 and 40 Cal. 716, ref.

[P. 648, C. 1.]

(c) Civil P. C. (5 of 1908), S. 100—Test to find whether question of negligence is of fact or law explained.

In order to find whether the question of negligence is a question of law or fact, the rule is that from any given state of facts the Judge must say whether negligence can legitimately be inferred and the Jury, whether it ought to be inferred. In other words, if the contention is that there is no evidence of negligence, the question is one of law; on the other hand, the question, whether the evidence is sufficient to justify the inference of negligence is one of fact. (1877) 3 A. C. 193, foll.; 24 Cal. 787, ref. and foll.

[P. 649, C. 1.]

Jogendra Chandra Ghose and *Satis Chandra Ghose*—for Appellants.

Mohendra Nath Roy and *Mohini Mohan Chatterjee*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for damages. On the 7th April, 1910, the plaintiffs made over to the defendants, who are common carriers, sixty bags of sugar for carriage from Calcutta to Jhalakati. The goods were received in the ordinary course of business and were placed on a flotilla for conveyance to the place of destination. On the 12th April,

between 2-30 and 3 in the morning the flat, which carried the goods, struck a snag; the vessel thus sprang a leak and the sugar in the bags was spoiled by the water. The plaintiffs accordingly claim as damages the price of the sugar. The defendants plead non-liability by virtue of the condition printed on the back of the forwarding note. The Munsif decreed the suit, but on appeal the District Judge has dismissed it. On behalf of the plaintiffs the decision of the District Judge has been assailed as erroneous in law, and reference has been made to the provisions of the Indian Carriers Act, 1865, and to judicial decisions thereon.

Two principles applicable to cases of this description must now be accepted as firmly settled. The *first* principle is that a common carrier in this country is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him, in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract. This is clear from the decision of a Full Bench of this Court in *Moothora Kant Shaw* v. *India General Steam Navigation Company* (1), as also from the decision of the Judicial Committee in *Irrawaddy Flotilla Company* v. *Bhuwan Das* (2) and a recent decision of this Court in *British and Foreign Marine Insurance Company* v. *India General Navigation and Railway Company* (3). The *second* principle is that the burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence. On this point it is sufficient to refer to the cases of *Choutmull Doogur* v. *River Steam Navigation Company* (4), affirmed on appeal to the Judicial Committee in the *River Steam Navigation Company* v. *Choutmull Doogar* (5), *Sesham Patter* v. *Moss* (6) and *India General Steam Navigation Company* v. *Bhagwan Chandra Pal* (7).

Now, the fifth clause of the conditions printed on the back of the forwarding note in the present case is in these terms:—

"The Company will not be liable for the loss or damage to any property delivered to be carried, caused by the act of God, stress of weather, difficulties and casualities of navigation, or any accident of the rivers or navigation, or any other loss or damage of whatever nature or kind so-ever, unless such loss or damage shall have arisen from the negligence or criminal act of their servants or agents."

The burden of proof is upon the defendants, carriers, to establish that the loss did not arise from negligence on their part. This point of view was apparently not fully appreciated by the District Judge, when he stated that in his opinion there was not sufficient evidence from which he could reasonably infer such negligence on the part of the servants of the defendants as would entitle the plaintiffs to damages. No question of burden of proof, however, really arises in this case, for as, was pointed out in the case of *Central Cachar Tea Company* v. *River Steam Navigation Company* (8), where evidence has been given on both sides of the circumstances under which the loss took place, and the Court has arrived at a finding upon the whole of such evidence, the question of burden of proof ceases to have any practical importance. Consequently, the ultimate point for consideration in the present case is whether the defendants have established absence of negligence on their part. This question requires consideration from two points of view, *viz.*, in the *first* place, was the injury to the flat due to negligence of the servants of the carriers, and *secondly*, after the collision had taken place, was there any negligence on their part in their attempt to save the goods? As regards the *first* branch of this question, the District Judge has found that there was no evidence to show that the snag was visible at the time of the night the flotilla passed, and he has drawn the inference that the accident was not attributable to careless navigation. As regards the *second* branch, he has found that as soon as the collision had taken place, the *serangs* went into the port hole and found the water waist deep there. They at once got to work with the pumps and reduced the accumulation of water. This was clearly their first duty, and by the time this was done, a good deal of damage would necessarily have been caused to the sugar. Reference, however, has been made to the circumstance that the bags of sugar had been placed alongside some bags of soda and that the water which had passed through the soda did greater damage to the sugar than

(1) (1884) 10 Cal. 166.
(2) (1891) 18 Cal. 620=18 I.A. 121 (P.C.).
(3) (1911) 38 Cal. 28=9 I.C. 364.
(4) (1897) 21 Cal. 786.
(5) (1899) 26 Cal. 398=26 I.A. 1 (P.C.).
(6) (1894) 17 Mad. 445.
(7) (1913) 40 Cal. 716=19 I.C. 245.

(8) (1897) 24 Cal. 787.

might otherwise have happened. But we are unable to hold that this was an act of negligence on the part of the carriers; they were under no obligation to keep the bags of different articles in distinct compartments in anticipation of a possible accident. The conclusion follows that the finding of the District Judge that there was no negligence on the part of the carriers, does not involve any error of law.

It has been finally argued that the question whether there was or was not negligence on the part of the carriers under given circumstances, is always a question of law which can be determined by this Court in second appeal. We are unable to accept this contention as well founded on principle. The rule applicable to cases of this description was enunciated by Lord Cairn in the case of *Metropolitan Railway Company* v. *Jackson* (9) in these terms:

"It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the Judge must say whether negligence *can* legitimately be interred and the Jury, whether it *ought* to be inferred."

In other words, if the contention is that there is no evidence of negligence, the question is one of law for the Judge to decide; on the other hand, the question, whether the evidence is sufficient to justify the inference of negligence, is one of fact. The present case is clearly of the latter description.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B/R.K.

Appeal dismissed.

(9) (1877) 3 A. C. 193=47 L. J. C. P. 303=37 L. T. 679=36 W. R. 175.

A I. R. 1916 Calcutta 649

RICHARDSON AND IMAM, JJ.

Krishna Kumar Ray Chowdhury — Plaintiff - Appellant.

v.

Chandra Kanta Mitra and *others*— Defendants--Respondents.

First Appeal No. 189 of 1914, decided on 30th November, 1915, against the Decree of Sub-Judge, 1st Class, Backergunge, dated 30th March, 1914.

Court Fees Act (7 of 1870), S. 7, Cl. 4 (c)—Plaint giving out value for purposes of jurisdiction but not for relief—Value of relief sought less—Court-fee payable on valuation of suit in plaint—Civil Procedure Code (1908), O. 7, R. 11, Cl. (c).

Where in a suit under S. 7, Clause (4) (*c*) of the Court Fees Act, 1870, the plaint contains no valuation of the relief sought but gives a valuation of the suit for the purpose of jurisdiction, the Court-fee is to be computed according to the valuation of the suit for the purpose of jurisdiction, though the actual value of the relief sought is less, unless the plaintiff with the Court's leave amends the plaint. [P. 649, C. 2.]

Abinash Chandra Guha—for Appellant.

Judgment.—This is an appeal from a decree rejecting a plaint under the provisions of O 7, R. 11, Clause (*c*), Civil Procedure Code. We have not had the advantage of hearing any one for the respondent; but the facts appear to be as follows:—

The plaint is dated the 20th February, 1914, and originally it bore a stamp of the value of Rs. 10. It is perfectly clear, however, as the learned Pleader for the plaintiff-appellant now concedes, that the suit is much more than a suit for a mere declaratory decree. The learned Subordinate Judge, therefore, was perfectly correct when he decided by his order of the 7th March 1914, that the Court-fee paid was insufficient. That order, however, might have been to some extent misleading in regard to the amount of the Court-fee that ought to have been paid. The suggestion then made was that the plaint should have been stamped as if it was a plaint for the recovery of the property to which the suit related. The plaintiff founding himself on that part of the order of the 7th March, put in an additional fee, the whole fee then paid being the proper *ad valorem* fee for a suit for the recovery of possession of the property. There is no doubt, however, that the fee payable in the present suit, a suit under sub-Clause (*c*), Clause 4 of S. 7 of the Court Fees Act, should have been computed under that section according to the amount at which the relief sought had been valued in the plaint. It is true that the plaint contains no valuation of the relief sought. In its paragraph 18 however, a valuation of that suit is made for the purpose of jurisdiction; and under S. 8 of the Suits Valuation Act, the value for the computation of Court-fees and the value for the purposes of jurisdiction are to be the same. The learned Subordinate Judge, therefore, was again correct when by his order of the 21st March, 1914 he refused to accept as sufficient, the additional fee which the plaintiff had put in. By that order, he gave the plaintiff a further week for the

purpose of putting in the proper fee. The plaintiff failed to carry out that order and on the 30th March, 1914, the suit was dismissed by the decree under appeal. The case is perhaps one of some hardship. In the *first* place, it may be that the plaintiff was originally misled by the form in which the order of the 7th March, 1914 was drawn up. In the *second* place, the amount at which the suit was valued for the purposes of jurisdiction was possibly greater than the actual value of the relief sought. If that be so, however, the plaintiff should not have contented himself with a simple failure to carry out the Subordinate Judge's order, but should have asked for leave to amend the plaint. In the circumstances, the conclusions at which we have arrived is that we should set aside the decree of the learned Subordinate Judge and direct that the plaint be accepted, provided that plaintiff pays the Court-fee computed on the footing that the value of the relief sought is six thousand rupees, within fourteen days of the receipt of the record by the Court below. If the deficit fee is not paid within that time, this appeal will stand dismissed.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 650

MOOKERJEE AND NEWBOULD, JJ.

Kamaksha Basini Chowdhurani—Objector—Appellant.

v.

Jagat Sundari Chowdhurani—Applicant—Respondent.

Appeal No. 535 of 1913, decided on 20th March, 1915, from the Orders of Dist. Judge, Mymensingh, dated 15th September and 19th November, 1913.

Guardian and Wards Act (8 of 1890), S. 47 (g)—Two guardians appointed—One applied for Letters of Administration of estate of deceased father of minor—Other applied for removal on this ground—Order passed allowing her to act singly for three months—After two months she was further allowed to act singly—Held order was appealable—Held enquiry should have been held before passing such order of removal—Held further that the matter should not have been kept pending indefinitely.

One of the two joint guardians appointed under the Guardians and Wards Act applied for the removal of the other on the allegation that she had made an application for Letters of Administration to the estate of the father of the minor and thereby had acted in a manner which disqualified her from holding the office of guardian. The District Judge made the following order: "The elder widow (the applicant) is permitted to manage the minor's estate singly, until the disposal of the case for the next three months." Two months after another order was recorded: "Put up after disposal of the Letters of Administration case. Order regarding the management of the estate by the petitioner will remain for the present." An appeal was preferred against these orders:

Held, that the appeal was competent under Clause (*g*) of S. 47 of the Guardians and Wards Act:

that an order of this description should not be made without some inquiry into the allegations made;

that the matter should not remain in abeyance till the disposal of the Letters of Administration case. [P. 651, C. 1.]

Taruk Chunder Chuckerbutty—for Appellant.

Mukund Nath Roy—for Respondent.

Judgment.—This appeal is directed against two orders passed under the Guardians and Wards Act, 1890. On the 31st August, 1912, two ladies, who were the widows of one Kalikumar Sen Chowdhury and are the appellant and the respondent respectively in this appeal, were appointed joint guardians of the person and property of an infant, Hemendra Nath Sen Chowdhury, who had been taken in adoption by the respondent. The two guardians could not long act in harmony, and not many months had elapsed when on the 16th June, 1913 the respondent applied to the District Judge for removal of the co-widow from the office of joint guardians. The application was promptly opposed. On the 30th August, 1913 the respondent brought to the notice of the District Judge that the appellant had made an application for Letters of Administration to the estate of the father of the infant with a copy of an alleged will and urged that thereby she had acted in a manner which disqualified her from holding the office of guardian. The District Judge thereupon, on the 15th September, 1913, made the following order:

"The elder widow is permitted to manage the minor's estate singly, until the disposal of the case for the next three months."

On the 19th November another order to the following effect was recorded:

"Put up after disposal of the Letters of Administration case. Order regarding the management of the estate by the petitioner on the 15th September will remain for the present."

This appeal is directed against the orders of the 15th September and 19th November.

On behalf of the respondent, a preliminary objection has been taken that the appeal is

incompetent. In answer it has been argued by the appellant that the appeal is competent under Clauses (*f*), (*g*) and (*i*) of S. 47 of the Guardians and Wards Act. In our opinion, it is plain that the appeal is competent under Clause (*g*). The real effect of the orders in question is to remove the appellant from the office of guardian of person and property of the infant, for the order of the 19th November is to remain in operation for an indefinite length of time. It may also be plausibly contended that the case is covered by Clause (*f*). But it is not necessary, for our present purpose, to determine whether Clause (*f*) or (*i*) is also applicable to the case.

As regards the merits we are of opinion that the orders cannot be sustained, as they were made without any inquiry into the truth or otherwise of the respective allegations of the guardian. On behalf of the respondent, the view has been pressed upon us that as the appellant has made an application for Letters of Administration to the estate of her husband on the basis of an alleged will, she has become hostile to the infant and is consequently no longer fit to continue as guardian of his property. No information, however, is available as to the terms of the will and we are unable on the materials before us to say that the conduct imputed to the appellant is of such a description as necessarily disqualifies her for the office of guardian. It is plain that an order of this description should not be made without some inquiry into the allegations made. It is also obvious that the matter should not remain in abeyance till the disposal of the Letters of Administration case, which, it is not improbable, may continue for some length of time. It is desirable that the question of guardianship should be settled as early as practicable.

The result is that this appeal is allowed and the orders of the 15th September and 19th November, set aside. The case will be remitted to the District Judge in order that he may inquire into the allegations made in the application of the 6th June, 1913 and determine, upon evidence to be adduced by both parties, whether the appellant should be removed from the office of guardian. In the examination of this question, her conduct as applicant in the Letters of Administration case will necessarily have to be taken into account. There will be no order as to costs of this appeal.

V.B./R.K.

Appeal allowed; Case remanded.

A. I. R. 1916 Calcutta 651

MOOKERJEE AND ROE, JJ.

Tara Sankar Ghose and *another*—Plaintiffs—Petitioners.

v.

Nasaruddi and *others*—Defendants—Opposite Parties.

Civil Rule No. 987 of 1914, decided on 7th May, 1915, against the Order of Munsif, 4th Court, Dacca.

(a) Bengal Tenancy Act (8 of 1885), S. 153-A—S. 153-A requires that a deposit of amount admitted to be due must be made before applying for setting aside *ex parte* rent decree between landlord and tenant.

S. 153-A of the Bengal Tenancy Act requires that no application to set aside an *ex parte* decree in a suit between a landlord and tenant as such shall be admitted, unless the applicant has, at or before the time when the application is admitted, deposited in the Court to which the application is presented, the amount, if any, which he admits to be due from him to the decree-holder. [P. 652, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), S. 153-A—Scope of admission—Admission to the rent of holding in suit.

The admission of rent contemplated by the Legislature is an admission that rent is due in respect of the holding for which the suit has been instituted. [P. 652, C. 2.]

(c) Bengal Tenancy Act (8 of 1885), S. 153-A—For setting aside *exparte* decree no deposit is required where no amount is admitted to be due.

A person is not bound to make any deposit where he does not admit that any money is due from him to the plaintiff in respect of the holding for which rent is claimed. [P. 652, C. 2.]

(d) Limitation Act (9 of 1908), Art. 164—Art. 164 prescribes period of limitation for setting aside *exparte* decree.

Article 164 of the first Schedule to the Limitation Act provides that an application by a defendant for an order to set aside a decree passed *ex parte* may be made within thirty days from the date of the decree or, where summons was not duly served, when the applicant had knowledge of the decree. [P. 652, C. 2.]

(e) Limitation Act (9 of 1908), S. 3—Point of limitation must be considered whether raised or not.

Under S. 3 of the Indian Limitation Act it is obligatory upon the Court to dismiss a time-barred application, although limitation is not set up as a defence. 34 Cal. 941; 1 C. W. N. 67; 20 All. 78 and 39 Cal. 473, ref. to. [P. 652, C. 2.]

(f) Civil P. C. (5 of 1908), S. 115—Allowing time barred application is material irregularity.

A Court acts with material irregularity in the exercise of its jurisdiction in granting relief, without adjudication of the question of limitation, on an application which, on the face of it, is barred by limitation. [P. 653, C. 1.]

Sarat Chandra Roy Chowdhury and *Bhudeb Chandra Roy*—for Petitioners

Satish Chandra Chowdhury—for Opposite Parties.

Judgment.—We are invited in this Rule to set aside an order made under R. 13 of O. 9 of the Code of Civil Procedure. The petitioner sued the opposite party and four other persons for recovery of arrears of rent. The opposite party, who was the first defendant, alone entered appearance and filed a written statement. On the day of trial, however, no one appeared on his behalf. The result was that an *ex parte* decree for rent was made against him on the 15th January, 1914. On the 25th January, he made an application to the Court to set aside the *ex parte* decree. That application was granted on the 27th September, 1914. The validity of this order is now challenged on two grounds, namely, *first*, that the Court was not competent to entertain the application under R. 13 of O. 9 of the Code of 1908, inasmuch as the requirements of S. 153-A of the Bengal Tenancy Act were not fulfilled; and, *secondly*, that the Court was bound to dismiss the application as barred by limitation under Art. 164 of the Schedule to the Indian Limitation Act.

As regards the *first* ground, we are of opinion that it cannot possibly be maintained. S. 153-A requires that no application to set aside an *ex parte* decree in a suit between a landlord and tenant as such shall be admitted, unless the applicant has, at or before the time when the application is admitted, deposited in the Court to which the application is presented the amount, if any, which he admits to be due from him to the decree-holder. The petitioner contends that the defendant admitted that rent was due from him to the plaintiff and yet did not make the requisite deposit. To test the validity of this contention, we must examine the plaint and written statement. The plaintiff claimed rent in respect of several parcels of land within definite boundaries, said to cover an area of 5 *pakis* and alleged to have been held by the defendant under him at an annual rent of Rs. 3-10-0. The defendant pleaded that the land mentioned, in the plaint constituted a portion only of his holding; he appended to the written statement a list of the parcels of land held by him within the boundaries mentioned and asserted that he held all these lands as one holding at an annual rent of Rs. 7-12-0. He further stated that he had always been ready and willing to pay the rent lawfully payable by him. Under these circumstances, we have to determine whether the defendant may be said to have admitted that rent was due from him to the plaintiff within the meaning of Clause (*a*) of S. 153-A. We are of opinion that the question must be answered in the negative. The defence in substance was that the defendant did not hold the holding alleged by the plaintiff and that he was liable in respect of rent of a different holding. That does not constitute an admission that rent is due from him to the plaintiff; the admission contemplated by the Legislature is an admission that rent is due in respect of the holding for which the suit has been instituted. It is further clear that if the contention of the plaintiff is well-founded, the written statement itself should not have been accepted under S. 149 of the Bengal Tenancy Act; it is significant that no such objection was taken by the plaintiff to the reception of the written statement. In our opinion, it is plain that the requirements of S. 153-A have been fulfilled; the defendant was not bound to make any deposit, because he did not admit that any money was due from him to the plaintiff in respect of the holding for which rent was claimed. The first contention consequently fails.

As regards the *second* ground, it is plain that the application is, on the face of it, barred by limitation. Article 164 of the Schedule to the Limitation Act provides that an application by a defendant for an order to set aside a decree passed *ex parte* may be made within thirty days from the date of the decree or, where summons was not duly served, when the applicant had knowledge of the decree. In this case, the summons was duly served. Consequently, the defendant was bound to make his application within 30 days from the date of the decree; that is within 30 days from the 15th January, 1914. This he did not do. It was not competent to the Court to extend the time under S. 5 of the Indian Limitation Act, nor was any ground of fraud established so as to bring the case within the scope of S. 18. On behalf of the respondent, however, it has been urged that this point was not taken before the Court below and should not now be entertained. It is conceded on behalf of the petitioner that the point was not brought to the notice of the Court, but under S. 3 of the Indian Limitation Act it was obligatory upon the Court to dismiss the application although limitation

was not set up as a defence, [*Balaram* v. *Mangta Das* (1)]. The position, then, is that the Court has entertained an application which, on the face of it, was barred by limitation and has failed to adjudicate upon the question of limitation. Consequently, as ruled by this Court in the case of *Kailash* v. *Bissonath* (2), it is open to this Court to interfere in the exercise of its revisional jurisdiction under S. 115 of the Code, although it might not have been open to the Court to interfere if the Court below had considered the question of limitation and decided it erroneously, as ruled in the case of *Sundar Singh* v. *Doru Shankar* (3) and *Ramgopal* v. *Joharmall* (4). We hold accordingly that the Court below acted with material irregularity in the exercise of its jurisdiction in granting relief without adjudication of the question of limitation, on an application which, on the face of it, was barred by limitation.

The result is that this Rule is made absolute and the order of the Court below discharged. As the ground on which the petitioner succeeds, was not taken in the Court below, each party will pay his own costs throughout these proceedings.

V.B./R.K.

Rule made absolute.

(1) (1907) 34 Cal. 941.
(2) (1897) 1 C. W. N. 67.
(3) (1898) 20 All. 78
(4) (1912) 39 Cal. 473=15 I. C. 547.

A. I. R. 1916 Calcutta 653

HOLMWOOD AND MULLICK, JJ.

Gangadhar Karmakar and *others*—Defendants—Appellants.

v.

Shekhar Basini Dasya—Plaintiff and another—Defendant—Respondents.

Second Appeal No. 1706 of 1913, decided on 23rd November, 1915, from the Decree of Dist. Judge, Khulna, dated 5th April, 1913.

(a) Bengal Tenancy Act (8 of 1885), S. 153—Suit for rent below Rs. 50—Defendant setting up title in himself—Relation of landlord and tenant not established—Dismissal of suit—Appeal not maintainable.

Where in a suit for rent under the Bengal Tenancy Act for an amount less than Rs. 50, the defendant set up the title in himself, but the suit was dismissed on the ground that no relation of landlord and tenant existed between the parties as no rent had ever been collected by the plaintiff

Held, that the decision was not appealable. [P. 653, C. 2.

(b) Practice—Second Appeal—Appeal from first Court's decision not maintainable—Second Appeal not competent.

No second appeal lies to the High Court from the decision in appeal of the lower Appellate Court when no appeal lay to the latter Court from the decision of the First Court. 12 C. W. N. 835, foll. [P. 654, C. 1.]

(c) Civil P. C. (5 of 1908), S. 115—Second appeal held incompetent—High Court has jurisdiction to deal under S. 115.

Where an appeal to the High Court is found to be incompetent, the High Court has jurisdiction in a proper case to deal with the matter under S. 115, Civil Procedure Code of 1908, even without an application for that purpose.

[P. 654, C. 1.]

Baranashibasi Mukerjee—for Appellants

Sarat Chandra Roy Chowdhury and *Sasadhar Roy (Junior)*—for Respondents.

Judgment.—This second appeal arises out of a rent suit brought under rather curious circumstances. The plaintiff, a lady, alleging that she purchased the land from the original proprietor, sued her father as a tenant for rent for the last two years of her vendor's incumbency and for the first two years of her possession. The father set up the title in himself and said that he purchased the holding *benami* in the name of his daughter and leased it out to his son-in-law—nominally for his daughter. The learned Munsif declined to have anything to do with these conflicting claims and decided that, because the plaintiff had not attempted to collect or collected any rents from her father, the relationship of landlord and tenant did not exist. The daughter went in appeal before the learned District Judge, and he held, on a preliminary objection, that the question of the conflicting title to or interest in the land had been decided by the Munsif and that it was competent to him to deal with the appeal and accordingly he dealt with it, and found clearly on the facts that the lady was speaking the truth and was supported up to the hilt by the necessary documents and that the story told by the father was a mere pretence to get rid of his liability.

In appeal before us, it is argued that the decision of the Munsif being simply that the relationship of landlord and tenant did not exist between the parties inasmuch as no rents had ever been collected, was a decision from which there was no appeal, the amount of rent claimed being under Rs. 50. In reply, the learned Vakil for the respondent strenuously argued that this case falls under those

exceptional instances which are referred to in two cases reported in 8 Calcutta Weekly Notes, one case being *Sita Nath Pal* v. *Kartick Gharmi* (1), and the other *Ram Kanai Dass* v. *Fakir Chand Dass* (2). We are, however, of opinion that the ruling in *Shilabati Debi* v. *Roderigues* (3) which is perfectly general in its terms, applies equally to this case as to every other case in which there has been no actual decision of the conflicting claims or interest in the land.

The learned Vakil took a *second* point that the suit was for rent immediately after the lady's purchase and that the decision that no rent was collected, was no decision at all and the Munsif had, therefore, failed to exercise a jurisdiction vested in him by law and that as the plaintiff had, with the appeal to the District Judge, filed an application under the proviso to S. 153 of the Bengal Tenancy Act for revision, the lower Appellate Court was perfectly competent to pass the decision he did. Here, again, we must rule against the respondent on the simple ground that the lower Appellate Court did not act under the proviso, but distinctly found that an appeal did lie and decided the appeal on the merits.

But there is a *third* ground upon which we are clearly of opinion that the respondent must succeed. It is laid down in the case of *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (4) that if no appeal lies from a Munsif to a Subordinate Judge, no appeal lies from the Subordinate Judge to this Court and that dictum is expressed in the most general terms and is obviously based upon common sense, for, if the first appeal is a nullity, *ex hypothesi* there cannot be a second appeal. The learned Vakil for the appellant asks us to deal with the matter under S 115 of the Code of Civil Procedure, as, no doubt, we are fully empowered to do, even though no application has up to date been made for that purpose. But when we are asked to exercise this extraordinary jurisdiction in revision *suo moto* it becomes necessary to consider the merits of the case, and on reading the learned Judge's judgment, it is perfectly plain that no good purpose whatever can be served by allowing this unfortunate litigation between a father and daughter to continue. There is the clearest finding, as we have already said, that the lady's story is established both by oral and documentary evidence beyond any doubt, and it is not, in the least, likely that this Court would interfere in revision in the face of such findings of fact by a very experienced District Judge.

The result is that the appeal is dismissed. Under the circumstances, the parties will bear their own costs throughout, and the decree of the lower Court will be modified to that extent.

V.B./R.K.

Appeal dismissed.

(1) (1904) 8 C. W. N. 434.
(2) (1904) 8 C. W. N. 438.
(3) (1908) 35 Cal. 547
(4) (1908) 12 C. W. N. 835.

A. I. R. 1916 Calcutta 654

MOOKERJEE AND NEWBOULD, JJ.

Ambica Charan Chakrabarti and *another* —Defendants—Appellants.

v.

Sasitara Debi and *others*—Plaintiffs—Respondents.

Second Appeal No. 3148 of 1913, decided on 7th April, 1915, against the Decree of Dist. Judge, Dacca, dated 18th August, 1913.

(a) Civil P. C. (5 of 1908), O. 41, R. 4—To apply R. 4 appeal must be against whole decree.

To justify the application of R. 4 of O. 41 of the Code of Civil Procedure it is essential that the appeal should have been preferred against the whole decree. [P. 655, C. 2.]

(b) Civil P. C. (5 of 1908), O. 41, R. 33—For purpose of R. 33 appeal need not be against whole decree—Order under R. 33 can be made even in favour of strangers to appeal.

For the application of R. 33 of O. 41 of the Code, it is not essential that the appeal should be directed against the entire decree, nor need the order be made in favour of persons who are parties to the appeal or have filed objections in the Court below. [P. 656, C. 1.]

(c) Succession Act (10 of 1865), Ss. 82 and 121—Legatee get whole interest unless otherwise provided—Devisee to have interest till he resided in a house was held as condition and did not imply life interest—Condition was valid under S. 121—Presumption of Hindu's desire not to allow property to pass out of family is not inflexible.

Where property is bequeathed to any person he is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him. [P. 656, C. 1.]

Where according to the will the devisee was to have an interest so long as he resided in the house of the testator his maternal grandfather.

Held, that the restriction was imposed as a condition, and not as an indication that the interest created was a life-estate. [P. 656, C. 2.]

that the condition was perfectly legal under S. 121 of the Indian Succession Act.

[P. 656. C. 2.]

The presumption that a Hindu does not desire that any portion of his property should pass beyond his own family, is not an inflexible guiding principle of universal application.

[P. 656, C. 2.]

Akshoy Kumar Banerjee – for Appellants.

Rajendra Chandra Guha and *Trailokhya Nath Ghose*—for Respondents.

Judgment.—This is an appeal by two of the defendants in a suit for partition of joint property. The property originally belonged to one Ramlochan Ganguly, who made a testamentary disposition on the 5th November, 1850. He left three sons—Tarini, Guru Charan and Ishan, and a grandson by a daughter, named Nilmoney. Tarini left two sons—Sasi Kumar and Basanta. The plaintiffs-respondents are the legal representatives of Sasi Kumar. The eighth and ninth defendants are the representatives of Basanta. The defendants-appellants have acquired the interest of Nilmoney in the portion of the property in dispute. The substantial question in controversy between the parties was, whether Nilmoney took a life-interest in the estate of his maternal grandfather, which terminated upon his death, or whether he took an absolute interest (subject to a condition which was fulfilled by him) which, upon his death, passed to his representatives. The Court of first instance decided in favour of the present appellants. That decree was assailed in appeal by the plaintiffs who claim by right of inheritance a half share of the interest which was vested in Nilmoney during his life-time. The eighth and ninth defendants, who set up a precisely similar claim in the primary Court, were not joined as respondents, nor did they prefer an appeal on their own account. Upon the appeal of the plaintiffs, the District Judge has reversed the decision of the Subordinate Judge and has made a decree, not only in favour of the appellants before him, but also in favour of the two defendants who were not parties to that appeal. On the present appeal, the decree of the District Judge has been assailed on two grounds, namely, *first*, that it was not competent to him to vary the decree of the Court of first instance in favour of persons who were neither appellants nor respondents before him; and, *secondly*, that upon a true construction of the will of the original proprietor, he should have affirmed the decision of the Subordinate Judge.

As regards the first ground, it is plain that neither R. 4 nor R. 20 of O. 41 of the Code is of any assistance to the respondents. R. 4 is in these terms:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendsnts, may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

Consequently, to justify the application of this rule, it is essential that the appeal should have been preferred against the whole decree. In the case before us, the decree of the Court of first instance was assailed by the plaintiffs alone, and only to the extent that they were prejudicially affected thereby. R. 20 is in these terms:

"Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future date to be fixed by the Court direct that such person be made a respondent."

This rule has obviously no application to this case, and the District Judge did not take action under it.

R. 33, however, is expressed in much wider terms as follows:

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

For the application of this rule, consequently, it is not essential that the appeal should be directed against the entire decree; nor need the order be made in favour of persons who are parties to the appeal or have filed objections in the Court below. In the case before us, plaintiffs as the representatives of Sasi Kumar and the eighth and ninth defendants as the representatives of Basanta were in an identical position with regard to the estate of Nilmoney; in other words, if the contention prevailed that Nilmoney had an interest terminable with his life,

that interest would vest, after his death, equally in the representatives of Sasi Kumar and Basanta. Consequently, if upon the appeal of the plaintiffs, the Court was satisfied that the decree of the primary Court was erroneous and was based upon an incorrect interpretation of the will of the original proprietor, the ends of justice required that the benefit of such decision should accrue not merely to the plaintiffs-appellants before the lower Appellate Court, but also to the representatives of Basanta, although the latter were neither parties respondents to the appeal nor appellants in an appeal preferred by themselves. The first ground upon which the decree of the District Judge is assailed cannot consequently be supported.

As regards the second ground, the validity of the respective contentions of the parties must be tested with reference to the terms of the will. On behalf of the representatives of Basanta, it has been argued that Nilmoney had nothing beyond a right of residence in a portion of the property of his maternal grandfather. On behalf of the plaintiffs-respondents a higher status has been conceded to him; and it has been contended that he took a life-interest in the estate of his maternal grandfather, which terminated on his death. In opposition to these contentions, the appellants have argued that Nilmoney was given an absolute interest subject to a condition, namely, that he should have an interest so long as he resided in the house of his material grandfather. Under S. 82 of the Indian Succession Act, it is plain that where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him. *Prima facie*, Nilmoney had an absolute interest. The question is, whether he took, as is argued by the appellants, an absolute interest subject to a condition, or whether, as is argued by the plaintiffs-respondents, he took a life-interest. The terms of the will are by no means free from ambiguity, as is indicated by the fact that the Courts below have taken divergent views upon this the most material point in the case. After anxious consideration of the arguments addressed to us on both sides, we have arrived at the conclusion that the view taken by the Subordinate Judge is correct. In our opinion, the intention of the testator was to give an absolute interest to Nilmoney, his grandson by daughter, who lived with him and was brought up by him. It is plain that he intended to make a provision for him; but he insisted, as was not unnatural, that his grandson should reside in his house. This was imposed as a condition, and not as an indication that the interest created was a life-estate. It would further be an unreasonable interpretation of all the provisions of the will to hold that the testator intended to enforce the condition of residence even after the death of Nilmoney. The condition was perfectly legal under S. 121 of the Indian Succession Act [*Ganendro Mohun Tagore* v. *Rajah Juttendro Mohun Tagore* (1), *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (2) and *Shyama Charan* v. *Naba Chandra* (3)] and it was fulfilled by Nilmoney because there is no dispute that, during his life-time, he continued to reside in the dwelling house of his maternal grand-father. The result was that, upon his death, his interest passed to his representatives and has now vested, not in the respondents, but in the appellants.

Reference has finally been made to the observations of their Lordships of the Judicial Committee in the case of *Mohamed Shumsool Hooda* v. *Shewukram* (4); and it has been argued that as there is a presumption that a Hindu does not desire that any portion of his property should pass beyond his own family, every effort should be made to avoid a contrary result. That, however, is not an inflexible guiding principle of universal application, as is made manifest by contrasting the decisions in *Surajmani* v. *Rabi Nath Ojha* (5) and *Radha Prasad* v. *Ranee Mani Dassee* (6). Where, as here, the terms of the Will indicate that an absolute interest, subject to a condition was intended to be granted to a grandson by a daughter, it would be wrong to interpret its provisions so as to restrict that interest and thus defeat the intention of the testator.

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(1) (1873-74) 1 I.A. 387 = 14 B.L.R. 60 (P.C.).
(2) (1897) 24 Cal. 646.
(3) (1912) 14 I. C. 708
(4) (1874-75) 2 I. A. 7 = 14 B.L.R. 226 (P. C.).
(5) (1908) 30 All. 84 = 35 I. A. 17 (P. C.)
(6) (1908) 35 Cal. 896 = 35 I.A. 118 (P.C.).

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. In view, however, of the obscurity in the terms of the will, which justifies a contest, we direct that each party pay his costs both here and in the Court of Appeal below.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 657

WALMSLEY, J.

Jnanendra Nath Bhattacharjee—Defendant—Appellant.

v.

Chandi Charan Saha and *another*—Plaintiffs—Respondents.

Second Appeal No. 904 of 1913, decided on 12th March, 1915, against the Decree of Dist. Judge, Nadia, dated 31st July, 1912.

Contract Act (9 of 1872), S. 23—Partnership in excise license to sell is not illegal.

A partnership for the sale of excisable articles is not illegal. [P. 657, C. 2.]

Baranashibasi Mukherjee—for Appellant.

Shiba Prosanna Bhattacharjya—for Respondents.

Judgment.—The plaintiff is the licensee of a country liquor shop. His son is the licensee of an imported liquor shop. He brought a suit against the defendant, now appellant, for accounts alleging that the defendant was his servant or *karmachari*. In the alternative he asked that if the defendant was found to be a partner, the partnership should be dissolved and an account in respect of the partnership taken.

The defendant appeared and said that he was a partner, and the learned Munsif found that he was a partner to the extent of 8 annas and he passed a decree accordingly.

Then the plaintiff preferred an appeal to the District Judge and the learned Judge held that the defendant could not be a partner, because the license of a liquor shop is a personal privilege and the licensee cannot take any one as a partner into the business. He also held that as the license for the imported liquor shop stood in the name of plaintiff's son, the plaintiff could proceed with the suit only with regard to the country liquor shop. Having found that the defendant could not be a partner, he proceeded to ascertain what he really was. He came to the conclusion that he was not an ordinary servant but that he was an agent and he ordered that he should render an account.

The defendant has appealed to this Court and it is urged on his behalf that the District Judge is wrong in finding that the defendant cannot lawfully be a partner, and *secondly*, that the finding as to the defendant being an agent is against the admitted facts on the record, and *thirdly*, that the subject of defendant's status was not argued before the lower Court. With regard to the *first* point the learned District Judge quotes two cases, *Rakhal Chandra Shah* v. *Damodar Shaha* (1) and *Behari Lal Shah* v. *Jagodish Chunder Shaha* (2).

The former of these cases came before this Court in its revisional criminal jurisdiction, and I do not think it lays down any principle useful to the present case. In the second case the licensee sold his stock in trade to another person, with the intention that the transferee should carry on the business of selling liquor without obtaining a license. The agreement was held to be void. I do not think it follows from this decision, or from the prohibition contained in the Act against transferring, sub-letting and assigning, that a partnership in any form for the sale of excisable articles is illegal. But whether the learned Judge's view as to the legality of partnership is right or wrong, I think he was clearly wrong in arguing that because defendant could not legally be a partner, he must stand in some other relation to the plaintiff. The Judge should have ascertained whether the defendant was a partner in fact, and if so, what was the legal consequence. This brings me to the second and third points.

With regard to the status of the defendant, it appears from the order sheet that the learned District Judge only heard arguments on the question of law and after that the case did not come up again for hearing.

This was an error and the parties should have been allowed an opportunity of

(1) (1911) 9 I. C. 115.
(2) (1904) 31 Cal 798.

setting before the Court their arguments as to the true relation between the plaintiff and defendant.

The view I take is this that the lower Appellate Court should first of all determine the relation which really existed between the parties. If it is found that they were partners, it will be for the Court to determine whether the terms of the partnership were such as to make it illegal, if they were, then it would follow from the principle laid down in the case of *Behari Lal Shah* v. *Jagodish Chunder Shaha* (2) that the agreement between them was one upon which the plaintiff could not sue.

I, therefore, set aside the decision of the lower Appellate Court and remand the case, for the appeal to be heard again in the light of these remarks.

Costs will abide the result.

V.B./R.K.

Case remanded.

A. I. R. 1916 Calcutta 658

MOOKERJEE AND ROE, JJ.

Mati Lal Poddar—Plaintiff—Appellant.

v.

Judhistir Das Teor and *others*—Defendants—Respondents.

First Appeal No. 211 of 1912, decided on 9th June, 1915, from the Decree of Sub-Judge, Dacca, dated 6th May, 1912.

(a) Civil P. C. (5 of 1908), O. 6—Plaint—Contents of.

It is absolutely essential that a plaint, not to be embarrassing to the defendants, should state those facts which will put the defendant on his guard and tell him what he will have to meet when the case comes on for trial. It is not necessary to set out the evidence whereby the plaintiff proposes to prove the facts which give him the title. [P. 659, C. 1.]

(b) Civil P. C. (5 of 1908), O. 6—Pleadings—Plaintiff bound to state nature of deeds supporting his title.

A plaintiff is bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims and show the devolution of the estate to himself. [P. 659, C. 1.]

(c) Practice—Pleadings—Parties to be restricted to their pleadings.

Parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in their pleadings. [P. 659, C. 1.]

(d) Practice—Pleadings—Inconsistent pleadings not permitted.

A plaintiff may in certain circumstances rely upon several different rights alternatively though they may be inconsistent. But he cannot be permitted to allege two absolutely inconsistent statements of facts each of which is destructive of the other. [P. 660, C. 1.]

Gopal Chunder Das—for Appellant.

Joges Chunder Roy and *Upendra Lal Roy*—for Respondents.

Judgment.—This is an appeal by the plaintiff against the preliminary decree in a suit for partition of joint property. The decree has been assailed on two grounds, namely, *first*, that the lower Court has erroneously determined the share of the plaintiff; and, *secondly*, that the lower Court has made an incorrect order for costs in favour of the defendants.

As regards the *first* ground, it appears that the disputed property was, on the 10th September, 1898, purchased at an execution sale for Rs. 6,130 by a person whom we shall call *X*. *X* had a brother *Y* who had four sons *A*, *B*, *C* and *D*. On the 7th November, 1900, *X* conveyed a six-annas share of the property to his three nephews *A*, *B* and *C*. On the 14th June, 1910, *A* transferred a two-annas share to the defendants on the assumption that he was competent to deal with that share as one of the three brothers in whose favour the conveyance had been executed by *X*. On the 6th October, 1910, *X*, *B*, *C* and *D* conveyed fourteen-and-a-half-annas share to the plaintiff, namely, a ten-annas share held by *X*, and four-and-a-half-annas share claimed by *B*, *C* and *D*, on the hypothesis that the conveyance by *X*, though nominally in favour of *A*, *B* and *C*, had really benefited *A*, *B*, *C* and *D*. On the 23rd January, 1911, the plaintiff commenced this action for partition on the allegation that he was entitled to fourteen-and-a-half-annas share of the property while the defendants were entitled to the remaining one-and-a-half-annas share. The defendants answered that they had acquired a good title to a two-annas share by their purchase from *A*, and that the plaintiff was entitled to only fourteen-annas share.

The plaint, it may be observed at the outset, is singularly meagre; it does not narrate the history of the title of the plaintiff, nor does it mention the deeds whereby the title had devolved on him. The defendants accordingly urged in their written statement that the plaintiff was not entitled to relief on a plaint so

framed and was bound to disclose the details of his title. This contention was well founded, as the plaintiff was bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims and to show the devolution of the estate to himself: *Philipps* v. *Philipps* (1), *Darbishire* v. *Leigh* (2) and *Davis* v. *James* (3); for as Cotton, L. J., said in *Philipps* v. *Philipps* (1), it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial. This much the plaintiff is bound to do, though he need not set out the evidence whereby he proposes to prove the facts which give him the title: *Williams* v. *Wilcox* (4) and *Gautret* v. *Egerton* (5). The Court, however, took no notice of the objection, and raised a comprehensive issue in these terms:

"What is the share of the plaintiff in the property in suit."

The plaintiff was thus left free to nullify the salutary rule enunciated by Brett, L. J., in *Philipps* v. *Philipps* (1) that the parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in the pleadings. What the consequence has been, we realise when we come to examine the case on the merits. We find that the title alleged by the plaintiff is contrary to the tenor of the admitted deeds. On the face of the sale-certificate, *X* became the sole owner by purchase of the property in dispute. Under the conveyance executed by *X* in favour of *A*, *B* and *C*, they became jointly interested in a six-annas share. After this transaction, a ten-annas share was left to *X*. Consequently, *A* was *prima facie* entitled to a two-annas share which he transferred to the defendant. *B* and *C* were entitled to a four-annas, while their uncle *X* had a ten-annas share; this they conveyed to the plaintiff who thereby obtained a fourteen-annas share. *D* was apparently not entitled to any share at all. The claim of the plaintiff to a fourteen-and-half-annas share cannot consequently be sustained, unless it is established that these deeds do not represent the true state of facts. The plaintiff in his plaint has furnished no indication of the source of his title, nor does he afford a clue to the grounds, if any, upon which he challenges the admitted deeds. When we turn to the evidence, however, we find that he has attempted to develop two inconsistent cases. He called one of his vendors, namely, *X* to prove that *X* and *Y*, who were separate in food and estate, became joint owners of the property by purchase at the execution sale and that the consideration was furnished by them in the proportion of ten to six, though the purchase was made in the name of *X* alone. The witness added that thereafter *Y* took a conveyance from him in respect of a six-annas share in the name of his three major sons. *X* in substance repudiated the allegations he had solemnly made in the conveyance in favour of his nephews. On this basis, the plaintiff can succeed only if he proves that what purports to be a conveyance to *A*, *B* and *C*, is in reality a deed of relinquishment in favour of their father *Y*, and that upon the death of the latter, his four sons *A*, *B*, *C* and *D* have taken equal shares by right of inheritance. The plaintiff then called another set of witnesses, namely, his vendors *B*, *C* and *D* to contradict the allegations of *X*, on the hypothesis that the property was acquired by *X* alone and was transferred by him for consideration under the conveyance in the names of *A*, *B* and *C* either to *Y* or to *A*, *B*, *C* and *D*. The defendants found themselves in a position of embarrassment, when these contradictory allegations were sprung upon them, without any indication afforded in the plaint; but fortunately, the testimony of one set of witnesses neutralised that of the other, and the Subordinate Judge held that the plaintiff had failed to prove his title to any share in excess of fourteen annas. In our opinion, the plaintiff should not have been allowed to proceed on the plaint as framed; he should have been called upon to specify in his statement of claim, the nature of the deeds and transactions from

(1) (1878) 4 Q. B. D. 127 = 48 L. J. Q. B. 135 = 39 L. T. 556 = 27 W. R. 436.
(2) (1896) 1 Q. B. 554 = 65 L. J. Q. B. 360 = 74 L. T. 241 = 44 W. R. 452.
(3) (1884) 26 Ch. D. 778 = 53 L. J. Ch. 523 = 50 L. T. 115 = 32 W. R. 406.
(4) (1838) 8 A & E. 314 = 3 N. & P. 606 = 1 W. W. & H. 477 = 7 L. J. Q. B. 229.
(5) (1867) 2 C. P. 371 = 36 L. J. C. P. 191 = 16 L. T. 17.

which he deduced his title. The plaintiff, deliberately and for obvious reasons, departed from the well-recognised rule applicable to the matter : when the plaint was filed, he could not make up his mind which alternative to choose, and consequently left his case to be developed by his witnesses now. it may be conceded that a plaintiff may in certain circumstances rely upon several different rights alternatively, though they may be inconsistent. This was recognised by the Full Bench in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (6) and is in conformity with the rule recognised in *Philipps* v. *Philipps* (1), *Berdan* v. *Greenwood* (7), *Hawkesley* v. *Bradshaw* (8) and *In re Morgan, Owen* v. *Morgan* (9). But as pointed out by the Judicial Committee in *Mahomed Buksh* v. *Hosseini Bibi* (10), the plaintiff cannot be permitted to allege two absolutely inconsistent statements of facts each of which is destructive of the other. In the case before us, the plaintiff, it is true, did not make a definite case in the plaint but sought at the trial to develop two inconsistent cases on the testimony of two different sets of witnesses. The Subordinate Judge rightly held that the evidence was not reliable enough to establish either the one case or the other. He has pointed out that the evidence to show that the execution purchase, though made in the name of *X*, was for the benefit of both *X* and *Y*, is utterly untrustworthy. The two brothers at the time were separate. There is no independent evidence to corroborate the assertion of *X* that a proportionate part of the consideration was furnished by *Y*. Nor is there any trustworthy evidence to show that, after this purchase, *Y* obtained joint possession of the property along with *X*. There is, on the other hand, no tangible evidence to prove that the conveyance executed by *X* in favour of *A*, *B* and *C* was really a conveyance in favour of *Y*, or of *A*, *B*, *C* and *D*. It was suggested at one stage of the argument in the Court below, and that suggestion has been repeated in this Court, that the conveyance might possibly be treated as a deed of relinquishment. This theory is extremely improbable. If the parties really intended the document to operate as a deed of release, there is no conceivable reason why it should not have been described as such ; it is inexplicable why recitals untrue in fact should have been deliberately inserted in the deed, and why a large amount should have been paid as stamp duty on the conveyance, while a smaller amount would have sufficed for a deed of release. We are clearly of opinion that the plaintiff has failed to prove that the deed of conveyance by *X* in favour of *A*, *B* and *C* was in reality other than what it purported to be. But the appellant has argued that as the parties in a suit for partition occupy the position of counter-claimants, it was incumbent upon the defendants to set up and establish their special case. There is plainly no force in this contention. The defendants had no occasion to meet any case alleged in the plaint, while the two alternative cases developed in the evidence were destructive of each other. The first ground consequently fails.

As regards the *second* ground, it has not been seriously disputed by the respondents that the order for costs is erroneous. The Subordinate Judge has allowed the defendants the full amount of Pleader's fees on the value of the suit. This order could not properly be made at the stage of the preliminary decree, when the matter in controversy related only to a half-anna share in the property valued at Rs. 320. We hold accordingly that the Pleader's fee in Court below should have been assessed at one gold *mohur* only and that the total costs allowed to the defendants should have been fixed at Rs. 42-1-9 instead of Rs. 376-1-9. Subject to this variation, the decree of the Subordinate Judge will be affirmed. The respondents are entitled to their costs in this Court. We assess the hearing fee at two gold *mohurs*.

V.B./R.K.

Decree modified.

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(6) (1907) 34 Cal. 51 (F. B.).

(7) (1878) 3 Ex. D. 251 = 47 L. J. Ex. 628.

(8) (1880) 5 Q. B. D. 302 = 49 L. J. Q. B. 333.

(9) (1887) 35 Ch. D. 492 = 56 L. J. Ch. 603 = 56 L. T. 503.

(10) (1888) 15 Cal. 684 = 15 I. A. 81 = 5 Sar. 175 (P. C.).

A. I. R. 1916 Calcutta 661

MOOKERJEE AND BEACHCROFT, JJ.

Kali Charan Nath and *another*—Decree-holder—Appellants.

v.

Sukhada Sundari Debi and *others*—Defendants—Respondents.

Second Appeal No. 397 of 1914, decided on 2nd August, 1915, against the order of Dist. Judge, Dacca, dated 16th March, 1914.

Civil P. C. (5 of 1908), S. 47—Decree against ostensible representatives—In execution it was discovered that deceased debtor left a will—Held decree could not be executed against the estate not in hands of ostensible representatives but in hand of executrices—Held remedy was by opening suit and obtaining decree against executrices or by separate suit against them—Action on domestic judgment when tenable stated.

On the 16th September, 1911, *A* instituted a suit against *M* for the recovery of a large sum of money. During the pendency of the suit *M* died on the 27th November, 1911. On the application of *A*, the three sons of the deceased, who were ostensibly his heirs and representatives, were brought on the record in his place. They did not object to the adoption of this course. The case was tried on the merits and on the 8th May, 1912, a decree was made, with the usual direction that the judgment-debt be realised out of the estate of the deceased in the hands of the substituted defendants. On the 9th June, 1913, the decree-holder applied for execution of the decree, and notices were duly issued. Thereupon the wives of the three sons of the deceased intervened and stated that execution could not proceed as *M* had made a testamentary disposition of his properties on the 18th May, 1911, whereby they had been appointed executrices:

Held, that the decree as it stood could not be executed against the estate in the hands of the executrices; [P. 662, C. 2.]

that the remedy of the decree-holder was, *either* to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them, *or* to institute a suit on the judgment and to obtain a decree thereon against the executrices. [P. 662, C. 2.]

An action on what may be called a domestic as distinguished from a foreign judgment is permissible only where the judgment cannot be enforced in some other way. [P. 664, C. 1.]

Satish Chunder Ghose and *Smritis Chunder Ghose*—for Appellants.

Upendra Lal Roy—for Respondents.

Judgment.—This is an appeal by the decree-holders against an order in execution proceedings, and illustrates, what has been often stated before, that the difficulties of a litigant begins when he has obtained his decree. On the 16th September, 1911 the appellants instituted a suit against one Mahim Chandra Chakrabarti for recovery of a large sum of money. During the pendency of the suit, the defendant died on the 27th November, 1911. On the application of the plaintiffs, the three sons of the deceased, who were ostensibly his heirs and representatives, were brought on the record in his place. They did not object to the adoption of this course. The case was tried on the merits, and on the 8th May, 1912 a decree was made against the persons supposed to be the heirs and representatives of the original debtor. The decree directed as usual that the judgment-debt be realised out of the estate of the deceased in the hands of the substituted defendants. On the 9th June, 1913, the decree-holders applied for execution of their decree, and notices were duly issued. Thereupon the wives of the three sons of the deceased intervened and stated that execution could not proceed as Mohim Chandra, their father-in-law, had made a testamentary disposition of his properties on the 1st May, 1911, whereby they had been appointed executrices. They alleged that the will had been duly proved in 1913, but that the Probate had not been actually issued as the question of valuation of estate was still under investigation by the Collector. The Court held that the decree had been obtained against persons who were not the true representatives of the deceased debtor and could not be executed against the estate in the hands of the executrices. The application for execution was consequently dismissed. The decree-holders appealed to the District Judge, but the appeal has been dismissed as incompetent. The decree-holders have now appealed to this Court and have contended that the appeal should have been heard on the merits by the District Judge and execution allowed against the estate in the hands of the executrices. It is plain that the answer to the question whether the order of the primary Court was appealable or not, depends upon the question, whether the decree is capable of execution against the estate in the hands of the executrices; if the latter are representatives of the parties to the suit, the order falls within the scope of S. 47 of the Code and is appealable as a decree; if they cannot be deemed such representatives, the order is

not covered by that section and cannot be challenged by way of appeal.

We may at the outset deal with a narrow ground assigned by the respondents in support of the view that the executrices are not representatives of the parties to the suit; they have argued that they are the representatives of the original debtor but are in no sense representatives of the sons of the debtor, who were brought on the record of the suit as his successor-in-interest. This contention is based on a limited view of the meaning of the term 'representative.' The sons of the deceased defendant were brought on the record as his representatives-in-interest; they were unquestionably his representatives to all appearances; the will had not been proved at that time, nor were the plaintiffs even aware of its existence. Consequently, they were the only persons who could be brought on the record as successors-in-interest of the deceased. Since then the Will has been proved, and the Probate, by a legal fiction, takes effect retrospectively from the date of the death of the testator. Consequently the estate which was then ostensibly represented by the sons and heirs of the deceased, is now represented by the executrices. Without undue stretch of language, the view may, in these circumstances, be maintained that the executrices are representatives of the parties to the suit who were themselves before the Court in a representative character. Reference may in this connection be made to the decision in *Premmoyi* v. *Preonath Dhur* (1), where an analogous question arose for consideration. There a Hindu widow had instituted a suit as representative of the estate of her husband; on her death during the pendency of the suit, the reversionary heirs were brought on the record. It was contended that they were not *her* representatives as they derived title not from *her*, but from her husband. This contention was negatived, and it was ruled that as the widow and the reversioners successively represented the same interest, the reversioners might be treated as representatives of the widow. We are, therefore, not prepared to hold that the order of the primary Court is beyond the scope of S. 47, merely because the executrices cannot, in popular language, be called representatives of the sons of the deceased debtor. Whether they can be deemed representatives of parties to the suit or not, depends, in our opinion, upon the answer to a more fundamental question.

It was explained by a Full Bench of this Court in *Ishan Chunder Sarkar* v. *Beni Madhub Sirkar* (2) that the term representatives includes not merely a legal representative such as heir, executor or administrator, but also a representative-in-interest, that is, a representative of the decree-holder or judgment-debtor who, so far as such interest is concerned, is bound by the decree: *Gulzari Lal* v. *Madho Ram* (3). We are thus brought back to what must be deemed the root of the matter in this case, namely are the executrices bound by the decree? We are of opinion that the decree as it stands cannot be executed against the estate in their hands and that the remedy of the decree.holders is, *either*, to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them, *or*, to institute a suit on the judgment and to obtain a decree thereon against the executrices. This is clear from the decision in *Ashi Bhushan Dasi* v. *Pelaram Mandal* (4). There a decree had been obtained for mesne profits against an alleged adopted minor son as the representative of the wrong-doer. The adoption was subsequently declared invalid, whereupon the decree-holder sought to proceed in execution against the real representative. It was ruled that the decree-holder could not proceed against the judgment-debtor on the record as he had not received any assets of the wrong-doer; nor could he ask the Court to substitute the name of the real representative in the decree, because the result would be really a new decree in his favour against such representative. At the same time, it is clear that a suit can be brought against the executrices on the basis of the judgment already obtained.

Reference may be made to the decision of Markby, J., in *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (5), where, under circumstances somewhat similar to those of the present case, it was held that if the decree could not be

(1) (1896) 23 Cal. 636.

(2) 24 Cal. 62.
(3) 26 All. 447 (F. B.).
(4) A. I. R. (1914) Cal. 28=21 I. C. 519.
(5) (1879) 4 Cal. 342.

executed against the estate in the hands of the executor, it was at any rate sufficient to enable the plaintiff to bring a suit against the executor to have the decree satisfied. We are not now concerned with the question of the binding character of orders made or sales held in execution of a decree obtained against persons who, as subsequent events show, are either not the proper representatives of the deceased defendant or constitute only some of his representatives. There has been some divergence of judicial opinion upon this matter, as is clear from an examination of the decisions in *General Manager of the Raj Durbhunga* v. *Ramaput Singh* (6), *Assamathem Nessa Bibee* v. *Lutchmeeput Singh* (7), *Chuni Lal* v. *Osmond Beeby* (8), *Baswantapa Shidapa* v. *Ranu* (9), *Janaki* v. *Dhanu Lal* (10), *Chathakelan* v. *Govinda Karumiar* (11), *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (12) and *Ramasawmi Chettiar* v. *Oppilamani Chetti* (13) on the one hand, and *Sitanath Das* v. *Roy Luchmiput Singh* (14), *Harish Chunder Biswas* v. *Puri Das Das* (15) and *Lal Behary* v. *Nagendra Nath* (16) on the other hand. These decisions do not directly touch the question in controversy now before us, *viz.*, whether the decree obtained against the ostensible representatives should be allowed to be executed against the estate in the hands of the executrices though objection is taken before execution has been issued, or whether the decree-holders should be limited to their remedy by way of a decree against the executrices, either by re-opening the suit or by instituting a fresh suit on the judgment previously obtained. The decision in *Rameshwar Singh* v. *Juneshwari Babooshin* (17), which bears on the subject, is clearly distinguishable, in view of the special circumstances under which the decree in the first suit was obtained. There cannot, we think, be reasonable doubt that a suit would lie on the judgment; this, indeed, is to some extent borne out by Article 122 of the Schedule to the Indian Limitation Act, which shows that the Legislature contemplated the possibility of suits upon judgments obtained in British India; though we are not unmindful that the Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof; as Sir Richard Couch observed in *Hari Nath* v. *Mothuramohan* (18), the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right: *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (19). It is not necessary, for our present purpose, to enter upon a discussion of the circumstances under which a suit lies upon a judgment in British India. An examination of the cases, specially those of *Sandes* v. *Jomir Shaikh* (20), *Attermoney Dossee* v. *Hurry Doss Dutt* (21), *Golam Arab* v. *Curreembux Shaikjee* (22), *Bhavanishankar* v. *Pursadri* (23), *Merwanji Nowroji* v. *Achabai* (24), *Ramayya* v. *Venkataratnam* (25), *Annoda Prosad* v. *Nobo Kissore Roy* (26), *Mallesam Naidu* v. *Jugala Panda* (27) and *Periasami Mudaliar* v. *Seetharama Chettiar* (28), shows that there is a considerable divergence of judicial opinion upon the subject, and that the Courts are by no means agreed as to the circumstances under which a suit may be instituted in this country on what may be called a domestic as distinguished from a foreign judgment. It is well known that in England there has been divergence of judicial opinion on the subject [Freeman on Judgments, Chapter XVII: Black on Judgments, Chapter XXIV], and it is only in recent years that the principle has been adopted that although an action lies on judgment which finally establishes a debt, whether the judgment be English or foreign, it is an abuse of the process of the Court to bring an action upon an

(6) (1870-72) 14 M. I. A. 605=10 B. L. R. 294=17 W. R. 459 (P. C.).
(7) (1879) 4 Cal. 142.
(8) (1903) 30 Cal. 1044.
(9) (1885) 9 Bom. 86.
(10) (1891) 14 Mad. 454.
(11) (1894) 17 Mad. 186.
(12) (1903) 26 Mad. 230.
(13) (1910) 33 Mad. 6=4 I. C. 1059.
(14) (1882) 11 C. L. R. 268.
(15) (1910) 6 I. C. 627.
(16) (1912) 16 I. C. 690.
(17) A. I. R. (1914) Cal. 263=21 I. C. 397.
(18) (1894) 21 Cal. 8=20 I. A. 183 (P. C.).
(19) (1911) 33 All. 356=10 I. C. 477=38 I. A. 87 (P. C.).
(20) (1868) 9 W. R. 399.
(21) (1881) 7 Cal. 74.
(22) (1880) 5 Cal. 294.
(23) (1881-82) 6 Bom. 292.
(24) (1884) 8 Bom. 1.
(25) (1896) 17 Mad. 122.
(26) (1906) 33 Cal. 560.
(27) (1900) 23 Mad. 292.
(28) (1904) 27 Mad. 243 (F. B.).

English judgment if it can be enforced in some other way: *Pritchett* v. *English and Colonial Syndicate* (29), *Grant* v. *Easton* (30), *Nourion* v. *Freeman* (31), *Pemberton* v. *Hughes* (32) and *Hodsoll* v. *Baxter* (33). The principle on which an action is allowed to be maintained on a judgment was concisely explained by Baron Parke in *Williams* v. *Jones* (34):

"The principle is, that, where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained."

No mischief can result from the acceptance of this principle, if it is adopted subject to the qualification recognised in modern English law, *viz.*, that an action is permissible only where the judgment cannot be enforced in some other way; and beyond this, it is not necessary for our purpose to proceed.

We hold accordingly that the decree-holders are not entitled to execute their decree against the estate in the hands of the executrices. The appeal is consequently dismissed, but there will be no order for costs.

V.B./R.K.

Appeal dismissed.

(29) (1899) 2 Q. B. 428=86 L. J. Q. B. 801.
(30) (1883) 13 Q. B. D. 302=53 L. J. Q. B. 68.
(31) (1889) 15 A. C. 1=59 L. J. Ch. 337.
(32) (1899) 1 Ch. 781=68 L. J. Ch. 281.
(33) (1858) El. Bl. & El. 884=28 L. J. Q. B. 61.
(34) (1845) 13 M. & W 628=67 R. R. 767=2 D. & L. 680=14 L. J. Ex. 145.

A. I. R. 1916 Calcutta 664

CHAPMAN AND NEWBOULD, JJ.

Kartic Mandal — Defendant — Appellant.

v.

Bama Charan Mandal—Plaintiff and another—Defendant—Respondents.

Second Appeal No. 783 of 1913, decided on 16th April, 1915, against the Decree of Offg. Sub-Judge, Jessore, dated 23rd November, 1912.

(a) Evidence Act (1 of 1872), S. 91—Oral of evidence of lease cannot be allowed when there is document.

Where there is a document as evidence of the transaction of a lease, oral evidence in the shape of admission relating to the transaction of the lease is not admissible.

(b) Landlord and tenant — Relationship — Proof of—Possession of other land included in alleged lease is not proof of tenancy.

It is not sufficient, to prove the plaintiff's tenancy, to show that he was in possession of other lands covered by the lease.

(c) Lease—Construction—Words '*Putra poutradhi kramay*' indicate perpetual lease.

The expression "*putra poutradhi kramay*" in a document signifies that the lease is a perpetual one.

Surendra Nath Sen—for Appellant.

Brojo Lal Chakravarti—for Respondents.

Judgment.—The plaintiff's case was that he had obtained a settlement from defendant No. 3, who was a *raiyat* and that upon his going to a portion of the land of which he had obtained the settlement, he was opposed by defendants Nos. 1 and 2. He, therefore, brought this suit for ejectment of defendants Nos. 1 and 2. The plaintiff claimed under a lease, the term of which is described by the expression "*putra poutradhi kramay*." The lease is, therefore, for a term exceeding nine years and having regard to the case of *Jarip Khan* v. *Durfa Bawa* (1), the document was not admissible in evidence and could not have operated to create any title in the plaintiff. The lower Appellate Court, however, decreed the plaintiff's suit.

On behalf of the respondents the difficulty is sought to be got over in three ways. *Firstly*, it is said that the plaintiff was entitled to adduce evidence irrespective of the document to prove his tenancy. This evidence, it is said, consists, in the present case, of an admission by defendant No. 3 that he had granted the lease, that he took an adequate *selami* and also that the plaintiff seemed to have obtained possession of the remainder of the land covered by the lease. If the admission of the defendant No. 3 could be used against defendants Nos. 1 and 2, we are of opinion that this is evidence relating to the transaction of the lease and that there being a document as evidence of that transaction, the oral evidence is not admissible. We do not think that it is sufficient, to prove the plaintiff's tenancy, to show that he was in possession of other lands covered by the lease and we note that there does not appear to have been any evidence that the plaintiff was in such a possession.

It is then contended that it would be possible for the plaintiff to prove that

(1) (1912) 15 I. C. 476.

there was an oral agreement by defendant No. 3 to create a tenancy. There does not appear to have been any evidence, oral or documentary, other than the evidence of the transaction—the transaction which could only be proved by the document of the lease.

It is then contended that the lease is not a perpetual lease. This contention cannot prevail having regard to the expression "*putra poutradi kramay.*"

The appeal, is, therefore, allowed, the judgment and decree of the lower Appellate Court is set aside and the plaintiff's suit is dismissed with costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 665

CHATTERJEE AND CHAPMAN, JJ.

Byomkesh Chakrabarti—Decree-holder—Appellant.

v.

Haladhar Mandal and *others*—Judgment-debtors—Respondents.

Appeal No. 316 of 1914, decided on 3rd May, 1915, from the Order of Dist. Judge, Jessore, dated 20th March, 1914.

Bengal Tenancy Act (8 of 1885), Sch. III, Art. 6—Decree for share of rent by co-sharer without making other co-sharers parties—Execution—Art. 6 applies.

An application for execution of a decree obtained by a co-sharer landlord for his share of the rent without making the other co-sharers parties, is governed by Article 6 of Schedule III of the Bengal Tenancy Act.

Surendra Madhub Mullick—for Appellant.

Narendra Kumar Bose and *Bhudhar Chandra Haldar*—for Respondents.

Judgment.—This appeal arises from a decision holding that an application for execution of a decree obtained by a co-sharer landlord for his share of the rent without making the other co-sharers parties, is governed by Article 6 of Schedule III of the Bengal Tenancy Act. There is certainly one case which favours the contention of the appellant. That is the case of *K. B. Dutt* v. *Gostha Behary Bhuiya* (1). That case, however, was not argued for the respondent and the learned Judges said that that was a suit to which provisions of the Bengal Tenancy Act did not apply. However, there has been a number of cases both preceding and subsequent to that in all of which, the Judges took a contrary view. These cases are *Thakomani Dasi* v. *Mohendra Nath* (2), *Mrityunjoy* v. *Bhola Nath* (3), *Khetra Mohan* v. *Mohim Chandra Das* (4) and *Kedar Nath* v. *Ardha Chunder Roy* (5). In all of these cases, it has been held that the object of the amendment of the Bengal Tenancy Act I of 1907 was to introduce words which, properly interpreted, would make the Article applicable to the question in controversy in this case. We are inclined to agree with this latter opinion and to accept the grammatical construction of the words as given in the Article after the amendment. The contention, therefore, that this Article does not apply, fails.

It is next contended that this view of the law is very hard upon the co-sharer landlord, who is bound by the rule of shorter limitation in this Article while he is unable to avail himself of the provisions of the Act for getting a complete remedy against his tenant. That may be so in a case of this kind, but after the amendment, a co-sharer landlord has an option of bringing a suit under S. 148-A, which would enable him to avail himself of all the provisions of the Act in favour of the entire body of landlords.

The next contention is that this application should be considered as a continuation of the previous application. The previous application is not before us and there are no materials on the record upon which we can say that this was ever intended to be a continuation of the previous application.

The result is that this application is dismissed.

As, however, at the time when the application was made there was a decision in favour of the appellant, we make no order as to costs in this appeal.

V.B./R.K.

Appeal dismissed.

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(1) (1912) 17 I. C. 207.

(2) (1909) 3 I. C. 389.
(3) (1913) 20 I. C. 833.
(4) (1913) 18 I. C. 595.
(5) (1902) 29 Cal. 54.

A. I. R. 1916 Calcutta 666

WOODROFFE AND MOOKERJEE, JJ.

Jamahar Kumari Bibi — Plaintiff—Appellant.

v.

Askaran Boid and *others* —Defendants—Respondents.

Appeal No. 46 of 1914, decided on 28th April, 1915, from the Original Side Decree of Chitty, J., dated 9th March, 1914.

Civil P. C. (5 of 1908), O. 21, R. 63—Declaratory suit by objector—Burden of proof that transaction is real is on him—Proof of deed alone is not sufficient—Suit under R. 63 is in nature of review.

A plaintiff who is calling in question in a suit contemplated by O. 21, R. 63 of the Civil Procedure Code an adverse decision of a Court, has to show affirmatively that not only the ostensible but the real title also is in him. He cannot discharge the burden of proof cast on him by merely pointing to the innocent appearance of the instruments under which he claims, he must show that they are as good as they look.

Such a suit is to alter or set aside a summary decision or order of the Court, and it is a method of obtaining review. [P. 667, C. 2.]

S. R. Das and *K. P. Basu* –for Appellant.

N. Sircar, *B. L. Mitter* and *Gossain*—for Respondents.

Jenkins, C. J.—This is a suit occasioned by the determination adversely to the plaintiff, Jamahar Kumari Bibi, of a claim to property preferred by her in execution proceedings.

This property is No. 147, Cotton Street, and Chitty, J, has held that Jamahar though ostensibly its owner, is in truth merely a *benamidar* for the judgment-debtor, her husband, Chatrapat Singh. He accordingly has dismissed the suit. From this judgment the present appeal has been preferred.

The house was put up for sale in execution of a decree against Chatrapat Singh and was ostensibly bought by Jamahar on the 10th of April, 1897 for Rs. 50,000. No cash passed and the explanation is that on the 2nd of March, 1896 the decree was expressed to be assigned to Jamahar in consideration of Rs. 1,10,000, and the Rs. 50,000 was set off against a corresponding part of what was due under the decree.

Jamahar contends that the assignment to her of the decree is free from flaw and that the defendants have not established its invalidity.

How then did Jamahar get this sum of Rs. 1,10,000 with which to buy this decree against her husband? Her case is that it is a part of a sum of three lacs raised by her on the 26th March, 1895 by a mortgage to the Pakur Rajah. It is recited in that instrument of mortgage that she was absolutely and beneficially seized and possessed in her own right and as her own property free from incumbrances of both the *zemindari* and *putni* rights in the *zemindari* Parganah Suksena and these rights she purported to mortgage for Rs. 3 lacs.

The question then arises, were these *zemindari* and *putni* rights really hers? To answer this, it is necessary to look into certain transactions of 1893 and 1895.

On the 15th August, 1893 Jarao, Chatrapat's mother, relinquished in favour of the Maharajah Sir Jotindra Mohun Tagore her *putni* right in Fatehpur Singia and conveyed to him the arrears of rent due to her from the tenants. In the instrument of relinquishment it is recited that she had learnt that it would be beneficial to her to acquire the *maliki* right of Suksena by relinquishing the *putni* right to Fatehpur Singia and then the recitals proceed as follows:

"So I applied to the Maharajah Bahadur for the conveyance of the *maliki* right of Suksena by relinquishing the said Fatehpur Singia, whereupon both myself and the Maharajah Bahadur would be benefited by this transaction, and we both agreed to the same. Accordingly with the object of fulfilling my long-cherished desire of making a gift of a *zemindari* in favour of my daughter-in-law Srimati Jamahar Kumar Bibi,—which for various reasons I could not fulfil (so long)—I applied to the Maharaja Bahadur for making over the *zemindari* right to the said Suksena to the aforesaid Jamahar Kumari Bibi by a deed of gift, believing that my desire would be fulfilled and that it would bring me pleasure if the Maharajah Bahadur would now give away the *maliki* right to the aforesaid Suksena *zemindari* by a deed of gift in favour of my daughter-in-law, Jamahar Kumari Bibi, instead of me, and the Maharajah Bahadur having agreed thereto and having executed a deed of gift in favour of the said Bibi."

Then there follows the relinquishment. On the same date an instrument described as a deed of gift was executed by the Maharaja in favour of Jamahar. It is there recited as follows:—

"At present the said Bibi Saheba having proposed that she should surrender the *putni* right which she has in the aforesaid Fatehpur Singia by executing a separate deed of surrender in my

favour and that in lieu of the same I should make an absolute gift of the proprietary right in the said *zemindari* Suksena to you, who are her daughter-in-law, and expressed that the Bibi Saheba would be pleased with and benefited by it, I have agreed to the said proposal and have taken *khas* possession of the said *putni mahal* and I have been benefited thereby. I being pleased with this act of your mother-in-law's and owing to the friendship of my deceased paternal grandfather and deceased paternal uncle and myself with your husband's paternal grandfather, the late Babu Protab Singh, and your husband's deceased father, I have, with the desire of doing you a good turn at the present time, agreed cheerfully to make a gift to you of the proprietary and other rights, title, interest and concern which I have in respect of the said *zemindari* Suksena in accordance with the said proposal and you have agreed to accept the same." Then there followed the gift of *zemindari* Suksena to Jamahar

By an instrument, dated the 2nd February, 1895, Jarao assigned to Jamahar her *putni* rights in Suksena as also the Girjaghar in Baluchar for Rs. 1,01000. This is the title Jamahar claims to show to the *zemindari* and *putni* rights mortgaged to the Pakur Rajah. To complete the history of the family's dealings with the property it is necessary to refer to certain instruments executed in 1880.

The *first* is dated the 13th of November, and it purports to be a sale by Luchmiput, Chatrapat's father, to his wife, Jarao, of three properties specified in the instrument including the Girjaghar for Rs. 50,000. No cash passed, but the price was treated as a partial payment of a debt due to her from her husband. On the 15th November, Luchmipat and Chatrapat executed in favour of the Maharajah Sir Jotindra Mohun Tagore an assignment of the *zemindaris* Fatehpur Singia, Suksena, Mandanipur and Poladasi for Rs. 13,50,000. At the same time there was a grant by the Maharajah to Jarao of the *putni* right in these four *zemindaris* for Rs. 2,04,000. This sum was not paid but was kept back by the Maharajah from the purchase-money for the *zemindaris* and allowed in account between Jarao and her husband by way of deduction from the debt alleged to have been due to her.

This then is the history of the material transactions and the view of Chitty, J., was that the intervention of both Jarao and Jamahar was as *benamidars*. I recognize that the value of this opinion is in some measure discounted by the fact that it was in part based on the view expressed in earlier litigations, a class of evidence that was used by the learned Judge to an extent that the law does not permit. But apart from this evidence, there are circumstances which clearly call for explanation and the onus in this case is on Jamahar to show affirmatively that not only the ostensible but the real title also is in her.

She is a plaintiff who is calling in question in a suit contemplated by the Code (O. 21, R. 63) an adverse decision of the Court given, it is true, in a summary proceeding, but conclusive subject to the result of this suit. This is a suit, therefore, to alter or set aside a summary decision or order of the Court, and it is a method of obtaining review: *Phul Kumari* v. *Ghanshyam Misra* (1).

The plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims: she must show that they are as good as they look. If specific authority for this is needed, it is furnished by many cases, among which are the decisions of Sir Richard Couch in *Roop Ram Doss* v. *Saseeram Nath Kurmokar* (2) and of Sir Charles Sargent in *Govind Atmaram* v. *Santai* (3).

It is then useless for Jamahar to contend that the actual deeds under which she claims are free from appearance of unreality and, therefore, it rests on the defendants to make out that they are colourable. Moreover, these deeds are so interwoven with the earlier transactions that they cannot be considered apart from them, and it cannot be claimed that the examination of the dealings disclosed on the record inspires confidence in Jamahar's case. Nor are matters mended when the later dealings are closely examined. Thus, to deal with the alleged purchase by Jamahar of Saraswati's decree. No doubt the price was made in cash, but why should Jamahar have brought on her own account this decree against her husband, a decree which she has never been able to realize, whether she has made real endeavours in that direction or not?

The question has naturally been asked, where did she get the money to pay the

(1) (1908) 35 Cal. 202=35 I. A. 22 (P. C.).
(2) (1875) 23 W. R. 141.
(3) (1888) 12 Bom. 270.

price, Rs. 1,10,000? The answer has been that it was a part of the Pakur Raj loan, and in support of this our attention has been invited to the fact that four of the Rs. 10,000 notes handed over in payment for the transfer of the decree are identical with four notes received on the occasion of the Pakur Rajah's mortgage. But it would seem that of the Rs. 10,000 notes paid on the transfer of the decree some were not received in connection with the Pakur Rajah's mortgage.

This is apparent from the entry, Exhibit DI, in Jamahar's *rokur*, where we find that of nine notes of Rs. 10,000 each five were not received on the execution of the Pakur Rajah's mortgage. In fact of the 30 notes of Rs. 10,000 then received from the Pakur Rajah only four formed part of the price paid for Saraswati's decree.

This does not agree with the explanation given by Jamahar and her witnesses, nor is there any suggestion made of intermediate dealings between the 16th of March, 1895 and the 2nd of March, 1896 which might account for the change in the notes representing the Pakur Rajah's advance.

Nor is this the only difficulty. No explanation is given why in March, 1895 Jamahar should have borrowed three lacs, or having borrowed it, should have kept so large a sum as Rs. 1,04,000 in her custody apparently uninvested.

Moreover, the mode in which the entry is made on the 3rd *Falgoon* 1302 (14th February, 1896) only serves to increase the difficulty, especially when it is borne in mind that the entry is in her *rokur*. And the same remark applies to the subsequent entry of the 21st of March.

A speculative explanation has been tendered for our acceptance, but it does not accord with the opening entry of September, 1895 in the corresponding ledger. The true position might have been disclosed by the next preceding *rokur* and ledger, but they are not forthcoming. It is said that they are lost, but why they alone should have suffered that fate does not appear.

These latter matters only serve to emphasise the necessity for clear and convincing proof of the genuineness of the transactions on which Jamahar relies and when she fails to produce the books that should disclose the truth, she cannot complain if an adverse presumption be drawn. What is disclosed suggests that though the Pakur Rajah's advance ostensibly came into Jamahar's hands it merely passed through them, and that the payment for Saraswati's decree merely passed through Jamahar's *rokur* as a matter of form. Nor is the failure to produce evidence limited to these account books. Jarao, if all that is represented regarding her be true, played an important part, and yet she was not called as a witness. True it is that she is a *pardahnashin* lady and advanced in years, but there can have been no difficulty in her evidence being taken on commission, as Jamahars was.

Then Jamahari's ignorance of the transactions in which she is supposed to have been the principal person concerned is not without its significance, and in so saying I have particularly in mind her rambling story as to the Rs. 50,000 the price of 147, Cotton Street.

Each side has claimed that the evidence of possession favours it. But at most its effect is negative, and all that one can say is that it is not inconsistent with the case of either side.

I recognize the force of Jamahar's contention that a gift to her was within the Maharajah's competence, but all the circumstances have to be considered, and when this is done the validity of her title requires more cogent proof than this to establish its reality.

The evidence of Ganguly, it is true, is to some extent inadmissible as resting on what was told him by others. But there are matters on which he is able to give relevant evidence of importance, and this so far as it goes is adverse to the plaintiff's case, and to the genuine character of the Maharajah's assurance to her.

The result, then, is that though I hold some of the evidence on which Chitty, J., acted was not relevant, still I agree with him that the suit ought to be dismissed.

And I come to that conclusion because the plaintiff has wholly failed to prove that the transactions under which she claims were real and genuine, a burden that rested on her in view of the result of the summary proceedings and the circumstances of the case. Therefore, I think, this appeal should be dismissed with costs.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 669

MOOKERJEE AND CHAPMAN, JJ.

Sib Kishore Ghose—Plaintiff—Petitioner.

v.

Manik Chandra Nath—Defendant—Opposite Party.

Civil Rule No. 832 of 1914, decided on 3rd May, 1915, against the decision of the Munsif, Iswarganj.

(a) Legal Practitioners Act (18 of 1879), S. 28—S. 28 does not affect a suit for reasonable fees in absence of agreement.

Where a party employs a Pleader without any agreement as to the amount of fees or the manner of payment thereof, the Pleader is entitled to recover on an implied promise of reasonable remuneration, and his suit to recover a reasonable sum as his remuneration is not touched by the principle embodied in S. 28 of the Legal Practitioners Act. Case-law discussed.

[P. 670, C. 1.]

(b) Legal Practitioner's Fees—In absence of agreement reasonable fees are recoverable.

In the absence of an agreement a Pleader is entitled to *quantum meruit*, which ought to be determined with reference to all the circumstances of the case. [P. 670, C. 2.]

Birendra Kumar De—for Petitioner.

Kali Kinkar Chakrabarty—for Opposite Party.

Judgment.—This Rule was issued under S. 25 of the Provincial Small Cause Courts Act, 1887, on an application by the plaintiff in the suit, who is a Pleader by profession. His case is that he was engaged to resist the claim in a mortgage suit instituted against the defendant. He successfully defended the suit, which was dismissed with costs on the 3rd February, 1911. He alleges that the defendant paid him Rs. 5 only on account of fees and has refused to make any further payments. He consequently instituted this suit on the 29th January, 1914 for recovery of such sum as the Court may adjudge reasonable, and values the relief at Rs. 45. He states incidentally in the plaint that Rs. 50 would be a fair measure of remuneration, as that was the sum decreed in favour of the defendant as against his opponent in the mortgage suit. The defendant pleaded that the suit was not maintainable and, further, that the plaintiff had been paid whatever was lawfully payable to him. The Small Cause Court Judge did not investigate the case on the merits, but dismissed the suit on the authority of the decision of *Kamini Moni Debi* v. *Khettra Mohan Ganguli* (1). We are now invited to set aside the decree of dismissal, on the ground that the case mentioned is distinguishable and S. 28 of the Legal Practitioners Act, rightly construed, does not bar the claim.

S. 28 of the Legal Practitioners Act is in these terms :

"No agreement entered into by any Pleader ...with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such Pleader . shall be valid, unless it is made in writing signed by such person, and is, within fifteen days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done."

It is plain that the agreement thus invalidated is an agreement respecting the amount and manner of payment of fees, charges and disbursements. In the case before us, there is no allegation that there was any agreement touching either the amount or the manner of payment of the fees. According to the plaintiff, the defendant asked him to act as his Pleader ; nothing was said as to the amount of fees or as to the time when the fees should be paid. The very fact that the defendant asked the plaintiff to conduct his case necessarily implied that he would reasonably remunerate the plaintiff. The relation between the parties is contractual and the case is not governed by S. 70 of the Indian Contract Act, which finds a place in the fifth Chapter devoted to certain relations resembling those created by contract. That section, besides, defines the obligation of a person who has enjoyed the benefit of a non-gratuitous act. Here the defendant is bound to remunerate the plaintiff, who acted at his request, even though the act might not have been beneficial to the defendant ; for instance, the defendant would have been bound to remunerate the plaintiff. even though the latter had been unsuccessful in his defence. It is plain that

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(1) (1912) 13 I. C. 43=11 I. C. 382.

if *A* requests *B* to do a piece of work for him, and *B* does it, not intending to act gratuitously, he is bound to pay *B*, even if he is not benefited thereby. The request implies a promise to pay reasonable remuneration. In this view, no question consequently arises as to the effect of S. 65 of the Indian Contract Act, which treats of the obligation of a person to make restitution or compensation for advantage received by him under an agreement that is discovered to be or becomes void. But it is worthy of note that if there had been an agreement as to the amount or manner of payment of fees, which was void because made in contravention of S. 28 of the Legal Practitioners Act, S. 65 of the Indian Contract Act would have been of no avail inasmuch as the agreement was void *ab initio* and on the face of it, and could not be aptly described as an agreement which has been *discovered* to be or has *become* void. To sum up the position: as the defendant employed the plaintiff without any agreement as to the amount of fees or the manner of payment thereof, the plaintiff is entitled to recover on an implied promise of reasonable remuneration, and the case is not touched by the principle embodied in S. 28 of the Legal Practitioners Act. This view is not opposed to the decision of *Kamine Moni Debi* v. *Khettra Mohan Ganguli* (1). There the Pleader claimed fees due under an agreement for professional services rendered; it was ruled that the agreement was void, as the requirements of S. 28 had not been fulfilled. In the case before us, there was no agreement between the parties either as to the *amount* or as to the *manner of payment* of fees. We need not, consequently, consider the question whether, if there had been such an agreement, which was void because contrary to the express provisions of the Statute, the Pleader could yet have claimed reasonable compensation. Upon that question, there has been a conflict of judicial opinion, as is clear from the decisions in *Raghunath Saran Singh* v. *Sri Ram* (2), *Raziud-Din* v. *Karim Bakhsh* (3), *Rama* v. *Kunji* (4), *Krishnasami* v. *Kesava* (5), *Anantayya* v. *Padmayya* (6), *Sundaraja Ayyangar* v. *Pattanathusami Tevar* (7), *Subba Pillai* v. *Ramasami Ayyar* (8), and *Hazari Lal* v. *Tilok Chand* (9). The observations in some of these cases, for instance, those in *Subba Pillai* v. *Ramasami Ayyar* (8), may, as has been argued with considerable force by the opposite party, practically render nugatory the salutary provisions of S. 28. Where there is an agreement, void under S. 28, the question may well require consideration, whether the Court should assist a person who has entered into a contract rendered void by positive law. No such question, however, arises where, as here, there is no agreement of the kind contemplated by S. 28. In the words of Sargent, C.J., in *Keshav Govind Joshi* v. *Jamsetji Cursetji* (10), the Pleader, in the absence of an agreement, is entitled to a *quantum meruit*, which ought to be determined with reference to all the circumstances of the case. To the same effect are the observations in *Sarat Chandra Roy* v. *Chandi Charan Mitra* (11) and *Mohendra Lal* v. *Akil Chandra Pakrashi* (12). We hold accordingly that the present case is not within the scope of S. 28 and that the suit is consequently maintainable.

The result is that the Rule is made absolute, the decree of the Court below set aside, and the case remanded for trial on the merits. The petitioner is entitled to his costs in this Court. We assess the hearing fee at one gold *mohur*.

V.B./R.K.

Rule made absolute.

(1) (1888) 15 Cal. 912.
(2) (1906) 28 All. 764.
(3) (1890) 12 All. 169.
(4) (1886) 9 Mad. 375.
(5) (1891) 14 Mad. 63.
(6) (1893) 16 Mad. 278.
(7) (1894) 17 Mad. 306.
(8) (1904) 27 Mad. 512.
(9) (1893) 136 P. R. 1893.
(10) (1888) 12 Bom. 557.
(11) (1903) 7 C. W. N. 300.
(12) A. I. R. (1914) Cal. 166 = 20 I. C. 47.

A. I. R. 1916 Calcutta 670

HOLMWOOD AND WALMSLEY, JJ.

Sudhakar Raut and *others*—Plaintiffs—Petitioners.

v.

Sadasiv Jhatap Singh and *others*—Defendants—Opposite Party.

Civil Rule No. 1287 of 1914, decided on 30th April, 1915.

Limitation Act (1908), S. 5—Appeal filed after failure of application for review—Grounds of appeal and review same—Time spent in review is not *bona fide* prosecution of Civil proceedings and cannot be excluded.

Where an appeal is filed after an application for review has failed and where the grounds for review are the only grounds of appeal, the time taken in prosecuting the application for review will not be excluded for making the appeal within time on the ground of *bona fide* prosecution of civil proceedings. [P. 671, C. 2.]

(b) Limitation Act (9 of 1908), S. 5—*Bona fide* prosecution of Civil litigation, explained.

A mere routine order registering an application for review does not constitute a *bona fide* prosecution of a civil litigation. [P. 671, C. 2.]

(c) Limitation Act (9 of 1908), S. 5—Exercise of discretion—Sufficient cause and time to be determined upon circumstances of each particular case, illustrated.

The discretion to admit out of time appeals ought not to be crystallised into definite rules to fetter other Judges in the exercise of the discretion which the Legislature has permitted to them. What is sufficient cause and what is reasonable time for filing an appeal, must depend upon all the circumstances of each particular case. [P. 671, C. 2 & P. 672, C. 1.]

The appellants were minors residing in an out of the way village and their father died during the hearing of appeal before the lower Appellate Court. They applied for a review of the judgment of the lower Appellate Court, which was against them, but the application was rejected. They applied 23 days after for the copy of the order and on receipt of the copy filed an appeal. The appeal was filed beyond time :

[P. 672, C. 2.]

Held, that in the circumstances of the case the appeal should be registered.

Manmotha Nath Mukerjee and *Probodh Chandra Chatterjee* - for Petitioner.

Girish Chandra Pal and *Nobin Chandra Pal*—for Opposite Party.

Holmwood, J.—This was a Rule calling on the opposite party to show cause why the second appeal should not be admitted out of time and registered on the ground that the time taken in the infructuous proceedings in the review matter is *bona fide* litigation which would save limitation.

It appears that the father of the minor applicant died during the hearing of the appeal before the lower Appellate Court. The lower Appellate Court's judgment was passed on the 11th August, 1914, The decree was passed on the 15th August, 1914. There was an application for review on the 10th September, 1914. The learned Subordinate Judge admitted the application, issued notice and fixed the 7th November, 1914. for hearing. In the meantime, he was transferred, and on the 7th November, 1914, the District Judge heard the parties in the review matter and wrote a considered judgment rejecting the review. The applicants then applied for a copy of the lower Court's judgment and decree on the 30th November, 1914. They obtained their copy on the 7th December. It is stated that the appeal was ready on the 12th December and it was filed on the 14th December.

In showing cause, the learned Vakil has relied upon the finding of the District Judge that all the grounds taken in the petition for review were grounds of appeal and the ruling in *Ashanulla* v. *Collector of Dacca* (1) has been relied upon. We entirely agree with that ruling, and if the grounds for review were only grounds of appeal we should certainly hold that the applicants can claim no exclusion of time on the ground of *bona fide* prosecution of civil proceedings. But here the fourth ground taken in the petition of review is obviously a good ground for review, and the learned Subordinate Judge must be taken in admitting the review and fixing a date of hearing to have held that there was such a ground. We have been referred to the case of *Gobinda Lal Das* v. *Shiba Das Chatterjee* (2) for the proposition that a mere routine order registering an application for review does not constitute the *bona fide* prosecution of a civil litigation. That also we are prepared to concede. But the facts of that case were totally different from the facts of the present case. There the application for review was ordered to be registered by the Judge who dismissed the suit, and the Judge who succeeded him when he was on leave refused to hear the review and a great delay took place in passing the order dismissing the review.

It is further contended that laches after the dismissal of the review in not immediately filing the appeal, would also deprive the applicants of the benefit of S. 14 of the Limitation Act and certain remarks of Mr. Justice Mookerjee in the case we have just referred to, are relied on. But those remarks being considered, as they must be, as a whole, do not support the contention. The learned Judge recalls the words of an eminent English Judge where he says,

"for myself I say emphatically that this discretion ought not to be crystallised, as it would become in course of time by one Judge attempting to prescribe definite rules with a view to fetter other Judges in the exercise of the

(1) (1888) 15 Cal. 242.
(2) (1906) 33 Cal. 1323.

discretion which the Legislature has permitted to them. What is sufficient cause and what is reasonable time for filing an appeal must depend upon all the circumstances of each particular case—circumstances which must necessarily vary greatly in different cases."

Now the laches which is here complained of is that the minor applicants did not apply for copies necessary for their appeal until 23 days after the review had been rejected, and the circumstances which we have to take into consideration are that their father had died in July or August when they were minors, their only guardian being a lady, Gouribari Bewa, and they resided in an out of the way village named Bara Khandu in the Kendrapara Sub-Division of District Cuttack, and we cannot say that 23 days was at all an unreasonable time for them to procure some gentlemen of their own neighbourhood to proceed on the long and troublesome journey to Cuttack and consult Pleaders, then come back and raise the necessary funds for the copies and do all the other necessary work that had to be done before the copies could be obtained.

We think that this is eminently a case where our discretion should be exercised in favour of the applicants, and we, therefore, make the Rule absolute and direct that the appeal be registered and put on the board for hearing under O. 41, R. 2, Civil Procedure Code. This being an indulgence we do not allow any costs to the applicants.

Walmsley, J.—I agree.

V. B./R. K.

Rule made absolute.

A. I. R. 1916 Calcutta 672

MOOKERJEE AND ROE, JJ.

Lenga Lalung —Plaintiff—Appellant.

v.

Penguri Lalungani and *others*—Defendants—Respondents.

Second Appeal No. 909 of 1914, decided on 28th May, 1915, against the Decree of Sub-Judge, Nowgong, dated 15th January, 1914.

Custom—Marriage—*Lalungs* though Hindus are governed in marriage by custom if not illegal—Custom requiring son-in-law to reside with father-in-law is not illegal.

Even if it be assumed that *Lalungs* are Hindus, their marriage relation must be governed by custom which prevails amongst the tribe, provided that the custom is neither immoral nor opposed to public policy. [P. 673, C. 1.]

There is nothing opposed to 'public policy' or 'the policy of the law' or injurious to the public interests, that is, to the interests of the tribe of the parties, or immoral in a tribal custom which requires a son-in-law to reside in the family of his father-in-law, if he can have there free access to his wife. [P. 673, C. 2.]

Jadu Nath Kanjilal—for Appellant.

Akhilbandhu Guha—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit which has been described as a suit for possession of a wife or for restitution of conjugal rights. The first defendant is the wife of the plaintiff and the second defendant is his father-in-law. The parties are *Lalungs*, a semi-aboriginal tribe who are governed by many customs peculiar to themselves. One of their marriage customs is that the parents of the girl find a husband for her and take him to their house as a member of their family: the offsprings of the marriage enter the clan of the mother. The defendants place reliance upon this custom and contend that the plaintiff is not entitled to a decree for possession of his wife and for her removal from the residence of her father, as it is incumbent upon him to reside in the family of his father-in-law. They allege that the plaintiff is always welcome in the household of his father-in-law where he may have free access to the society of his wife. The Subordinate Judge has held that this custom cannot be disregarded in a Court of law and that the plaintiff is consequently not entitled to succeed in this litigation. On the present appeal it has been argued that the *Lalungs* are Hindus governed by the Hindu Law, and that the plaintiff is, under that law, entitled to possession of his wife, regardless of the custom, which, it is said, is if not immoral, at least clearly opposed to public policy, as it serves to restrict the personal liberty of the husband.

It is not disputed that as was ruled in the case of *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1), the duty imposed upon a Hindu wife to reside with her husband wherever he may choose to reside is a rule of Hindu Law and not merely a moral duty, and that, consequently, an ante-nuptial agreement on the part of the husband that he will

(1) (1901) 28 Cal. 751=5 C. W. N. 673.

never be at liberty to remove his wife from her paternal abode would defeat that rule of Hindu Law and is invalid on that ground as well as on the ground that it is opposed to public policy. It is also not disputed that under the Muhammadan Law a condition that the wife shall, though adult, be at liberty to live in the house of her parents is void, though this question is by no means settled by authority, as is clear from the decision in *Hamidunnessa Bibi* v. *Zohir-ud-din Sheik* (2). But there is nothing to show that the *Lalungs* are governed by the Hindu Law, in all respects. Even if it be assumed, however, that the *Lalungs* are Hindus, their marriage relation must be governed by custom which prevails amongst the tribe, provided that the customs are neither immoral nor opposed to public policy. The case before us is clearly not of an immoral custom such as came before the Courts in *Reg* v. *Karsan Goja*; *Reg* v. *Bai Rupa* (3), *Reg* v. *Manohar Raiji* (4), *Uji* v. *Hathi Lalu* (5), *Khemkor* v. *Umiashankar Ranchhor* (6), *Narayan* v. *Laving* (7) and *Koraga* v. *Queen* (8). We are also unable to accept the contention of the appellant that the custom alleged in this case is opposed to public policy. As Mr. Justice Burrough observed in *Richardson* v. *Mellish* (9) public policy is a very unruly horse and when once you get astride of it you never know where it will carry you. These weighty words were adopted and approved by Lord Esher, M. R. in *Cleaver* v. *Mutual Reserve Fund Life Association* (10). To the same effect are the observations of Cave, J., in *Official Receiver, Ex parte, Mirams, In re* (11). "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." We do not see that there is anything opposed to "public policy" or "the policy of the law," as Kekewich, J., puts it in *Hope Johnstone*, v. *Hope Johnstone* (12), in a tribal custom which requires a son-in-law to reside in the family of his father-in-law; the plaintiff is also entitled to free access to his wife, if he chooses to go to the house of his father-in-law. It is worthy of note that the Courts have recognised the validity of a custom or contract whereby the wife is to remain in her parents' house till puberty is established; *Kateeram* v. *Gendhenee* (13), *Suntosh Ram Dass* v. *Gera Pattuck* (14), *In the matter of the petition of Dhuronidhur Ghose* (15), *Surjyamoni Dasi* v. *Kali Kanta Das* (16) and *Arumuga Mudali* v. *Viraraghava Mudali* (17), though a different view is possibly indicated in *Dadaji Bhikaji* v. *Rukmabai* (18). We are clearly of opinion that the Court should not assist the plaintiff to violate the tribal custom and to remove his wife from the home of her father. We are not prepared to say that it is injurious to the public interests, that is, to the interests of the tribe to which the parties belong, nor is it in conflict with any express law of the Ruling Power: *Hirbae* v. *Sonabae* (19), *Howard* v. *Pestonji* (20), *Tara Chand* v. *Reeb Ram* (21), *Bhau Nanaji Utpat* v. *Sundrabai* (22) and *Mathura* v. *Esu* (23), and we are not bound by any rule of public policy to disregard this custom, subject to and with full knowledge of which the plaintiff married the first defendant.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(2) (1890) 17 Cal. 670.
(3) (1864-66) 2 B. H C. R. 117.
(4) (1868-69) 5 B. H. C. R. 17 Cr.
(5) (1870) 7 B. H. C. R. 133.
(6) (1873) 10 B. H. C. R. 381.
(7) (1877-78) 2 Bom. 140.
(8) (1883) 6 Mad. 374.
(9) (1824) 2 Bing. 229=9 Moore 435.
(10) (1892) 1 Q. B. 147=16 L. J. Q. B. 128=66 L. T. 220
(11) (1891) 1 Q. B. 594=60 L. J. Q. B. 397=64 L. T. 117.
(12) (1904) 1 Ch. 470=73 L. J. Ch. 321=90 L. T. 253.
(13) (1875) 23 W. R. 178.
(14) (1875) 23 W. R. 22.
(15) (1890) 17 Cal. 298.
(16) (1901) 28 Cal. 37.
(17) (1901) 24 Mad. 255.
(18) (1886) 10 Bom. 301.
(19) (1847) Perry O. C. 110.
(20) (1852) Perry O. C. 535.
(21) (1866-67) 3 M. H. C. R. 50 at p. 56.
(22) (1874) 11 Bom. H. C. R. 249.
(23) (1879-80) 4 Bom. 545.

A. I. R. 1916 Calcutta 673

FLETCHER AND ROE, JJ.

Surendra Narayana Mitra—Plaintiff—Appellant.

v.

Dejindra Prosad Mitra and *others*—Defendants—Respondents.

Second Appeal No. 3899 of 1912, decided on 3rd May, 1915, against the Decree of District Judge, Jessore, dated 21st September, 1912.

(a) Civil P. C. (5 of 1908), S. 11—Party deriving title subsequent to the prior decision also comes within purview of S. 11.

S. 11 of the Civil Procedure Code, 1908, contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation. [P. 674, C. 2.]

(b) Civil P. C. (5 of 1903), S. 11—Where no interest is derived subsequent to the prior decision S. 11 does not prescribe that suit by such person must be dismissed.

There is nothing in S. 11 of the Code of Civil Procedure to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should involve the consequence of being dismissed. [P. 674, C. 2.]

(c) Civil P. C. (5 of 1908), S. 11—Issues must have been raised and tried to make principles of S. 11 operative.

Where no issue was raised or tried in the former suit between the parties to the new suit:

Held, that the claim was not barred by S. 11 of the Code of Civil Procedure. [P. 674, C. 2.]

(d) Civil P. C. (5 of 1903), O. 20, R. 12—Scope of R. 12 stated—It does not apply to co-defendants.

O. 20, R. 12, does not contemplate anything except the relation between the plaintiff and the defendant in a previous suit. There is nothing in O. 20, R. 12, to suggest that it applies between co-defendants. [P. 674, C. 2.]

Sarat Chandra Roy Chowdhury and *Dhirendra Krishna Roy*—for Appellant.

Bepin Behary Ghose II, *Jnamendra Nath Sircar* and *Amarendra Nath Bose*—for Respondents.

Judgment.—This is an appeal from a decision of the learned District Judge of Jessore affirming the decision of the Subordinate Judge of the first Court there. The plaintiff brought the suit to recover mesne profits or damages in respect of certain lands of which he had been kept out of possession by the defendants Nos. 1 to 56. The plaintiff in the year 1896 obtained a lease of about 600 *bighas* of land at an annuai rent of Rs. 196 odd from the defendants Nos. 57 to 60. When the plaintiff attempted to take possession, he was resisted by the defendants Nos. 1 to 56. Then happened what has caused the difficulty in the present suit. In the year 1900, the defendants Nos. 57 to 60 instituted a suit to recover possession through the plaintiff of the lands together with mesne profits. The present plaintiff was the *pro forma* defendant to that suit. But it is quite clear that that suit ought to have been dismissed, because either the defendants Nos. 57 to 60 had a right to possess the lands in which case the decree ought to have been in their favour, or that there had been a right of possession in favour of the present plaintiff in which case the suit ought to have been dismissed. What happened was that the suit was decreed on the 11th July, 1902, actual possession being delivered on the 23rd July, 1909. In the course of the execution proceedings in that suit, mesne profits were assessed for three years down to the 11th July, 1905, and now the plaintiff brings the present suit to recover mesne profits after that date. The learned Judges of the Courts below have dismissed the suit on the ground that it is barred by the rule of *res judicata*. It is quite clear that S. 11, Code of Civil Procedure, contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation. There is nothing in S. 11 to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should involve the usual consequence of being dismissed. That is what has caused the difficulty in the present case because obviously the plaintiff in this suit does not claim through the defendants Nos. 57 to 60 subsequent to the date of the former suit.

Then the *next* point is that, at any rate, the present plaintiff was a formal party to the former suit and that a case of *res judicata* has arisen between the present plaintiff and the defendants Nos. 1 to 56 by reason thereof. But no issue was raised or tried between the present plaintiff and the defendants Nos. 1 to 56 in the former suit. It is quite clear, therefore, that the present claim is not barred by S. 11, Code of Civil Procedure.

The *other* point is that the plaintiff's suit is barred by S. 211 of the old Code of Civil Procedure, which corresponds with O. 20, R. 12 of the new Code. But O. 20, R. 12, does not contemplate anything except the relation between the plaintiff and the defendant in that suit. There is nothing in O. 20, R. 12, to suggest that it applies between co-defendants. That being so, there is nothing to prevent the plaintiff in the present suit from recovering damages in respect of

the period subsequent to the assessment of damages in the former suit. The present appeal must, therefore, be allowed with costs both here and in the Courts below and the case remitted to the Court of first instance for the purpose of deciding the other issues raised in the case and, if necessary, for assessing and determining the amount of damages payable to the plaintiff.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 675

IMAM, J.

Sukumari Ghosh and *another*—Plaintiffs.

v.

Gopi Mohan Goswami—Defendant.

Ordinary Original Civil Suit No. 176 of 1910 and Small Cause Court Transfer Suit No. 3 of 1910, decided on 24th May, 1915.

(a) Practice—Costs—Default or dishonest conduct in accounting by manager—Suit for accounts—Costs against manager to be granted.

A person who takes up the management of another's estate and collects and disburses moneys, has to be ready with his account. His failure to perform the obvious duty, necessitates a suit and he must pay the plaintiffs' costs. *Collyer* v. *Dudley*, (1823) 2 L. J. Ch. 15, foll.

This is all the more so when he makes a dishonest defence, submits a false account and keeps back books of account or documents. 14 Cal. 147, ref. to. [P. 676, C. 1.]

(b) Practice—Costs — Suit by manager for salary—Suit for accounts by principal against manager—Suit heard together—Sum found due to principal from manager—Costs against manager were awarded.

Where the manager of an estate sued the principal for arrears of salary in the Presidency Court of Small Causes and the principal sued the manager in the High Court for accounts and the two suits were heard together in the High Court and an amount less than Rs. 1,000 was found due from the manager to the principal, costs were awarded against the manager on High Court scale No. II having regard to the circumstances above stated. [P. 676, C. 1.]

H. D. Bose and *B. K. Ghosh* – for Plaintiffs.

S. R. Dass—for Defendant.

Judgment. – This matter comes up for further direction on the Assistant Referee's report. The principal question involved in it, is one of costs. The defendant had sued the plaintiffs for arrears of salary amounting to Rs. 1,886-12-6 in the Small Cause Court of Calcutta. The plaintiffs then instituted this suit in this Court for account against the defendant. The suit in the Small Cause Court was removed to this Court for trial with this suit. The plaintiffs represent the estate of the late Mr. Lal Mohan Ghose, and it is the common case of the parties that in 1908, the defendant was the manager of the Bairagadi Estate belonging to the deceased. In answer to the claim of the plaintiffs for account, the defendant in his written statements stated that he was not accountable to the plaintiffs nor had he been accountable to the late Mr. Ghose, inasmuch as he had fully explained to the latter all his dealings with the said estate and the management thereof. The plaintiffs admitted the defendant's claim to Rs. 1,886-12-6 as arrears of salary. A preliminary decree was passed for accounts, which were directed to be taken before the Assistant Referee. In the state of facts filed by the defendant, he showed Rs. 44 or thereabouts as balance due to him. The plaintiffs disputed the accuracy of that account and sought to surcharge and falsify the defendant's state of facts and alleged that he had not accounted for various sums received by him as manager, and that he had entered certain fictitious payments in his account. After a prolonged enquiry extending over 60 days or more, the Assistant Referee has reported that the defendant has failed to account for Rs. 716 out of the moneys collected by him as manager of the said Bairagadi Estate. From the report of the Assistant Referee, which stands confirmed by effluxion of time, it appears that the book most important for the enquiry, *viz.*, the *talab-baki*, was suppressed by the defendant though he had been called upon to produce it. He has been guilty of suppression of other material documents also. Judging from the Assistant Referee's report, the defendant's conduct deserves the fullest condemnation. His motives have been described by the Assistant Referee as "not honest from the outset." The Court's discretion in the matter of costs, as was explained in *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1), is to be exercised with special reference to all the circumstances of the case, including the conduct of

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(1) (1868) 9 W. R. 61.

parties. A person who takes up the management of another's estate and collects and disburses moneys, has to be ready with his account. His failure to perform the obvious duty, necessitates a suit, and he must pay the plaintiff's costs [*Collyer* v. *Dudley* (2)]. In the present suit, it is not merely an unreadiness to account that stands to the discredit of the defendant, but he sets up a deliberately false defence that he was not accountable at all, and, when decreed to render account, submitted a false account and suppressed important documents, thereby hampering and prejudicing the enquiry before the Assistant Referee. In view of the *bona fide* and honest character of the plaintiffs' suit and the reprehensible conduct of the defendant, I am clearly of opinion that the plaintiffs should be allowed full costs, including costs of and incidental to the enquiry. The case of *Ram Gopaul* v. *Bhobun Mohun* (3) is in point. There is also a higher authority in *Hurrinath Rai* v. *Krishna Kumar Bakshi* (4), in which their Lordships of the Privy Council ordered the defendant to pay the costs inasmuch as he had taken the untruthful course of denying his receipts, fiduciary position and his accountability *in toto*.

Mr. S. R. Das, on behalf of the defendant, objects to costs being allowed to the plaintiffs on the ground that the suit for account should have been filed in the Small Cause Court. He maintains that the Assistant Referee having found that only a sum of Rs. 716 had remained unaccounted for, the claim was well within the jurisdiction of the Small Cause Court, and the plaintiffs, having obtained a decree for less than Rs. 1,000 in this Court, are not entitled to any costs under the provisions of S. 22, Presidency Small Cause Courts Act. I cannot accede to this contention, inasmuch as the plaintiffs could institute their suit in the Small Cause Court only if they were in a position to appraise its value within the pecuniary jurisdiction of that Court, which they could not do on the facts of this case. The sum ascertained by the Assistant Referee has been arrived at by an enquiry. I do not think that a suit for account without a claim to a specific sum within the competence of the Small Cause Court, can lie in that Court. But even if it were conceded that this suit was cognisable by the Small Cause Court, I would not hesitate to certify that it was fit to be brought in the High Court.

For these reasons, I allow full costs on scale No. 2 to the plaintiffs, including reserved costs, if any. The costs will include the enquiry before the Assistant Referee and the Commission at Dacca.

The defendant will get the costs of the Small Cause Court transferred suit on the Small Cause Court scale. To the defendant is decreed the sum of Rs. 1,370-9-7½ from the plaintiffs on account of salary. Out of the said sum, the sum of Rs. 1,170-12-6 will carry interest at 6 per cent. from the date of the Assistant Referee's report till the date it came to be filed.

The amount deposited by the plaintiffs in the Small Cause Court transferred suit, or any portion of it, will not be withdrawn by the defendant till the costs of both parties have been ascertained. The plaintiffs will get the costs of this application.

V.B./R.K.

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(2) (1823) 2 L. J. (O. S.) Ch. 15=Turn & R. 421=37 E. R. 163.
(3) (1864) Coryton's Rep. 126.
(4) (1887) 14 Cal. 147=13 I. A. 123 (P. C.).

A. I. R. 1916 Calcutta 676

MOOKERJEE AND ROE, JJ.

Habiram Das and *others*—Defendants—Appellants.

v.

Hem Nath Sarma and *others*—Plaintiffs—Respondents.

Second Appeal No. 3256 of 1912, decided on 13th May, 1915, from the Order of Dist. Judge, Assam Valley.

(a) Assam Land and Revenue Regulation Act (1 of 1886), S. 154, Cl. (f)—In revenue partition plaintiff claiming interest but not being registered proprietor was denied right to intervene or be heard—Before completion plaintiff sued for declaration that he was entitled to share allotted to his predecessor—Held S. 154(f) does not bar the suit.

An estate wherein the plaintiff claimed a share was the subject of partition by the Revenue Authorities. The plaintiff was not a recorded proprietor, and, consequently, his application to intervene in the partition proceedings was rejected and he was denied an opportunity to be heard. Before the completion of those proceedings the plaintiff instituted a suit seeking a declaration that the share which had been allotted to his predecessor-in-interest was his property:

Held, that the suit was not barred under the provisions of Clause (*f*) of S. 154 of the Assam

Land and Revenue Regulation, and that it was open to the Civil Court, at that stage, to make a declaration of title in favour of the plaintiff. [P.678, C. 1.]

(b) Evidence Act (1 of 1872), Ss. 66 and 74—Certified copy of order of probate with will attached is admissible under S. 74—It would be admissible under S. 66 though no steps are taken to require the defendant to produce the original that is in his possession.

A certified copy of an order of a Probate Court to the effect that Letters of Administration be granted to the person named with a copy of the will annexed is a public document within the meaning of S. 74 of the Indian Evidence Act and is consequently admissible in evidence. It would also be admissible under S. 66 of the Act if the original document is in the possession of the defendant even if no steps are taken to call upon him to produce it in Court, because such steps may be waived at the discretion of the Court specially where no question of genuineness is raised. [P. 678, C. 1.]

Jadunath Kanjilal—for Appellants.

Mohini Mohan Chakrabarty and *Biraj Mohan Majumdar*—for Respondents.

Judgment.—This is an appeal by the first three defendants in a suit for confirmation of possession of land on declaration of title. The plaintiff seeks relief in respect of an one-fourth share of an estate; Courts below have made a decree in his favour to the extent of one-sixth share. Upon this appeal, the decree of the District Judge has been assailed on two grounds, namely, *first*, that the suit was barred under the provisions of Clause (*f*) of S. 154 of the Assam Land and Revenue Regulation, 1886; and, *secondly*, that the District Judge has erroneously determined the share of the plaintiff to be one-sixth instead of one-twelfth, by improper exclusion of evidence which was legally admissible. In our opinion, there is no substance in the first contention, but there is no answer to the second objection.

As regards the first ground, we observe that Clause (*f*) of S. 154 of the Assam Land and Revenue Regulation provides that no Civil Court shall exercise jurisdiction in the distribution of land or allotment of revenue on partition. The estate wherein the plaintiff seeks a share was the subject of partition by the Revenue Authorities in a proceeding instituted in 1902, and terminated on the 6th October, 1910. The plaintiff was not a recorded proprietor, and, consequently, his application to intervene in the partition proceedings was rejected. He, thereupon, instituted this suit on the 30th May, 1910 for declaration of his title to a share of the estate and for confirmation of possession therein. The relief sought by the plaintiff plainly does not relate to the distribution of land or allotment of revenue of an estate on partition. The plaintiff seeks a declaration that the share which has been allotted to his predecessor-in-interest is his property. This declaration, if made in favour of the plaintiff, will not disturb the distribution of lands or allotment of the revenue on partition by the Revenue Authorities. The suit is consequently maintainable. This view is in accordance with the decision of *Muhammad Jan* v. *Sadanand Pandey* (1). We are not unmindful that the case mentioned has been criticised in *Khasay* v. *Jugla* (2), *Muhammad Nasar-ullah Khan* v. *Muhammad Ishaq Khan* (3), *Debi Saran* v. *Ramjas* (4) and *Lachman Das* v. *Hanuman Prasad* (5). There are no doubt expressions of wide generality in the judgment in the case of *Muhammad Jan* v. *Sadanand Pandey* (1), but they are not necessary for the determination of the question raised before us: this much is clear that the suit is maintainable when the plaintiff was denied an opportunity to be heard in the partition proceedings before the Revenue Authorities, *Awadh Bihari Lal* v. *Ishri Prasad* (6). We have here the additional fact that when the suit was instituted the partition proceedings had not been completed, and consequently it was open to the Civil Court, at that stage, to make a declaration of title in favour of the plaintiff. The first contention consequently fails.

As regards the second ground, we observe that the Courts below have excluded from evidence a certified copy of Letters of Administration granted to two of the defendants, Gurudutt Katki and Chandradutt Katki, in respect of the estate of Kasinath Katki who had made a testamentary disposition of his property before his death. In our opinion, the evidence has been erroneously excluded. The certified copy produced is a copy of the order of the Probate Court to the effect that Letters of Administration be granted to the persons named, with a

(1) (1906) 28 All. 394.
(2) (1906) 28 All. 432.
(3) (1910) 32 All. 523=6 I. C. 833.
(4) (1909) 31 All. 541=2 I. C. 982.
(5) (1911) 33 All. 169=8 I. C. 807.
(6) (1907) 4 A. L. J. 662=(1907) A. W. N. 172.

copy of the will annexed of the deceased Kasinath Katki. The view may well be maintained that the document of which a certified copy has been produced, is a public document within the meaning of S. 74 of the Indian Evidence Act, for it is a document which forms the record of the act of a public Judicial Officer in British India, namely, the act of the Judge of the Probate Court. The certified copy is consequently admissible. This view does not conflict with the decision of *Ponnammal* v. *Sundaram Pillai* (7), where a copy was tendered of a record in a Ceylon Court, which was not even proved to have been certified as a correct copy. The view may also be maintained that the certified copy is admissible under S. 66, inasmuch as the Letters of Administration granted to the administrators was in the possession of some of the defendants who were interested to oppose the claim of the plaintiff. No doubt, the procedure was not strictly regularised as steps were not taken to call upon the persons in possession of the Letters of Administration to produce it in Court. But such steps might be waived at the discretion of the Court, specially as no question of genuineness arises here. We are of opinion that the document should have been received in evidence. If it is received in evidence, there is no controversy that the share of the plaintiff is not one-sixth but one-twelfth, because the will shows that there had been a testamentary disposition of the properties of Kasinath Katki and his share in the estate did not pass to the plaintiff.

The result is that the decree of the District Judge is varied to this extent, namely, the share of the plaintiff will be declared to be one-twelfth and not one-sixth. The decree will further state from the share of what person this share is to be carved out in favour of the plaintiff. This specification will be inserted in the decree when it is drawn up on the basis of partition papers which have already been called for by an order of this Court. As the appellants have succeeded in part only, there will be no order for costs of this appeal.

V.B./R.K.

Decree varied.

(7) (1900) 23 Mad. 499.

A. I. R. 1916 Calcutta 678

FLETCHER, J.

Jadab Chandra Sardar and *another*—Defendants – Appellants.

v.

Govinda Chandra Mandal and *others*—Plaintiffs—Respondents.

Appeal No. 1355 of 1913, decided on 30th April, 1915, from the Appellate Decree of Dist. Judge, 24 Parganas, dated 23rd January, 1913.

(a) Landlord and Tenant — Forfeiture—Transfer by non-transferable occupancy *raiyat* of his right to under-*raiyat* effects forfeiture.

Where in the absence of any custom of transfer an occupancy *raiyat* transfers the property to the under-*raiyats*, the landlord has a right to re-enter upon the property. [P. 679, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 49 and 87—Notice under S. 49 is not necessary in case of forfeiture of right of occupancy *raiyat* by transfer without consent—S. 49 applies when occupancy right retains his right—Notice under S. 87 also is unnecessary.

A notice under S. 49 of the Bengal Tenancy Act, to which under-*raiyats* are entitled, is indeed required before ejectment, but that does not apply to a superior landlord who is claiming to re-enter because the occupancy *raiyat* has forfeited his holding by having transferred it without the consent of the landlord.

S. 49 applies where the occupancy *raiyat* still remains in the position of the landlord, not where the occupancy *raiyat* has forfeited his interest by having transferred his interest without the consent of the landlord.

A notice served under S. 87 of the Bengal Tenancy Act is not required for the landlord to re-enter in a case like this. [P. 679, C. 1.]

Dwarka Nath Mitter and *Baikuntha Nath Mitter*—for Appellants.

Sarat Chandra Roy Chowdhury and *Satya Charan Sinha*—for Respondents.

Judgment.—This is an appeal by the defendants Nos. 1 and 2 from a decision of the learned District Judge of 24 Parganas dated the 23rd January, 1913, affirming the decision of the Munsif of the second Court of Basirhat. The suit was brought by the plaintiffs for ejectment. The defendants Nos. 1 and 2 were under-*raiyats* under the defendant No. 4. Then the defendant No. 4 transferred his occupancy right to the first three defendants. After that transfer, the landlord settled the land with the present plaintiffs. The plaintiffs then sued to recover possession of the land. The under-*raiyats* raised many defences, but it has been found by the learned Judge of the lower Appellate

Court that the interest that the defendant No. 4 had was that of an occupancy *raiyat* and that there is no custom of transfer. Therefore, when the fourth defendant transferred the property to the other three defendants, the landlord had a right to re-enter upon the property. But it is said that the defendants Nos. 1 and 2, who were originally under-*raiyats*, are entitled to a notice under S. 49 of the Bengal Tenancy Act. Under S. 49 an under-*raiyat* is not liable to be ejected by his landlord, except when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. That does not apply to a superior landlord who is claiming to re-enter because the occupancy *raiyat* has forfeited his holding by having transferred it without the consent of the landlord. S. 49 applies where the occupancy *raiyat* still remains in the position of the landlord, not where the occupancy *raiyat* has forfeited his interest by having transferred his interest without the consent of the landlord.

Then another point, has been made that, in this case, the landlord could only re-enter after a notice served under S. 87 of the Bengal Tenancy Act. The decision of this Court are clear and conclusive that that is not so. Those decisions have been acted upon and recognised and this point about S. 87 clearly has got no substance in it. I agree with the conclusion arrived at by the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

V.B./R.K

Appeal dismissed.

A. I. R. 1916 Calcutta 679

CHATTERJEE AND BEACHCROFT, JJ.

Biswa Nath Sinha—Plaintiff—Appellant.

v.

Bidhumukhi Dasi—Defendant — Respondent.

Appeal No. 138 of 1915 and Rules Nos. 394 and 395 of 1915, decided on 26th May, 1915, from Original Decree of Dist. Judge, Nadia, dated 1st February, 1915.

Land Acquisition Act (1 of 1894), Ss. 54 and 31—District Judge allowing Hindu widow to take out compensation money deposited by Collector—Order is not appealable.

No appeal lies under S. 54 of the Land Acquisition Act from an order made by the District Judge allowing a Hindu widow to take out compensation money deposited in the District Judge's Court by the Collector under S. 31 of the Act. [P. 679, C. 2.]

Brojo Lal Chuckerbutty, *Gurudas Sinha* and *Harish Chandra Roy*—for Appellant.

Brojendra Nath Chatterji—for Respondent.

Judgment.—A dwelling house belonging to a Hindu widow was acquired under the Land Acquisition Act. The compensation money amounting to Rs. 5,800 odd was sent by the Collector to the District Judge under S. 31 of the Land Acquisition Act. Upon the lady making the application for taking out that money for the purpose of building a house to live in, there was an objection at first on behalf of the reversioner; but ultimately, the reversioner gave his consent to the money in deposit being invested by the Court under S. 32 (*a*) of the Land Acquisition Act for the construction of a suitable building. This consent was given upon an application of the lady for paying out the money to her. The order No. 14 shows that "the Pleader for the opposite party intimated that he had no objection to the permission being granted to the petitioner to withdraw the money in deposit for the construction of a suitable building for the petitioner." After this order was made to pay out the money, there was an application for review by the opposite party, but that was disallowed, and ultimately the money was paid out upon taking a surety bond from a third person and from the lady. Against this order allowing the lady to take out the money in this way, there was an appeal to this Court and also an application for revision. A preliminary objection was taken on the ground that an appeal was incompetent, and we think the preliminary objection is sound because under S. 54 of the Act no appeal lies from an order of this nature made by the District Judge. Dealing with the case, however, under S. 115 of the Code of Civil Procedure, we think that there have been some just reasons for complaint in the proceedings of the Court below. Although a large amount of money has been paid out for the purpose of a building, no plan or estimate has been taken and the surety bond that has been taken is worded so

indefinitely that in case of loss there may be no chance of recovering any amount that may be lost. As the reversioner consented to the money being paid out, we are not inclined to alter the order that has been passed for paying the money.

We must, however, arrange for a safeguard against the misapplication of the money. We, therefore, direct that the learned Judge will enquire into the title in respect of the land that has been acquired by the lady for building a house in the presence of the reversioner. Then the lady will put in a plan and an estimate which will be passed by the learned Judge in the presence of the reversioner. Then a new surety bond will have to be filed within a time fixed by the Court, and the sufficiency of the security is to be tested in the presence of the reversioner: and the surety will be made liable for the misappropriation of the money and for the construction of the building according to the plan and estimate to be filed within a time to be fixed by the Court. When the house is completed, the lady should report the completion of the building to the Court and also file the accounts; and if there is any objection as to the plan not being properly carried out in accordance with the estimate, the Judge will hear the objection, decide the same and pass proper orders. If there is any money left, it will be deposited in Court for being dealt with in accordance with law.

In view of the results of the two proceedings, we make no order as to costs.

The appeal is dismissed and the rules are disposed of as stated above.

V.B./R.K.

Appeal dismissed; Rules made partly absolute.

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MOOKERJEE AND ROE, JJ.

Madhusudan Sen – Defendant—Appellant.

v.

Rakhal Chandra Das Basak and *others* —Plaintiffs—Respondents.

Second Appeal No. 2236 of 1913, decided on 6th May, 1915, from the decision of the Sub Judge, Dacca, dated 19th May, 1913.

(a) Limitation Act (9 of 1908), Art. 132—Liability of agent after accounts sought to be enforced by sale of immovable property hypothecated for due discharge of duty is governed by Art. 132.

Where an agent's immovable property is hypothecated as security for the due discharge of his duty as agent, and his principal seeks to realise from him whatever sum may be found due on adjustment of accounts, by sale of the immovable property hypothecated the suit is one to enforce a charge on immovable property within the meaning of Art. 132 of the Indian Limitation Act. Case-law discussed.

[P. 681, C. 2.]

(b) Limitation Act (9 of 1908), Arts. 89 and 115—Agent after death of principal continues to work for heirs—Contract of agency is implied—Suit for accounts—Held to be governed by Art. 89.

An agency is terminated by the death of the principal and the agent does not continue to be the agent of the heirs of the deceased principal as he was before his death, but if the agent continues to work for the heirs a new agency is created by implication; and if under such new agency the parties agree that accounts should be submitted from year to year, a suit for accounts would be governed by Article 89 and not by Article 115 of the Limitation Act. Case-law discussed. [P. 682, C. 2 & P. 683, C. 1.]

(c) Limitation Act (9 of 1908), Art. 89—Suit for accounts within 3 years of termination of agency—Principal is entitled to accounts for whole period.

Where a principal's suit against his agent is governed by the second alternative provided in Article 89 of the Limitation Act, namely, where time runs against the principal from the date of determination of the agency, and a suit is brought within three years, the principal is entitled to accounts for the entire period of the agency. 29 I. C. 848; 9 C. W. N. 745 and 8 Ind. Cas. 637, rel. upon. [P. 683, C. 1 & 2.]

(d) Limitation Act (9 of 1908), Art. 89—What is refusal to render accounts within Art. 89 is stated—In absence of demand and refusal suit is governed by second alternative provided in Art. 89.

If there has been a demand for accounts and the agent has not responded to the call, there is, by implication, a refusal within the meaning of Article 89. If, however, the principal demands an account and the agent submits papers, there is not necessarily a refusal on the part of the agent to render accounts unless the agent fails to respond to the further demand of explaining the papers submitted by him.

When there is nothing to show that there was a demand and refusal, a claim for accounts would be governed by the second alternative in the third column of Article 89.

[P. 683, C. 2 & P. 684, C. 1.]

(e) Principal and Agent—Duty—Accounts—Agent is bound not only to submit but explain accounts—Papers produced before one principal—Agent not liable for non-production before other principals—But he is bound to produce those papers not produced.

The duty of an agent when he is called upon to render account to his principal does not terminate merely by the submission of account papers; he is bound to explain those papers, and if, on accounts taken, it is found that he has

in his hands money which belongs to his principal, he is bound to pay that sum. [P. 684, C. 1.]

If an agent for collection has submitted the collection papers to one of the several principals, he is under no obligation to submit papers, again to the other principals; and he cannot be held responsible for the production of the papers, if they are not produced by the person to whom they were submitted by him. But he is obliged to produce such papers as have not already been produced and to explain all the papers to the satisfaction of the Court. [P. 684, C. 2.]

Gunada Charan Sen, *Romesh Chandra Sen* and *Surendra Nath Das Gupta*—for Appellant.

Sarat Chandra Basak and *Bepin Chandra Bose*—for Respondents.

Judgment.—This is an appeal by the first defendant in a suit for accounts. The facts material for the decision of the questions of law raised before us may be briefly stated. On the 5th September, 1895 the defendant was appointed agent of the plaintiffs and their co-sharers for management of their estate. The defendant and his father at the time hypothecated immovable property as security for the due performance of the duty of the first defendant as agent. This bond was executed in favour of persons who were proprietors of a half share of the entire property. One of these, Radhika Mohan Das, was interested to the extent of one-eighth share; another, Rakhal Chandra Das, for himself and as guardian of his infant brother, Brojo Gopal Das, was interested to the extent of another one-eighth share. Two other persons, Gobind Lal Das and Keshab Lal Das, were each interested to the extent of one-eighth share. The proprietors of the remaining one-half share were not parties to the transaction, but it has been alleged—and that statement has not been challenged—that the defendant was also their agent for the purpose of collection of rent. This agreement continued in force till the 19th August, 1904, when its terms were varied in the manner following, *viz.*, the defendant undertook to collect the rent of one-fourth share separately and to submit separate collection papers in respect of that share year after year. In the interval, Radhika Mohan Das had died in the year 1900 and his interest in the property had vested in Rakhal Chandra Das and Brojo Gopal Das; but there was no new contract in writing between these persons and the defendant, although the latter continued to act as their agent as previously. The defendant was discharged from his office on the 7th August, 1908. This suit for account was commenced against him on the 7th August, 1911 by the plaintiffs who are representatives of the one-fourth shareholder other than Gobind Lal Das and Keshab Lal Das. These latter have not joined as co-plaintiffs and have consequently been joined as *pro forma* defendants. The plaintiffs claim accounts for the period from the 14th April, 1901 to the 7th August, 1908. The claim is resisted by the defendant on the merits as also on the ground of limitation; he urges that he has rendered accounts and is under no further obligation to the plaintiffs, and further contends that, if this plea is not established, the claim is barred by limitation. The Court of first instance decided in favour of the defendant and dismissed the suit. Upon appeal the Subordinate Judge has set aside that decision and has made a preliminary decree for accounts from the 14th April, 1901 up to the 7th August, 1908. On the present appeal, it has been urged on behalf of the defendant that the entire claim is barred by limitation. In our opinion, this contention cannot possibly prevail.

The defendant and his father hypothecated immovable property as security for the due discharge of the duty of the defendant as agent of the plaintiffs and their co-sharers. The plaintiffs seek to realise from the defendant whatever sum may be found due to them on adjustment of accounts, by sale of the immovable properties hypothecated. The suit is consequently one to enforce a charge on immovable property within the meaning of Article 132 of the Indian Limitation Act. This view is supported by the decisions in *Hafezuddin Mandal* v. *Jadu Nath Saha* (1), *Troilukhyanath Mandal* v. *Abanish Chandra Roy* (2), *Sures Kanta Banerjee* v. *Nawab Ali Sikdar* (3) and *Venkatachalam Chetty* v. *Narayanan Chetty* (4). It has been pressed upon us, however, on behalf of the appellant that a contrary view is supported by the case of *Jogesh Chandra* v. *Benode Lal Roy* (5).

(1) (1908) 35 Cal. 298.
(2) A.I.R. (1915) Cal. 118=24 I. C. 18.
(3) (1915) 29 I. C. 848.
(4) (1915) 26 I. C. 740.
(5) (1910) 5 I. C. 59.

But as was pointed in *Troilukhyanath Mandal* v. *Abanish Chandra Roy* (2), the case of *Hafezuddin Mandal* v. *Jadu Nath Saha* (1) was not brought to the notice of the Division Bench that decided the case of *Jogesh Chandra* v. *Benode Lal Roy* (5). For this reason that decision was not followed either in *Troilukhyanath Mandal* v. *Abanish Chandra Roy* (2) or in *Sures Kanta Banerjee* v. *Nawab Ali Sikdar* (3). In these circumstances, we adopt the view taken in *Hafezuddin Mandal* v. *Jadu Nath Saha* (1) and hold that the claim of the plaintiffs in so far as they are in a position to enforce a lien on immovable property is not barred by limitation. This brings us to the question, whether the plaintiffs are entitled to enforce a lien on immovable property in respect of their entire claim.

On behalf of the appellant, it has been contended that when Radhika Mohan Das died in 1900, the agency of the defendant under him terminated. In support of this view, reliance has been placed upon S. 201 of the Indian Contract Act, which provides that an agency is terminated by the death of either the principal or the agent. On behalf of the plaintiffs-respondents, it has been argued that a contrary view may be supported by a reference to the terms of S. 209 which defines the duty of the agent on termination of the agency by the death of the principal. In our opinion, there is no foundation for this contention. S. 209 is in these terms:—

"When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him."

This provision does not indicate that the agent continues to be the agent as he was before the death of the principal. If he continues to be the agent, no such provision as is embodied in S. 209 is needed. On the other hand, if we contrast the provisions of S. 253 which defines the effect of the death of any partner on a partnership, it becomes plain that under S. 209 an agency is terminated by the death of the principal or the agent. Clause (10) of S. 253 lays down that, in the absence of any contract to the contrary, partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner. In S. 209 we miss the expression "in the absence of any contract to the contrary" which finds a place in S. 253. We hold accordingly that the agency of the defendant was terminated in 1900 with regards to the share of Radhika Mohan Das, and that thereafter a new agency was created by implication in respect of that share as between the defendant and the representatives of the deceased: *Mohendra Nath Ghosh* v. *Jadu Nath Mullik* (6). In respect of the account of this share consequently the plaintiffs are not entitled to enforce a lien on immovable property under the terms of the original contract of the 5th September, 1895. *Behari Lal Roy* v. *Hara Kumar Dutta* (7) and *Sures Kanta Banerjee* v. *Nawab Ali Sikdar* (3). The question next arises, what period of limitation is applicable with regard to this portion of the claim of the plaintiffs. On behalf of the appellant, it has been contended that Art. 115 applies and that as, on the 19th August, 1904, the parties agreed that accounts would be submitted from year to year, there was a breach of obligation of the defendant at the end of each year, so that under Art. 115, this portion of the claim is barred by limitation. In support of this view, reference has been made to the decisions of *Mati Lal Bose* v. *Amin Chand Chattopadhay* (8), *Easin Sarkar* v. *Barada Kishore Acharyya Chowdhury* (9), *Jogesh Chandra* v. *Benode Lal Roy* (5) and *Jhapajhanessa Bibi* v. *Bama Sundari Chaudhrani* (10). The first three of the cases mentioned, no doubt, lend some support to the contention of the appellant. But it must be observed that, as pointed out in *Jhapajhanessa Bibi* v. *Bama Sundari Chaudhrani* (10), there is a strong current of authority in the contrary direction. The cases of *Jogendra Nath* v. *Deb Nath Chatterjee* (11), *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (12), *Hafezuddin Mandal* v. *Jadu Nath Saha* (1) and *Chandra Madhab Barua* v. *Nabin Chandra Barua* (13), show that Art. 89 is applicable to cases of this description. It is worthy of note that in the cases of *Easin Sarkar* v. *Barada Kishore Acharyya Chowdhury* (9) and *Jogesh Chandra* v.

(6) (1909) 3 I. C. 684.
(7) (1915) 29 I. C. 748.
(8) (1905) 1 C. L. J. 211.
(9) (1910) 5 I. C. 186.
(10) (1912) 16 I. C. 414.
(11) (1904) 8 C. W. N. 113.
(12) (1905) 32 Cal. 719.
(13) (1913) 40 Cal. 108=18 I. C. 735.

Benode Lal Roy (5), the attention of the Court was not invited to the decision of *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (12) where it had been pointed out, on a review of the earlier authorities including the decision of the Judicial Committee in *Asghar Ali* v. *Khurshed Ali* (14), that Art. 89 is applicable to a suit for accounts by a principal against his agent. We may observe paranthetically that the appellant has argued that the case before the Judicial Committee was not in reality a suit by a principal against his agent. We are unable to give effect to this contention. The suit was brought by the then plaintiff for money in the hands of the defendant, who had consequently to account for the sum which he had taken and spent; and the Judicial Committee held that the suit was one for accounts, governed by Article 89 of the Indian Limitation Act. We hold accordingly that Article 89 is applicable in respect of this portion of the claim of the plaintiffs. We do not think it necessary to refer the question for the decision of a Full Bench of this Court, *first*, because the point is really concluded by the decision of the Judicial Committee in *Ashgar Ali* v. *Khurshed Ali* (14) and, *secondly*, because the later decisions to the contrary did not take notice of the earlier decisions which are precisely in point. It is further worthy of note that Mr. Justice Coxe who reluctantly followed the decision of *Jogesh Chandra* v. *Benode Lal Roy* (5) in *Jhapajhanessa Bibi* v. *Bama Sundari Chaudhrani* (10) was of opinion that the contrary view taken in *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (12) gave effect to the true intention of the Legislature.

We now proceed to examine the effect of the application of Article 89 to the case before us. That Article provides that a suit by a principal against his agent for movable property received by the latter and not accounted for may be instituted within three years from the date when the account is during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. On behalf of the respondent it has been strenuously urged that the case is governed by the second alternative, namely, that time runs against the plaintiff from the date when the agency terminates. The reason for this contention is obvious, because if it prevails, the plaintiffs would be entitled to accounts for the entire period claimed; for, as was pointed in *Sures Kanta Banerjee* v. *Nawab Ali Sikdar* (3) and the same view had been taken by the Judicial Committee by implication in *Jawahir Singh* v. *Lachman Das* (15) and by the Bombay High Court in *Nathubai Bhikandas* v. *Devidas Mangaldas* (16), if the suit has been brought within three years, the plaintiff is entitled to accounts for the entire period of the agency. The appellant has fully appreciated the danger of this argument, and accordingly contended strenuously that the case falls within the first alternative, namely, that here the account was demanded and refused during the continuance of the agency. To substantiate this contention, reliance has been placed upon a letter written admittedly by the plaintiffs to the defendant on the 24th April, 1909. In this letter, it was stated that the defendant had submitted account papers for 1311 and 1312 *Faslis* but had not explained them. He was accordingly called upon to appear before the plaintiffs and explain, as soon as possible, the accounts up to the end of the year 1312 *Fasli*. The defendant admittedly has not responded to this call. The question is, whether there has been a demand and refusal within the meaning of Article 89. Our attention has, in this connection, been invited to the cases of *Hori Narain Ghose* v. *Administrator-General of Bengal* (17), *Easin Sarkar* v. *Barada Kishore Acharya Chowdhury* (9) and *Chandra Madhab Barua* v. *Nabin Chandra Barua* (13). The cases of *Hori Narain Ghose* v. *Administrator-General of Bengal* (17) and *Easin Sarkar* v. *Barada Kishore Acharya Chowdhry* (9) show that if there has been a demand for accounts and the agent has not responded to the call there is, by implication, a refusal within the meaning of Article 89. A different view appears to have been taken in *Chandra Madhab Barua* v. *Nabin Chandra Barua* (13). In that case, there were apparently repeated demands by the principal, with which the agent had failed to comply. The Court held that as the demands were made while the business was in existence, limitation would run from the termination of the business. The facts of the case do not appear, however, fully either from the judgment or from the report; but, if this was intended as a formulation of

(14) (1902) 24 All. 27=28 I. A. 227 (P. C.).

(15) (1905) 9 C. W. N. 745.
(16) (1910) 8 I.C. 637.
(17) (1879) 3 C.L.R. 446.

a general principle applicable to all cases, we are unable to accept it as well-founded on principle. In our opinion, if there has been a demand, failure to respond to the demand is refusal within the meaning of Article 89. There may, however, be cases where omission to render accounts may not be a refusal within the meaning of Article 89. To take one illustration, if the principal demands an account and the agent submits papers, there is not necessarily a refusal on the part of the agent to render accounts. But, in the case before us, after the papers had been submitted, there was a further demand upon the agent to explain them. To this he failed to respond. In these circumstances, there was a refusal within the meaning of Article 89. Consequently, the claim for accounts up to 1312 *Fasli* in respect of the share of Radhika Mohan Das, is barred by limitation. In respect of the accounts for the remaining period, there is nothing to show that there was a demand and refusal; consequently the claim for accounts from 1313 *Fasli* is governed by the second alternative in the third column of Article 89 and is not barred by limitation.

Finally, we have to deal with the question of the mode in which accounts should be rendered. On behalf of the defendant the position has been maintained that as soon as the defendant as agent of the plaintiffs submitted his account papers, his duty was discharged, and that the plaintiffs are under an obligation to examine these papers without his assistance. In support of this position, reliance has been placed upon observations in *Chand Ram* v. *Brojo Gobind Das* (18) and *Upendra Kishore Rai Chaudhury* v. *Ram Tara Debya Chaudhurani* (19). We are unable to agree in the view put forward on behalf of the appellant. The duty of an agent when he is called upon to render account to his principal was explained by the Judicial Committee in the case of *Hurrinath Rai* v. *Krishna Kumar Bakshi* (20). It is well-settled that his obligation towards his principal does not terminate merely by the submission of account papers; he is bound to explain those papers, and if, on accounts taken, it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum. This principle has been recognised in a long series of cases: *Shushee Shekhur Audhikaree* v. *Suleem Biswas* (21), *Alaiahmad* alias *Moolaki* v. *Nusibun Bibee* (22), *Annoda Persad Roy* v. *Dwarkanath Gangopadhya* (23), *Ram Chunder Shaha* v. *Manick Chunder Manikya* (24), *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (12) and *Ram Das* v. *Bhagwat Das* (25). But the defendant here has not explained the papers, at any rate, the papers subsequently to 1310 *Fasli* and, consequently, he must render accounts when they are taken by a Commissioner.

As regards the submission of the papers, it has been argued on behalf of the defendant that up to the time when collection was joint he had submitted some of the collection papers to the *pro forma* defendants and other papers to the proprietors of the eight-annas share known as the Guha Babus. The Court of first instance found that the papers had been so submitted and in this view the defendant is under no obligation to submit papers again to the plaintiffs. It is plain, in so far as the papers relating to the time during which the collection was joint are concerned, that it is a matter between the landlords themselves and steps must be taken by the Court at the instance of the plaintiffs to compel the *pro forma* defendants and the Guha Babus to produce the papers which were made over to them by the defendant. The powers of the Court in this respect are ample and have certainly not been exhausted; every endeavour must be made by the Court below to obtain the papers from those persons. But, we desire to make it clear that the defendant cannot be held responsible for the production of papers, if they are not produced by the persons to whom they were submitted by him.

There remains only one other point for consideration. On behalf of the defendant it has been urged that the trial Court found expressly in his favour that the papers up to 1310 *Fasli* had not only been submitted but explained. Upon this point, the Subordinate Judge has not come to an explicit finding. One fact, however, is patent; namely, that the co-sharers of the plaintiffs are satisfied with the accounts up to the end of 1310 *Fasli* they, at any rate, have not put forward a claim in respect of the accounts for that period. In view

(18) (1873) 19 W. R. 14.
(19) (1909) 4 I. C. 542.
(20) (1887) 14 Cal. 147=13 I. A. 123 (P. C.).
(21) (1874) 22 W. R. 191.
(22) (1875) 24 W. R. 70.
(23) (1881) 6 Cal. 754.
(24) (1882) 7 Cal. 428.
(25) (1905) 1 A. L. J. 347=(1905) A. W. N. 1.

of the special circumstances of this case, we hold that in respect of the accounts up to the end of 1310 *Fasli* the plaintiffs must establish that the accounts have not been explained to them by the defendant. If they make this out to the satisfaction of the Court below, the defendant must explain the papers before the Commissioner. But in respect of the period subsequent to 1310 *Fasli* the defendant is clearly under an obligation to produce such papers as have not already been produced and to explain all the papers to the satisfaction of the Court.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge varied in the manner following. The plaintiffs will have a decree for accounts against the defendant in respect of one-eighth share for the entire period claimed in the suit, and for the sum which may be found due on account of this share, they will be allowed to enforce their claim by sale of the immovable properties hypothecated. In respect of the one-eighth share originally vested in Radhika Mohan Das, the claim for accounts is dismissed up to the 13th April, 1906, (that is, up to the end of the year 1312 *Fasli*). But the plaintiffs are entitled to an account in respect of that share for the period commencing with the 14th April, 1906, (corresponding to the 1st *Baisakh* 1313) up to the date of the termination of the agency on the 7th August, 1908. In respect of any sum which may be found due to the plaintiffs with regard to this share, the plaintiffs will have a money-decree against the defendant. Steps will be taken by the Court below to compel the *pro forma* defendant and the proprietors of the one-fourth share who are not parties to this suit, to produce such papers as were placed in their hands by the defendant. The defendant will explain the accounts subsequent to 1310 and he will produce such papers as have not already been filed by him. In respect of the accounts antecedent to 1310 *Fasli*, the plaintiffs must establish to the satisfaction of the Court that they have not been explained by the defendant, and the defendant will be called upon to explain the accounts antecedent to 1310 *Fasli* only if the plaintiffs establish this. If the Court fails to secure the production of the papers made over to the co-sharers of the plaintiffs the accounts covered thereby will be taken only if the plaintiffs are able to place other relevant materials before the Commissioner; if the plaintiffs fail to do so, the accounts covered thereby will not be taken. Each party will pay his costs in this Court. The costs in the Court of first instance and before the Subordinate Judge, as also the costs of the accounts now directed, will abide the ultimate result of the suit.

V.B./R.K.

Appeal allowed; Decree verified.

A. I. R. 1916 Calcutta 685

SHARFUDDIN AND RICHARDSON, JJ.

Anant Prasad Singh—Plaintiff—Appellant.

v.

H. Manners and *others*—Defendants—Respondents.

Appeal Nos. 2196 and 3049 to 3052 of 1912, decided on 29th March, 1915, from the Appellate Decrees of Dist. Judge, Darbhanga, dated 28th June, 1912.

Bengal Tenancy Act (8 of 1885), S. 22—Sale of *raiyati* holdings for arrears of rent—Right of under-*raiyati* subsists till he is evicted by law.

Though the *raiyati* right merges into that of the superior landlord by the sale of the holding for arrears of rent and its purchase by the landlord, the right of an under-*raiyat* does not cease but remains alive till he is evicted by law, according to the proviso of S. 22 of the Bengal Tenancy Act. [P. 686, C. 2.]

Umakali Mukherjee and Sharoshi Charan Mittra—for Appellant.

Samatul Chandra Dutt—for Respondents.

Appeal No. 2196 of 1912.

Sharfuddin, J.—In this appeal the plaintiff is the appellant. He instituted the present suit for declaration of title to, and recovery of possession over, a piece of land against the defendants on the ground that they are trespassers.

In order to understand the grounds urged in support of the present appeal, it is necessary to advert to some facts that happened before the institution of the present suit, and these facts are:

In 1883 the defendants 1st party were the lessees of a share in *Mouza* Satmalpore and while they were lessees, they obtained possession of the land in suit under *kurtowlee* leases executed by the tenants of the *mouza*. By this arrangement the 1st party defendants acquired the right of under-*raiyats*.

In 1906 the landlord brought rent suits against the defendants 2nd party who are

the tenants and obtained *ex parte* decrees and in execution of those decrees put up the holdings of those tenants to sale and himself purchased them and thereafter took delivery of possession. There was a criminal proceeding under S. 145 of the Code of Criminal Procedure between the landlord and the defendants 1st party and in this proceeding the latter were found to be in possession, and hence the present suit.

The holdings purchased by the landlord were occupancy holdings and the landlord claims the lands of the holding as a proprietor thereof, on the ground that the entire interests of the landlord and the *raiyat* having united in him, he became a proprietor under S. 22 of the Bengal Tenancy Act and that in consequence of the sale of the holding in execution of rent decrees, the *raiyati* interest of those tenants ceased to exist and with it the under-*raiyati* interest of the defendants 1st party and they are, therefore, trespassers and liable to be ejected.

The case set up by the defendants 1st party is described in paragraphs 8 and 9 of their written statements and they are these :

Para. 8—"That these defendants have been in lawful possession over the land in suit for the past 20 years as tenants, and, therefore, the plaintiff is not entitled to eject them."

Para. 9—"That the plaintiff has no legal claim to mesne profits but only to rent, which these defendants have ever been ready to pay and have duly tendered."

The Munsif gave a decree to the plaintiff, whereupon the defendants 1st party appealed to the District Judge. The appeal was allowed and the suit was dismissed. The lower Appellate Court held that the status of the defendants 1st party was that of occupancy *raiyats*. The lower Appellate Court further held that the *ex parte* rent decrees were obtained *mala fide*.

The grounds urged on behalf of the appellant are : (1) that there being no allegation on the part of the defendants 1st party and no proof on their behalf that the rent decrees were obtained *mala fide*, the lower Appellate Court erred in holding that those decrees were *mala fide*; (2) that defendants 1st party, having entered into possession of the land as under-*raiyats* and having continued in possession of the land either in the same capacity or as trespassers, could not acquire any right of occupancy.

It appears that the original tenants allowed the defendants 1st party to remain in possession of the land even after the expiry of the period mentioned in the *kurtowlee* leases.

I am of opinion that on the above facts no decision is necessary as to whether the lower Appellate Court should or should not have held that the *ex parte* rent decrees were obtained *mala fide*.

The decision of the present appeal rests on a finding as to the status of the defendants 1st party. On the admitted facts I find that although the defendants 1st party may not have acquired a title to the land as high as that of an occupancy *raiyat*, yet there can be no doubt that these defendants were holding the land as under-*raiyats* for the whole period from the execution of the *kurtowlee* leases down to the time when these holdings were sold and purchased by the plaintiff landlord in execution of his decrees for rent. The next question is what is their status after the sale of the holdings. I am of opinion that although the *raiyati* interest became merged into the superior interest of the landlord by operation of law, the defendants 1st party's status continued as that of an under-*raiyat* till evicted according to law.

When the appellant relies on the provisions of S. 22 of the Bengal Tenancy Act, he must rely on the whole provision of that section. There is a proviso in that section, namely, that nothing in that sub-section shall prejudicially affect the rights of any third person.

There was a preliminary objection that the present appeal is defective inasmuch as Mr. Wilson, one of the members of the 1st party defendants, is not represented. The objection does not require any decision as I am of opinion that the appeal should be dismissed.

The appeal is dismissed with costs.

Richardson, J.– I agree.

This judgment governs the other Appeals Nos. 3049 to 3052 of 1912.

V.B./R.K.

Appeals dismissed.

A. I. R. 1916 Calcutta 686

HOLMWOOD AND WALMSLEY, JJ.

Tekait Ganesh Narain Sahi Deo—Plaintiff—Appellant.

v.

Protap Udai Nath Sahi Deo—Defendant—Respondent.

Appeal No. 27 of 1914 and Rule No. 109 of 1915, decided on 17th May, 1915, from the Original Decree of Special Sub-Judge, Ranchi, dated 1st December, 1913.

(a) Chota Nagpur Tenancy Act (6 of 1908), Ss. 258 and 264—Judicial Commissioner specially appointed to deal with revenue cases is Revenue Officer.

The Judicial Commissioner specially appointed under S. 264 (*viii*) of the Chota Nagpur Tenancy Act to deal with the Revenue questions decided by the inferior Revenue Officers in appeal, is a Revenue Officer within the meaning of S. 258. [P. 688, C. 2.]

(b) Jurisdiction—Civil Court—Decision of Judicial Commissioner bars civil suit for same purpose.

A decision of the Judicial Commissioner in appeal from a decision of a Revenue Officer in a suit or proceeding under S. 87 of the Chota Nagpur Tenancy Act bars a subsequent suit for the same purpose in a Civil Court.

[P. 688, C. 2.]

(c) Civil P. C. (5 of 1908), S. 11—Order of Revenue Court under S. 87, Chota Nagpur Tenancy Act operates as *res judicata*.

A party cannot by suit seek to vary or set aside an order of a Revenue Court made under S. 87 of the Chota Nagpur Tenancy Act but if he is in possession, he can defend his title in a suit for resumption against him. [P. 688, C. 2.]

Dwarka Nath Mitter and *Bepin Chandra Mullick*—for Appellant.

Caspersz and *Jogesh Chandra Dey*—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff to have it declared that the entire *Pargana* Barway is a hereditary impartible estate of the family of the plaintiff and that it is descendible generation after generation in the male line of the original holder and that the right of the second plaintiff to hereditary succession be declared.

It appears that Barway is one of six *parganas* which, Cuthbertson in his report states, were incorporated with the Chota Nagpur Raj on the assumption of British rule. The Maharaja has the right to receive the Government revenue, but in other respects the so-called Raja for the time being is in the position of a *talukdar* subject to the custom of primogeniture and impartibility.

The question of resumability by the Maharaja on the failure of direct male heirs is not dealt with by Cuthbertson, but in the Revenue Settlement of 1908 the final publication of which as far as *Pargana* Barway is concerned took place on the 22nd April, 1909, the plaintiff No. 1, who died after this case was decided in the lower Court, was entered in the Record of Rights as holding the *pargana* as *jagir* properties descendible to children generation after generation, and the Maharaja of Chota Nagpur filed a suit under S. 87 of the Chota Nagpur Tenancy Act to have this record amended and altered to life-*jagir*, valuing his suit before the Revenue Officer at Rs. 10,000. The Revenue Officer dismissed his suit in August, 1910, but on appeal to the Judicial Commissioner, acting under the special powers conferred upon him by S. 264 (*viii*) of the Act, he decided that the tenure was not hereditary but resumable and that plaintiff's father had only obtained a life-grant from the Maharaja under a written *kabuliyat* and *patta*. This was because Lal Sahi Deo, father of the plaintiff No. 1 Raghubar Sahi, was a very distant collateral who could only succeed on the ordinary right of survivorship under Mitakshara Law, and the Judicial Commissioner held that the tenure was resumable by the Maharaja on failure of heirs male to the last Raja and that Lal Sahi had no title outside his life-grant. The matter was somewhat complicated by the intermediate holding of one Lachmi Nath Sahi Deo, who succeeded his half-brother Harnath Sahi Deo and died without issue. This Lachmi Nath has in subsequent litigation been held to be illegitimate and the impartible Raj governed by primogeniture is said to have become resumable on the death of Harnath who also left no heir male of his body. The late Maharaja, who was later on declared insane, neglected his estates and in litigation with the Ranis, the widows of Harnath and Lachmi Nath Sahi, wanted to resume the tenure and joined the then holder Lal Sahi Deo, to whom he had given a life-interest, as plaintiff. He appears to have admitted the legitimacy of Lachmi Nath for the purposes of that case, as the widows of Harnath had consented to eat with Lachmi Nath. But whether Lachmi Nath was legitimate or not, the direct male line came to an end at his death, and the question before the Judicial Commissioner was whether Lal Sahi Deo had an hereditary right to the tenure or whether it was a resumable tenure held under a life-grant.

Mr. Kingsford decided this question against Raghubar Sahi Deo, the son of Lal Sahi. On this suit brought by the plaintiffs, Raghubar and his son Ganesh Narain, plaintiff No. 2, the Subordinate Judge has held that S. 258 is a bar and has dismissed the suit on that ground alone. He was asked also to hold that the decision of Mr. Kingsford operated as *res judicata* under S. 11, Civil Procedure Code, but he refrained

from expressing any opinion on that point. In appeal before us, it is contended that S. 258 has no more effect than S. 109 of the Bengal Tenancy Act and, that a suit to recover or to get confirmation of possession of property valued at Rs. 52,000, cannot be barred by any decision of a Revenue Court which was not competent to try such a suit. *Further*, it is contended that Mr. Kingsford sitting in appeal was not a Revenue Officer and, therefore, S. 87 does not apply.

Thirdly, that plaintiff No. 2 being no party to the suit under S. 87, is not bound by it.

The answer to the *first* contention is that this is not a suit for recovery or confirmation of possession, but a suit for a simple declaration of the nature of the tenure, which is fully within the competence of the Revenue Court. Moreover, the suit as laid was incompetent, as plaintiff No. 2 had no right to any declaration in the life-time of his father and the suit was bad for misjoinder of causes of action. The plaintiff No. 2 has acquired his right to sue, if any, on the death of his father, but on the finding of the lower Court made in his father's life-time, he has no such right.

The *second* contention is based on what we must characterise as the defective drafting of the Act.

S. 87 provides for a suit before a Revenue Officer and for an appeal in the prescribed manner to the prescribed officer from decisions passed under sub-S. (*f*), that is, decisions on any other matter not referred to in Clauses (*a*) to (*e*).

The Revenue Officer has power to transfer any particular case or class of cases to the Civil Court.

The rules made by Government provide that suits under S. 87 shall be tried in all respects as Civil suits between the parties.

S. 264 (*viii*) gives the Government power to prescribe the officer to hear appeals and the Judicial Commissioner is the prescribed officer under the rules. We are asked to hold that the Judicial Commissioner is not a Revenue Officer within the meaning of S. 258, which says that no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under S. 87. The definition of a Revenue Officer in S. 3 (*xxv*) is any officer whom the Local Government may appoint to discharge any of the functions of a Revenue Officer under any provision of the Act. Now the Judicial Commissioner is specially appointed under S. 264 (*viii*) to deal with the Revenue questions decided by the inferior Revenue Officers in appeal and, therefore, comes within the definition. It would be a great anomaly to hold that the decision of the Court of Appeal was open to be assailed in a suit when the first Court's decisions could not be so assailed, and the only alternative would be to treat the decision of the Judicial Commissioner as that of a competent Civil Court which would have the effect of raising a bar of *res judicata* under S. 11, Civil Procedure Code. We do not think that this could have been the intention of the Legislature. The provisions for appeal appear to have been overlooked in S 258, and we must hold that the special Appellate Court in Revenue cases is, in deciding a dispute under this Act, performing the functions of a Revenue Officer. We may further observe that the jurisdiction of the Judicial Commissioner to decide the question that is now sought to be agitated in this suit, was decided by a Bench of this Court in *Raghubir Sahi* v. *Protap Udoy Nath Sahi Deo* (1), the judgment in which appears on page 50 of the paper-book.

As regards the *third* contention, we think the Judge in the Court below is right. The plaintiff No. 2 had no co-parcenary right in the estate, which was fully represented by his father in the suit under S. 87. The plaintiff No. 2 being in possession can defend his title in the suit for resumption, which is now being brought by the Maharaja of Chota Nagpur. But he cannot by suit seek to vary or set aside the order of the Revenue Courts made under S. 87. No bar of *res judicata* has as yet been found against him under S. 11, Civil Procedure Code, but his present suit is incompetent for more than one reason. We fix the hearing-fee at Rs. 300.

The result is that this appeal is dismissed with costs and the Rule to stay further proceedings in the respondent's suit for resumption, is discharged with costs, two gold *mohurs*.

V.B./R.K.

Appeal dismissed; Rule discharged.

(1) (1912) 39 Cal. 241 = 13 I. C. 193.

A. I. R. 1916 Calcutta 689

JENKINS, C. J. AND WOODROFFE AND MOOKERJEE, JJ.

Chaitram Rambilas — Respondents — Appellants.

v.

Bridhichand Kesrichand—Petitioners — Respondents.

Appeal No. 16 of 1915, decided on 28th April, 1915, from the Order of Imam, J., dated 8th March, 1915.

Arbitration—Agreement to refer dispute to Bengal Chamber of Commerce—Agreement to observe rules of Chamber is implied.

Where a party to a contract agrees to submit to an arbitration of the Bengal Chamber of Commerce, the rules of the Chamber are imported into the contract and that party is bound by those rules. [P. 689, C. 2.]

N. Sircar and *H. C. Mozumdar*—for Appellants.

L. Pugh and *C. C. Ghose*—for Respondents.

Jenkins, C. J.—This is an appeal from an order of Mr. Justice Imam made apparently under S. 14 of the Indian Arbitration Act. There was an arbitration followed by an award. But it is alleged that there was misconduct on the part of the arbitrators; and it is on the ground of this misconduct that the application was made to the Court and succeeded before the learned Judge. The misconduct suggested was the failure to hear evidence. Whether there was that failure or not is a matter in dispute.

But the way in which the case was presented to the learned Judge and in which he understood it appears from this passage in the judgment: "The petitioners' complaint is that the arbitrators refused to allow them to adduce evidence to establish their contentions and proceeded with the arbitration according to the Rules of the Tribunal of Arbitration established by the Bengal Chamber of Commerce, and not according to the law under the Indian Arbitration Act. The petitioners' contention is that the arbitration clause in the contract is merely an agreement to abide by the decision of the Chamber without accepting to be governed by the wide powers of that body as expressed in their rules." It is apparent, therefore, from this that it was admitted that the misconduct depended upon the alleged non-applicability of the rules governing an arbitration by the Bengal Chamber of Commerce. I cannot attribute any other meaning to the words of the judgment which I have just quoted.

The *first* question, therefore, which we have to consider is whether these rules were imported into the contract. Even without the assistance of any authority it appears to me that these rules were imported into the contract, and that without such importation the contract would be insensible so far as it related to arbitration. For it would involve the ridiculous position that every member of the Chamber of Commerce would have to sit on the arbitration. So that on the contract itself I should have felt no doubt. But apart from that there is a very careful judgment of Mr. Justice Harington in *Ganges Manufacturing Co., Ltd.* v. *Indra Chand* (1) delivered as far back as the 5th June, 1906, where the contract was in the same terms as that with which we are now concerned. The learned Judge came to the conclusion which I have indicated as a correct view of the contract. That decision was certainly binding on the learned Judge, and according to my opinion should have been followed by him. It may not be binding on us in the strict sense. But I think it is entitled to every respect and it agrees with the view I entertain on the subject.

Therefore, it appears to me that on the basis on which this case was argued and conducted before Mr. Justice Imam there was no misconduct because the rules of the Chamber of Commerce were applicable.

It appears to us unnecessary to consider other matters. But I cannot refrain from pointing to the fact that the application, verified and supported in the way it is, forms a most unsatisfactory basis on which to claim relief under S. 14 of the Indian Arbitration Act. It is so unsatisfactory that I do not think that there should be a remand.

In my opinion the appeal should be allowed and the application dismissed. The respondents should pay the costs of the hearing before Mr. Justice Imam and before this Court.

Woodroffe, J.—I agree that the appeal should be allowed. The fact that the Chamber of Commerce has framed rules for its arbitration is, I should have thought, well known to every trader in Calcutta, particularly to those accepting contracts stipulating for arbitration by the Chamber of Commerce. However this may be, I

(1) (1906) 33 Cal. 1169.

entirely agree with the judgment of Mr. Justice Harington in the case referred to by the Chief Justice that if a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of Commerce, he must be held to be bound by the rules of that Chamber.

Mookerjee, J.—I agree with the Chief Justice.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 690

WOODROFFE AND MULLICK, JJ.

Romesh Chandra Das and *others*—Plaintiffs—Appellants.

v.

Anthony Penheiro and *others*—Defendants—Respondents.

Civil Rule No. 202 of 1915, decided on 21st May, 1915, against the Decree of Addl. Dist. Judge, Chittagong, dated 28th June, 1913.

(a) Civil P. C. (5 of 1908), O. 41, R. 20—R. 20 refers to representative of a party also.

The words "any person who was a party to the suit" in O. 41, R. 20 of the Code of Civil Procedure will, on a reasonable construction of the same, include the representative of such a party. [P. 690, C. 2.]

(b) Civil P. C. (5 of 1908), O. 1, R. 10—Order to add a party ought to be at a hearing—All facts must be before Court.

The power given to the Court to add parties is a power which is to be exercised at the hearing, for it is necessary that the Court should have before it all the circumstances of the case. [P. 690, C. 2.]

(c) Civil P. C. (5 of 1908), O. 22, R. 9—Even when a representative is on record application to set aside an order of abatement must be made.

The mere fact that the representative of a deceased person happens to be a party already on the record in his own right, does not dispense with an application for setting side an abatement and substitution. [P. 691, C. 1.]

Jogesh Chandra Roy and *Probodh Kumar Das*—for Petitioner.

Ram Charan Mojumdar, *Gopal Chandra Das* and *Hemendra Kumar Das*—for the Opposite Party.

Judgment.—This Rule is based on a petition which comprises two forms of relief. The first is that Durgesh Nandusi Debi, the administratrix to the estate of Rajani Kanta Das, should be made a respondent. Now, this lady is the widow and representative of the deceased plaintiff, Rajani Kanta Das, but through, it is said, inadvertence, she was not made a party to this appeal. An application, however, has been made to us to make her a respondent under the provisions of O. 41, R. 20 of the Code of Civil Procedure. I think that the words of that section "any person who was a party to the suit," etc., would, on a reasonable construction of the same, include the representative of such a party. But the difficulty in the way of the applicant is, as has been pointed out by the learned Pleader on behalf of the opposite party, that the power given to the Court to add parties is a power which is to be exercised at the hearing, and doubtless it is necessary that the Court should have before it all the circumstances of the case. Therefore, so far as this part of the Rule is concerned, the petition is premature and must be rejected. This, however, will not stand in the way of the applicant applying to the Court at the hearing by a petition under O. 41, R. 20. The first part of this application is premature; and the only other matter which remains for us to consider is whether or not we should, as asked, make an entry in the record that the right of appeal survives to Rajani Kanta in respect of the estate of Mohendra Lal Das. Mohendra Lal Das died on the 9th April, 1914, and six months from the date of his death expired on the 8th October, 1914. So far as this plaintiff is concerned there has been an abatement, and the proper course appears to me is to apply, if the party is so advised, to set aside the order of abatement and to substitute in the place of Mohendra Lal Das Romesh Chandra Das, who is said to be his administrator. Now it is admitted that if a third party and not Romesh had been the administrator, it would have been necessary to make such an application and then to apply for substitution in the place of Mohendra Lal Das as his legal representative. But it has been submitted to us that the petitioner is excused from taking this course by reason of the fact that Romesh who is the administrator of Mohendra happens to be also on the record as plaintiff in his own capacity. This, however, does not appear to me to be a sufficient answer. It may well be, as is pointed out, that where property has been obtained by inheritance by some person who is already on the record, it is not necessary that any further steps should be taken. But the present case appears to me one in which the substitution is necessary. The mere fact that the

representative of a deceased person happens to be a party already on the record in his own right, does not dispense with an application for setting aside an abatement and substitution.

This part, therefore, of the application also fails and the Rule must be discharged with costs, the hearing-fee being assessed at one gold *mohur*.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 691

N. R. CHATTERJEA AND MULLICK, J.J.

Nabendra Kishore Roy and *others*—Plaintiffs—Appellants.

v.

Rahima Banu and *another*—Defendants—Respondents.

Second Appeal No. 1932 of 1911, decided on 11th March, 1915, from the Judgment of Sub.-Judge, Noakhali, dated 9th March, 1911.

(a) Practice—Evidence—Observations of High Court as to probative value of *chittas* in another case—Lower Courts not to reply upon.

A Subordinate Court ought not to rely upon the observations of a High Court as to the probative value of *chittas* made in another case, the evidence in which was different from that adduced in the case before it. [P. 692, C. 1.]

(b) Evidence Act (1 of 1872), S. 74—*Chittas*—Evidence—Private and public documents.

Where the *chittas* are prepared for a public purpose such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government, they are public documents, but where they are prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of the *bahali* shares they cannot be called public documents even though they might have been availed of subsequently for assessment of Government revenue. [P. 692, C. 1.]

Akshoy Kumar Banerjee and *Romesh Chandra Sen*—for Appellants.

Ram Dayal De—for Respondents.

Judgment.—The plaintiffs-appellants as purchasers of an entire estate at a sale for arrears of Government revenue, known as the 4-annas *bahali hissya pargana* Darra, sued to recover possession of the lands in dispute as appertaining to the said estate. The defence was that the lands did not belong to the estate purchased by the plaintiffs, but to another *hissya* (the 3-annas 1-*kurant hissya*) in that *pargana*, and was part of a *taluk* which was existing from before the Permanent Settlement. The Commissioner who was appointed to make a local investigation found that, according to the *thak* map, some of the lands formed part of the estate purchased by the plaintiffs, but that according to certain *chittas* of the year 1844, the lands appertained to 3-annas and odd *gandas-zemindari*. The Court of first instance preferred the *thak* map to the *chittas*, on the ground that the *chittas* were prepared by the Government in its capacity as the fractional *zemindar* of the *pargana* in order to ascertain the lands belonging to it, without prejudice to the rights of the rival *bahali maliks*, and its evidentiary value is hardly better than that of one prepared by any other private proprietor. That Court accordingly decreed the suit with respect to a portion of the lands. On appeal, the learned Subordinate Judge held that the *chittas* prevailed over the *thak*, and dismissed the suit entirely. The plaintiffs have appealed to this Court. Now both the *thak* map and the *chittas* are evidence, and it was for the lower Appellate Court to attach such value as it thought proper to each of them, and in second appeal, we cannot go in to the weight to be attached to these documents respectively. The learned Subordinate Judge, however, referring to a decision of a Division Bench of this Court (Caspersz and Doss, JJ.) in a case [*Nobendra Kishore Roy* v. *Durga Charan Chowdhury* (1)] relating to the very same estate in which a similar question was raised, observed:

"As regards the probative force of the *Chitta* of 1251, it has been decided by the Hon'ble High Court that the record thus prepared, is a document of a public nature and evidence of the state of affairs then existing."

The learned Judges in that case observed:—

"The *Chitta* was prepared at that time, as appears from the evidence, for the purpose of distributing in equal manner the public revenue on the separate *Bahali hissya* which was subsequently purchased by the plaintiffs. The record thus prepared is a document of a public nature and evidence of the state of affairs then existing."

We do not know what evidence there was in that case with reference to which those observations were made.

On the other hand, in a later case relating to the same estate, which came up to this Court, another Division Bench (Carnduff and Chapman, JJ.,) referring to the same *chittas* observed as follows:—

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(1) (1911) 10 I. C. 287.

"The *chittas* in question were prepared by the Government as *zemindar*: but in this case, a part of the *pargana* measured had escheated to the Government on account of the rebellion of the former owner, and it is suggested that the Government must, in these circumstances, be held to have measured in its Sovereign capacity. We are unable to draw any distinction between the position of the Government as owner of land which has been escheated, and its position as owner of land acquired in any other way; and it is well-settled that a *chitta* prepared by the Government when interested as a proprietor of the estate concerned, cannot be said to be a public document." See *Fazlar Rahim* v. *Nabendra Kishore Roy* (2).

It appears, therefore, that different views have been taken as to whether these *chittas* are or are not public documents and it seems that this difference is due to the fact that the evidence adduced in each case was not the same. We think the Subordinate Judge ought not to have relied upon the observations of the High Court as to the probative value of these *chittas* made in another case, the evidence in which was different from that adduced in the present.

In the present case, we have not been referred to any evidence to show that the *chittas* were prepared

" for the purpose of distributing in equal manner the public revenue on the separate *bahali hissya* which was subsequently purchased by the plaintiffs"

as was found in the case of *Nobendra Kishore Roy* v. *Durga Charan Chowdhury* (1).

If the *chittas* were prepared for a public purpose such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government, they would be public documents, but if they were prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of the *bahari* shares, as found by the Court of first instance, they cannot be called public documents, even though they might have been availed of subsequently for assessment of Government revenue. *Chittas* may be very valuable evidence for the purpose for which they are prepared; but they may not have the same value on any other question. We, however, cannot go into these questions, and it is for the lower Appellate Court to find upon the evidence on the record in the case for what purpose the *chittas* were prepared, and the determination of the question whether they are or are not public documents will depend upon the finding which may be arrived at.

It is contended, however, on behalf of the respondents that even if the *chittas* are not public documents, the judgment of the learned Subordinate Judge is not affected, because the Court is entitled to attach such weight as it likes to a private document. No doubt it was open to the lower Appellate Court to attach such weight as it thought proper to the *chittas* considered as private documents. But it is impossible for us to say to what extent the Court below was influenced by the idea that the *chittas* upon which the judgment is mainly based were public documents.

It is further contended on behalf of the respondents that the Subordinate Judge has not treated the *chittas* as public documents, but has referred to them as documents as a public nature. But he took that description from the judgment of Caspersz and Doss, JJ., in *Nobendra Kishore Roy* v. *Durga Charan Chowdhury* (1).

The words "a document of a public nature" could not have been used loosely in the sense of documents prepared by officers of Government. The learned Judges in that case were of opinion that the *chittas* were prepared for the purpose of distributing in equal manner the public revenue. That would be a public purpose, and it seems to us, therefore, that the words "a document of a public nature" must have been used in the sense of "public document."

The learned Subordinate Judge also refers to some other evidence, but there is no doubt that his judgment is based mainly upon the *chittas* considered as documents of a public nature and it is impossible for us to say what value he attached to them.

We are constrained, therefore, to remand the case for a re-hearing of the appeal to the lower Appellate Court. If the Court finds upon the evidence on the record that the *chittas* were prepared for a public purpose, the suit will be dismissed. If, however, it is found that the *chittas* were not prepared for a public purpose, they will be considered as private documents and that Court will decide the case upon the whole evidence, treating the *chittas* as private documents and attaching such value to them as it thinks proper. Costs will abide the result.

V.B./R.K.

Case remanded.

(2) (1912) 15 I. C. 341.

A. I. R. 1916 Calcutta 693

FLETCHER (ON DIFFERENCE BETWEEN) SHARFUDDIN AND BEACHCROFT, JJ.

Ram Subhag Singh — Accused – Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1925 of 1914, decided on 19th May, 1915, against the Judgment of Fletcher and Beachcroft, JJ., dated 23rd February, 1915.

(a) Criminal P. C. (5 of 1898), Ss. 233 and 537—Joinder of offences of causing hurt to two distinct persons is an irregularity that can be cured.

Per *Sharfuddin and Beachcroft, JJ.*—The joinder in one charge of two distinct offences of causing hurt to two distinct individuals is not an illegality which vitiates the trial but is an irregularity which is cured by S. 537, Criminal Procedure Code. [P. 699, C. 1 & P. 706, C. 1.]

(b) Criminal P. C. (5 of 1898), S. 537--Scope of words subject to provisions hereinbefore contained in S. 537 is stated—It refers to Ss. 529 to 536.

The qualifying words "subject to the provisions, hereinbefore contained" in S. 537, Criminal Procedure Code, do not refer to the entire Code that precedes that section but only to Ss. 529 to 536 of Chapter 45 where the section occurs. [P. 698, C. 1 & 2 & P. 701, C. 1.]

(c) Criminal P. C. (5 of 1898), S. 233—Per *Sharfuddin, J.*—First part of S. 233 is not mandatory—Object of S. 233 is that Court's mind should not be prejudiced.

Per *Sharfuddin, J.*—The first portion of S. 233, Criminal Procedure Code, is not so imperative as to render a trial null and void if the direction enjoined therein is disobeyed. In other words, a disobedience of the first portion of S. 233 is not an illegality which vitiates a trial but is a mere irregularity curable by S. 537 of the Code. [P. 702, C. 2.]

S. 233 of the Code contains the general law and the reason of it is that the mind of the Court might not be prejudiced against the prisoner, if he were tried in one trial upon different charges resting upon different evidence. [P. 705, C. 1.]

(d) Criminal P. C. (5 of 1898), S. 221—What is charge is stated—It must be clear and certain to prepare the accused to meet the case.

A charge is a first notice, to the prisoner, of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intended to prove against him and of which he will have to clear himself. [P. 705, C. 1.]

(e) Criminal P. C. (5 of 1898), S. 537—Scope of Ruling in 25 Mad. 61 stated—Mode of trial—It is doubtful if framing of charges is mode of trial—Joint trial of distinct offence is.

What their Lordships of the Privy Council have decided in the case of *Subramania Iyer*, 25 Mad. 61, is that if law expressly provides a particular mode of trial, a disobedience of that law vitiates the whole trial. It is doubtful if the framing of charges is a mode of trial but joint trial of charges as to distinct offences would be a mode of trial. [P. 705, C. 1.]

(f) Criminal P. C. (5 of 1898), S. 233—When two offences have no connection they are distinct.

When two offences have been committed and either of them has no connection with the other they are distinct offences. [P. 705, C. 2.]

(g) Interpretation of Statute—Illustrations—Illustrations explain intention of statute.

Although illustrations have no force of law they go a great way to explain the intention of the Legislature. [P. 705, C. 2.]

(h) Criminal P. C. (5 of 1898), Ss. 233 and 234—Per *Beachcroft, J.*—Scope of ruling in 25 Mad. 61 explained—Meaning of words "mode of trial" explained—Object of S. 233 stated—It is to give accused clear idea of the charge and not to embarrass him with unconnected charges in one trial—Form of endorsing charges is immaterial.

Per *Beachcroft, J.*—In the case of *Subramania Iyer*, 25 Mad. 61, the Privy Council did not decide that a defect under S. 233, Criminal Procedure Code, was fatal to the trial. They in effect decided that a disregard of the second part of the section, by joining charges beyond the limits specified in S. 234, vitiated the trial. The general observation "their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity" must be read with the sentence immediately following it which limits its application to the case where charges are tried together which the law expressly says shall not be tried in the same trial. The words "mode of trial" in the general observation cannot have reference to the formal defect of drawing up one charge instead of two. The drawing up of the charge is part of the trial, but the words "mode of trial" have reference to the constitution of the trial. [P. 696, C. 1 & 2 & P. 697, C. 1.]

The object of S. 233 is two-fold: in the *first* place, to give an accused person notice of the charges which he has to meet, in the *second*, to see that he is not embarrassed by having to meet charges in no way connected with one another. Where the offences form part of the same transaction the law allows that they can be tried together; in such a case the accused is not likely to be embarrassed or the Court confused. The first part of the section is designed to give the accused notice of the charges against him. The object is that he shall not be convicted of an offence of which he has not been charged. This object is not frustrated, and the accused is not prejudiced if the accusations against him are written in one sentence or on one sheet of paper, instead of in two sentences or on two sheets of paper. [P. 697, C. 1.]

(i) Criminal trial — Illegal — Consent — Whether pleader's consent can cure illegal trial is doubtful.

It is open to question whether consent of Pleaders can validate a trial which is illegally constituted. [P. 697, C. 2.]

(j) Criminal Procedure Code (5 of 1898), S. 537—What is irregularity and illegality is stated.

Where a thing is directed to be done and that thing is in effect done, but in the wrong way, the error amounts only to an irregularity and not an illegality. [P. 698, C. 1.]

(k) Practice—Privy Council—General remarks of Privy Council are also considered to have binding force—English decisions—Their value is stated.

Though a decision even of the Privy Council is an authority only for what it decides, the general remarks of their Lordships are ordinarily considered to have binding force in this country. [P. 696. C. 2.]

Reliance on cases decided under the Criminal Law of England is liable to mislead though such cases may sometimes be useful as illustrating principles. [P. 699. C. 2.]

(l) Criminal Procedure Code (5 of 1898), S. 233—Per *Fletcher, J.*—Hurt to two persons—Offences must be separately charged—It is illegality which vitiates trial.

Per *Fletcher, J.*, (dissenting).—The causing of hurt to two different persons are two distinct offences for each of which there ought to be a separate charge. A failure to frame two separate charges is not a curable irregularity but an illegality which vitiates the trial. [P. 694, C. 2.]

(m) Criminal Procedure Code (5 of 1898), S. 537—Disregard to provisions of S. 233 cannot be cured by S. 537.

The whole of the S. 537, Criminal Procedure Code, is governed by the words "subject to the provisions, hereinbefore contained." Therefore a neglect of the provisions of S. 233, Criminal Procedure Code, is not cured by that section and renders the trial illegal. [P. 695, C. 1.]

Dwarka Nath Mitter, *Baikunta Nath Mitter* and *Manindra Nath Banerji*—for Petitioner.

Sultan Ahmad—for the Crown.

Fletcher, J.—This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence passed upon the petitioner should not be set aside.

The petitioner was charged along with others of having committed an offence punishable under S. 147 of the Indian Penal Code. He was also charged with having caused hurt to two persons, Khalifa Ahir and Rambilas Lal, and thereby having committed an offence under S 323 of the Indian Penal Code. Only one charge was framed against the petitioner in respect of the hurt caused to these two persons. The petitioner having been convicted and sentenced on the charges framed against him applied for and obtained the present Rule.

The only question for our decision is, whether the charges of committing hurt against two persons having been charged in one charge renders the trial illegal.

S. 233 of the Code of Criminal Procedure provides that for every distinct offence of which any person is accused there shall be a separate charge. The causing of hurt to two different persons are obviously two distinct offences and there ought to have been in the present case two separate charges framed against the petitioner of the offences charged under S. 323 of the Indian Penal Code.

The question we have to decide is, whether the failure to frame two separate charges vitiated the trial or whether it was merely an irregularity which is cured by other sections in the Code.

It has been held in a series of cases in this Court that the neglect to observe the provisions of S. 233 of the Code renders the trial illegal.

I need not set out all the cases laying down this proposition. It will be sufficient to state that they commence with the case of *Gul Mahomed* v. *Cheharu Mandal* (1) and end with the case of *Asgar Ali* v. *Emperor* (2). Those cases which are binding on us clearly cover the question which we have to decide.

Unless we come to the conclusion that the matter ought to be referred to a Full Bench, our decision must be in accordance with those authorities.

There is, however, a later decision of this Court, *Musai Singh* v. *Emperor* (3), in which a contrary view was taken. With all due respect to the learned Judges who decided that case, it was not open to them to ignore the previous decisions of the Court and to decide that case without reference to them. The case of *Musai Singh* v. *Emperor* (3) does not appear to me on consideration to have been well decided. The learned Judges observe that in the case before them "the defect is one of 'duplicity' not of misjoinder."

In England, however, an indictment is said to be 'double' when an accused has been charged with having committed two or more offences in one count of the indictment. This I should have thought was a misjoinder. Further, the learned Judges in quoting the law in India from the Code of Criminal Procedure make, what is to my mind, a most important omission. In quoting from S. 537, which is the only

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(1) (1906) 10 C. W. N. 53.
(2) (1913) 40 Cal. 846=20 I. C. 609.
(3) A. I. R. (1914) Cal. 288=22 I. C. 1008=41 Cal. 66.

section (if any) that can remedy a defect such as we are at present considering, the learned Judges fail to observe that the whole of the section is governed by the words "subject to the provisions hereinbefore contained." This includes amongst other provisions the provisions contained in S. 233 and a neglect of the provisions contained in that section is not, I think, cured by S. 537.

Not only do I, therefore, consider that we are bound by the decisions of this Court earlier than the decision in the case of *Musai Singh* v. *Emperor* (3) but I approve and follow such decisions. In my opinion the case of *Musai Singh* v. *Emperor* (3) was wrongly decided and as it is contrary to the series of the earlier decisions of the Court we are not bound by and ought not to follow it.

The present Rule ought, therefore, I think, to be made absolute and the petitioner should be re-tried according to law.

Beachcroft, J.—The charges against the petitioner were of rioting and causing hurt. The latter charge, which has formed the subject of discussion in this case runs as follows : –

"that you on or about the 5th day of July, 1914 at Megitala voluntarily caused hurt to Khalifa Ahir and Ram Bilas Lal and thereby committed an offence punishable under S. 323 of the Indian Penal Code."

This charge and the charge of rioting are drawn up on a form with the heading "charges with *two* heads."

The only ground urged by the petitioner's Vakil is that the charge above quoted is defective and, therefore, on the authority of the case of *Subramania Aiyar* v. *Emperor* (4) the whole trial was bad. The learned Vakil also cited five cases decided by this Court and one by the Allahabad High Court to support his contention. It is unfortunate that the Crown has not been represented to argue the case before us, yet inspite of that fact I feel no doubt whatever that the Rule ought to be discharged.

The five cases of this Court quoted by Dr. Dwarka Nath Mitter were the following in order of time, (1) *Gul Mahomed* v. *Cheharu Mondal* (1). The accused was convicted on one charge of extorting a *muchlika* and Rs. 25 apparently on different dates. The learned Judges held that the fact of there being only one charge was fatal to the trial, on the authority of *Subramania Aiyar's* case (4). (2) *Johan Subarna* v. *Emperor* (5). One charge was framed in respect of two attempts to cheat on different dates. The learned Judges said "there should have been two charges. Under the ruling of the Privy Council in *Subramani Aiyar's* case (4) this would seem to be an illegality which vitiates the trial and cannot be cured by S. 537." Then referring to a case cited by the Deputy Legal Remembrancer, "this does not relate to a defect under S. 233, Criminal Procedure Code, which according to the ruling of the Privy Council above referred to vitiates the trial." (3) *Tilakdhari Das* v. *Emperor* (6). In this case two persons were charged in one charge for misappropriation of three sums of money, collected in accordance with their duty from three persons. Apparently it was suggested that the money had never come into the possession of one of these two persons. It was argued that there was both misjoinder of persons on the authority of *Budhai Sheikh* v. *Tarap Sheikh* (7) and of offences on the authority of *Johan Subarna* v. *Emperor* (5) and *Gul Mahomed* v. *Cheharu Mandal* (1). The learned Judges remarked that the cases cited carried the rule in *Subrahmania Aiyar's* case (4) to an extreme length, but they were not prepared, as the case had not been fully argued, to dissent from the cases cited. They then remarked that the irregularity in procedure —it is not clear whether they referred to misjoinder of persons, or offences or both— had in fact caused a failure of justice and ordered a re-trial of the accused separately, which suggests that they considered the joinder of persons to be irregular. This case is certainly not an authority in favour of the petitioner. It is to be noticed that the learned Judges did not refer to S. 222, Criminal Procedure Code, which might have been an answer to the argument of misjoinder of charges, the charge being of one offence of misappropriation only, though three sums were separately specified. (4) *Srish Chandra Mukerjee* v. *Emperor* (8). The accused was charged with cheating and an allegation of delivery of property on three different dates was made in one charge. Two cases only, those of *Johan Subarna* v. *Emperor* (5) and *Gul Mahomed* v. *Cheharu Mandal* (1), were cited, and the learned Judges disposed of the case on the authority of those cases, without expressing any opinion

(4) (1902) 25 Mad. 61 = 28 I. A. 257 (P. C.).

(5) (1906) 10 C. W. N. 520.
(6) (1907) 6 C. L. J. 757.
(7) (1906) 33 Cal. 292.
(8) (1909) 4 I. C. 16.

on the correctness of fhe view propounded.

(5) *Asgar Ali* v. *Emperor* (2). The accused was charged with misappropriating between the 29th May and 4th December, 1911 a sum of money made up of two sums collected between those dates. Harington, J., said the charge was bad in view of S. 233. Coxe, J., said that as the charge framed was illegal, the conviction could not stand in view of *Subramania Aiyar's* case (4). The authority of this case is considerably weakened as the learned Judges do not seem to have referred to S. 222 of the Code of Criminal Procedure and their decision is directly contrary to the decisions in *Samiruddin Sarkar* v. *Nibaran Chandra Ghose* (9) and *Sat Narain Tewari* v. *Emperor* (10). In all three cases there was a charge of misappropriation of a lump sum and it is immaterial whether that sum is made up of several smaller sums or not.

In only one of these five cases, the second, was the Crown represented.

The case in the Allahabad High Court is that of *Emperor* v. *Fattu* (11). The accused were charged with committing dacoity and it was alleged that they looted the houses of three, if not four, persons on one night. Stanley, C. J., remarked :

"Their Lordships of the Privy Council have held in the recent case of *Subramania Aiyar* v. *Emperor* (4) that the disregard of the express provisions of Ss. 233 and 234 of the Code of Criminal Procedure was not a mere irregularity, such as could be remedied by S. 537, but was altogether illegal."

It will be noticed that in two of the above six cases the Privy Council is represented as having decided that a defect under S. 233, Criminal Procedure Code, is fatal to the trial. In my opinion that is too broad a generalization of what their Lordships said. They in effect decided that a disregard of the second part of S. 233, by joining charges beyond the limits specified in S. 234, vitiated the trial. A reference to the judgment itself will show that their Lordships made no mention of S. 233, Criminal Procedure Code. The headnote of the report does, it is true, say that one of the counts of the indictment contravened the provisions of Ss. 233 and 234, but the judgment itself from beginning to end deals with S. 234 and with that section alone. The criticism, in the last paragraph of the judgment, of the decision of this Court in *In the matter of Abdur Rahman* (12) have reference to S. 234 only, as in that case there was a joinder of offences not committed within the space of 12 months.

In a passage that is frequently quoted, Lord Halsbury, L. C., who also delivered the judgment in *Subramania Aiyar's* case (4), says in *Quinn* v. *Leathem* (13): "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

Now in those cases in this Court in which the learned Judges have expressed the opinion that a defect under S. 233 vitiates the trial, they have considered themselves bound by *Subramania Aiyar's* case (4). With the greatest respect for the learned Judges who took part in those decisions I venture to say that the decision of the Privy Council is not an authority for the proposition stated.

Though a decision even of the Privy Council is an authority only for what it decides, the general remarks of their Lordships are ordinarily considered to have binding force in this country. But not only is the decision in *Subramania Aiyar's* case (4) not an authority on the result of a disregard of the first part of S. 233, Criminal Procedure Code, but the "generality of the expressions" used in the judgment does not even bear on the question. Dr. Dwarka Nath Mitter relies especially on the sentence—"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." But this sentence must be read with the one immediately following it which limits its application to the case where charges are tried together which the law expressly says shall not be tried in the same trial. Nor can

(9) (1904) 31 Cal. 928.
(10) (1905) 32 Cal. 1085.
(11) (1904) 26 All. 195.

(12) (1900) 27 Cal. 839.
(13) (1901) A. C. 495=70 L. J. P.C. 76=85 L. T. 289.

the words "mode of trial" in that sentence have reference to the formal defect of drawing up one charge instead of two. The drawing up of the charge is, of course, part of the trial, but the words "mode of trial" have reference to the constitution of the trial, and when their Lordships speak of "disobedience to an express provision as to a mode of trial," they do not refer to a formal defect in the proceedings in a trial which is properly constituted. That the present accused could be tried at one trial for the offence of rioting and two offences of causing hurt is not and cannot be disputed.

If then *Subramania Aiyar's* case (4) is not to be regarded as an authority for the proposition advanced for the petitioner, is the defect in the charge curable? For an answer to this question the cases cited do not help us, as the learned Judges did not consider the question apart from the case of *Subramania Aiyar* v. *Emperor* (4).

The object of S. 233 is two-fold: in the *first* place, to give an accused person notice of the charges which he has to meet, in the *second*, to see that he is not embarrassed by having to meet charges in no way connected with one another. Where the offences form part of the same transaction the law allows them to be tried together; in such a case the accused is not likely to be embarrassed or the Court confused. The first part of the section is designed to give the accused notice of the charges against him. The object is that he shall not be convicted of an offence of which he has not been charged. This object is not frustrated, and the accused is not prejudiced, if the accusations against him are written in one sentence or on one sheet of paper instead of in two sentences or on two sheets of paper.

This was in effect the view taken in the case of *Moharuddi Malita* v. *Jadu Nath Mandul* (14) in which three charges of theft were included in one formal charge, the persons from whose fields the thefts had been committed being differentiated by the letters (*a*), (*b*) and (*c*). The accused were convicted and separately sentenced for three offences of theft. Even though they were charged with having committed "an offence," they were convicted of three offences. The learned Judges held that this was an error of form and not of substance, an irregularity and not an illegality. That the Pleaders consented to the joint trial of three persons does not affect the case. It does not touch the present question which is as to the misjoinder of charges and not as to the misjoinder of persons, and in any case it is open to question whether consent of Pleaders could validate a trial which was illegally constituted.

The learned Judges also distinguished the case from that of *Gul Mahomed* v. *Cheharu Mandal* (1), on the ground that in that case the two offences were distinct and committed at different times. Whether or not this distinction be a sound one, it will also apply to the 2nd and 4th cases which I have referred to above. If the distinction was good in *Moharuddin Malita* v. *Jadu Nath Mandul* (14) it is good in the present case.

The mere fact that the letters (*a*), (*b*) and (*c*) were used in *Moharuddin Malita* v. *Jadu Nath Mandul* (14) does not really distinguish that case from this: here both persons assaulted are named; the irregularity in that case was really greater than the irregularity in this, for in that case charged with one offence, though there were in fact three offences, they were convicted of three; in the present case, charged with one offence, though there were in fact two, the petitioner had been convicted only of one offence though the facts found amount to two.

The result of this review is that of the five cases of this Court cited for the petitioner, three have been distinguished in another case on grounds applicable to this and the authority of the other two, as I have already pointed out, is considerably weakened by other considerations.

In the case of *Musai Singh* v. *Emperor* (3) an accused was charged with having cheated three different persons and caused them to deliver to him three sums of money, three distinct offences of cheating, but there was only one charge under S. 420, Indian Penal Code, covering the three different acts. It was held that the charge was defective for duplicity and not misjoinder and the case of *Subramania Aiyar* v. *Emperor* (4) now quoted against such a charge was referred to by the learned

(14) (1907) 11 C. W. N. 54.

Judges as not affecting such a case. The case of *Srish Chandra Mukerjee* v. *Emperor* (8) was relied on in support of the Rule in that case, but the Rule was discharged, the defect being treated merely as an irregularity. The learned Judges relied on S. 535 and 537, Criminal Procedure Code. It may be interesting to note that the learned Vakil who now appears for the petitioner appeared in that case to support the exactly opposite contention. He has not attempted to distinguish that case from this.

If the view be correct that no departure from the strict letter of the law can be treated as a mere irregularity, but is an illegality, it is difficult to see what kind of case is provided for by the phrase "irregularity in the charge" in S. 537, for unless there has been a departure of some kind from the strict letter of the law, it is clear that there has been no irregularity. Dr. Dwarka Nath Mitter suggested two instances of what would be merely an irregularity (1) where the name of the accused or of the person against whom the offence was committed is omitted from or wrongly given in the charge, (2) where the common object is not specified in a charge of rioting.

Obviously the first is not an instance of irregularity, it is either an omission or an error, both of which are also provided for by S. 537. The second is also an omission, and if the common object is one of the particulars required by S. 222 to be given in the charge, then S. 225 would cure the defect and recourse to S. 537 would be unnecessary. That section then must apply to some other state of things.

What is the effect of the words "subject to the provisions hereinbefore contained" in S. 537? I do not think it can possibly be taken to be that the section is to have no application if there has been any departure from any of the previous sections of the Code. Such an interpretation would render the words "error, omission or irregularity in . . . . . other proceedings . . . . . ." absolutely nugatory. The Code is exhaustive as to procedure. I think the opening words of the section must be read as having reference to Ss. 529 to 536. The Chapter in which these sections are included is headed "Of Irregular Proceedings" and Ss. 529 to 536 deal directly with the effect of various irregularities including some cases of want of jurisdiction. In some cases, the irregularity is fatal in others not. Then follows S. 537 a general saving section which is, however, limited by the foregoing sections in the same Chapter. In one of the sections before S. 537, *viz.*, S. 535 is a provision that the absence of a charge shall not invalidate proceedings, unless it has in fact occasioned a failure of justice. So that in the present case if no charge at all under S. 323 had been framed, a conviction under that section, or two convictions under that section, would not have been invalid unless there had been an actual failure of justice. In view of that section, apart from S. 537, it is difficult to see how the petitioner's contention that the trial is bad because there was one charge instead of two, can be supported.

I consider it is impossible to define accurately what is meant by "irregularity" in S. 537 and undesirable to attempt such a definition. The Judicial Committee say, "The illustration of the section itself sufficiently shows what was meant." The illustration shows that where a signature by a Magistrate is required, a signature by initials is purely an irregularity. So that where a thing is directed to be done and that thing is in effect done but in the wrong way, the error amounts only to an irregularity and not an illegality. Applying this test, what does S. 233 in effect require and what has in effect been of done? The section requires that a person is to be informed by a charge of every offence in respect of which he is to be tried. Treating the charge as one of two offences of causing hurt, he has in effect been told that he is to be tried for causing hurt to two persons named. The necessary information has been given to him, but in the wrong way, it has been given in one sentence instead of in two.

I have discussed the case up to this point as if the accused had really been charged with two offences in one charge, that being the footing on which it was argued by Dr. Dwarka Nath Mitter, and all the cases cited on behalf of the petitioner to which I have referred, appear to have been treated on that footing. But in the present case though acts amounting to two offences of causing hurt are alleged, the charge is only of one offence, as if the Magistrate had considered that the hurt caused to two persons amounted only to one offence. Not only is

this indicated by the wording of the charge itself, but support is lent to this view by the fact that the charges are drawn on a form headed "charges with two heads," one is the rioting charge, the other the charge of causing hurt. The conviction is also on that footing. The cases of *Gul Mahommed* v. *Cheharu Mandal* (1), *Johan Subarna* v. *Emperor* (5) and *Srish Chandra Mukerjee* v. *Emperor* (8) could not have been treated on that footing, as in those cases the acts alleged were committed on different occasions and not as here at the same time.

Now it is somewhat surprising to me that an accused should be allowed to say,

"I have been charged with and convicted of one offence but, as I ought to have been charged with and convicted of two, the whole proceedings are bad,"

and unless the law on the subject is very clear, I should be unwilling to attribute to the Legislature the intention of allowing him to say any such thing.

If the charge is treated as one of one offence only, the Magistrate has merely told him that causing hurt to two persons amounts to one offence, whereas he might have charged, convicted and sentenced him for two. In such a case the provisions of S. 233 have not been contravened, for the accused is in effect accused of one offence only.

Whether the charge is treated as one of two offences or one, the result is the same. In one case, I prefer the view taken in *Moharuddi Malita* v. *Jadu Nath Mandul* (14) that the error is one of form and not of substance and that taken in *Musai Singh* v. *Emperor* (3) to that taken in the cases cited on behalf of the petitioner. In the other, the provisions of S. 233 have hot been contravened.

To recapitulate, I am of opinion (1) that the case of *Subramania Aiyar* v. *Emperor* (4) is not an authority for the proposition that failure to observe the first part of S. 233 is fatal to the trial, (2) that if we are merely to follow authority, we must follow *Moharuddi Malita* v. *Jadu Nath Mandul* (14) in which the learned Judges made it a distinguishing feature that the offences were committed on the same occasion—a distinction which applies to the present case, and in view of that distinction the cases cited by the petitioner do not apply, (3) that if *Moharuddi Malita* v. *Jadu Nath Mandul* (14) is not distinguishable from the other cases, it is a more correct interpretation of S. 537 than the other cases, which do not discuss S. 537, (4) that if petitioner had been convicted of one or two offences under S. 323 without any charge at all, the defect would not in view of S. 535 have been necessarily fatal, much less can it be where in fact there has been a charge under S. 323, (5) that if the case be considered from the point of view that the petitioner has been accused of only one offence, though the facts alleged amount to two offences, there has been no contravention of S. 233.

In dealing with the case I have not referred to English cases, as reliance on cases decided under the Criminal Law of England is liable to mislead, though such cases may sometimes be useful as illustrating principles. Even in that stronghold of technicality the joining of more charges than one in one count has been held not to be a fatal defect. In the case of *Reg.* v. *Giddins* (15) the prisoners were charged in one count of assaulting two persons and of stealing from those persons. Objection was taken before trial, Tindal, C. J., decided that Counsel for the prosecution was not to be put to elect on the ground that "it was all one act and one transaction." It is noticeable that this in effect was the ground on which the learned Judges who decided *Moharuddi Malita* v. *Jadu Nath Mandul* (14) distinguished it from the case of *Gul Mahomed* v. *Cheharu Mandal* (1).

In a recent case, the case of *Rex.* v. *James Andrew Thompson* (16), the Court of Criminal Appeal refused to interfere in the case of a conviction, where there were two counts in each of which a number of offences were alleged. The indictment was bad, but it was held that the appellant had not in fact been prejudiced, as in the deposition and at the trial offences were proved on specific dates. The decision proceeded on one of the sections of the Criminal Appeal Act, which in effect provides what is provided by S. 537, Criminal Procedure Code.

In conclusion I may mention that it would be difficult to find a case where a mere technicality, if upheld, would lead to more absurd results than in this case. The petitioner has been sentenced to six months' imprisonment under

(15) (1842) Cor. & Mar. 634.
(16) (1914) 9 Cr. App. Rep. 252=85 L.J.K.B. 643=2 K.B. 99=110 L.T. 272.

S. 147 and to two months' under S. 323. The sentences are to run concurrently, yet because he has been charged on only one charge instead of two under S. 323 the trial in respect to the charge of rioting also is to be held invalid, though it would have been unaffected if there had been no charge and no conviction at all under S. 323.

I think the Rule should be discharged and the petitioner committed to jail to serve out the rest of his sentence.

This Rule again came up for hearing before Sharfuddin, J., who delivered the following

Judgment.—This is a reference made to me under S. 439 read with S. 429 of the Code of Criminal Procedure as Fletcher and Beachcroft, JJ., were divided in opinion as to the interpretation of the first portion of S 233 of the Code.

The facts so far as are necessary for the purposes of the present reference are these:

There was rioting in which hurt was caused by one Ram Subhag Singh to two men, named Khalifa Ahir and Ram Belas Lal. The petitioner was charged with rioting and with hurt caused by him to the above-mentioned two men. The latter charge is under S. 323, Indian Penal Code.

The second head of the charge is in the following terms:

"That you, Ram Subhag Singh, on or about the 5th day of July, 1914 at Mafitala, appertaining to *Mouza* Bangra, voluntarily caused hurt to Khalifa Ahir and Ram Belas Lal, and thereby committed an offence under S. 323 of the Indian Penal Code, etc. etc."

Ram Subhag Singh, the petitioner, having been found guilty of both the charges, was convicted and sentenced. He moved this Court and obtained a Rule in the following terms:—

"Let the record be sent for and a Rule issue calling on the District Magistrate to show cause why the conviction and sentence passed upon the accused should not be set aside or why such other orders should not be passed as to the Court may seem fit and proper."

The above is an open Rule, but the present reference relates to the first ground taken in the application for revision, and that ground is that the joinder in one charge of two distinct offences of causing hurt to two distinct individuals was an illegality which was fatal to the whole trial.

The difference between the two learned Judges of the Bench that heard the Rule is as to whether the first portion of S. 233, Criminal Procedure Code, is so imperative as to render the whole trial null and void for the reason that the direction enjoined therein has been disobeyed, and also as to whether the omission complained of is curable by S. 537 of the Code.

S. 233 of the Code enacts:

"*for every distinct offence of which any person is accused, there shall be a separate charge*, and every such charge shall be tried separately except in the cases mentioned in Ss. 234, 235, 236 and 239."

For the purposes of the present reference I am concerned with that portion of the section which I have italicised and which refers only to the framing of the charge.

In the present case the accused was charged in one count with having caused hurt to two men. On behalf of the petitioner it has been contended that a duplication of two charges in one count was not a mere irregularity which could be cured by S. 537 of the Code; and that the omission was an illegality in the mode of trial and in disobedience of an express direction of law and that by reason of this disobedience the whole trial vitiates.

S. 537 enacts:

"subject to the provisions hereinbefore contained, no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter 27, or an appeal or revision on account:—

(*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code, or

(*b*) of the want of or any irregularity in any sanction required by S. 195, or any irregularity in proceedings taken under S. 476, or

(*c*) of the omission to revise any list of jurors or assessors in accordance with S. 324, or

(*d*) of any misdirection in any charge to a Jury unless such errors, omission, irregularity. want or misdirection has in fact occasioned a failure of justice.

Explanation:—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could or should have been raised at an earlier stage in the proceedings."

For the purposes of the present reference, I am concerned with Clauses (*a*), (*b*), (*d*) and the explanation. The above section is prefixed by the qualifying words "subject to the provisions hereinbefore contained." A question arises as to whether these qualifying words refer to the part of the Code which

precedes S. 537 or they refer only to the Chapter where this section finds a place. The question has been raised, though not expressly decided, whether the provisions referred to are the provisions of the entire Code preceding this section or only the provisions of Chapter XLV where this section occurs. The former view was adopted in the case of *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (17) and in the case of *Nilratan Sen* v. *Jogesh Chundra Bhattacharjee* (18), and the latter view was put forward by the referring Judges in the case of *In the matter of Abdur Rahman* (12) but the Full Bench did not decide the question.

To my mind it is clear, from the wording of Clause (*b*) of S. 537 and the explanation attached to it, that the qualifying words "subject to the provisions hereinbefore contained" do not refer to the entire Code that precedes that section, because if those qualifying words referred to all the sections of the Code preceding S. 537, the Clause (*b*) of the section would become meaningless or inoperative. Take the case of giving false evidence in a Court under S. 195, Clause (*b*) of the Code no Court

"shall take cognizance except with the previous sanction or on the complaint of the Court where the offence was committed or some other Court to which such Court is subordinate."

If the qualifying words in S. 537 were to be interpreted in the manner suggested by the learned Vakil for the petitioner, Clause (*b*) of S. 537 would conflict with that interpretation. If the qualifying words refer to the entire Code preceding the section, it would mean that trial of an accused for giving false evidence without a sanction previously obtained would be altogether null and void and S. 537 would not be able to cure the defect; but Clause (*b*) distinctly provides that in such a case, S. 537 can cure the defect if there has not been a failure of justice.

If the words "subject to the provisions hereinbefore contained" referred to all the preceding sections of the Code, then an omission to sign a warrant cannot be cured by this section. S. 75 of the Code requires a warrant of arrest to be in writing and to be signed by the presiding officer. The words used in that section are "shall be in writing, signed by the presiding officer." Clause (*a*) of S. 537 provides that an omission in a warrant is curable by that section under certain circumstances. There is only one illustration attached to this section, which is this,

"A Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity, and does not affect the validity of the proceeding."

S. 68 requires certain formalities with regard to summons and the word used is "shall." but having regard to the new and the only illustration to S. 537 of the Code, it is purely an irregularity and cannot, therefore, affect the validity of the proceeding.

In the present case the objection that the charge has not been framed in accordance with the provisions of S. 233 of the Code was never taken before the matter came to this Court. In determining whether the omission complained of has occasioned a failure of justice, I must have regard to the fact whether the objection could or should have been raised at an earlier stage in the present proceeding.

If by the duplication of the charges the petitioner was embarrassed, he should have objected to the form of the charge when it was read to him.

On behalf of the petitioner reliance has been placed on the case of *Subramania Aiyar* v. *Emperor* (4) and some other cases that followed that Privy Council case. The later cases I propose to discuss later on. At present I think it necessary to examine the judgment of their Lordships of the Privy Council and find out from it whether their Lordships held therein that a disobedience to the direction contained in the first portion of S. 233 is an illegality not curable by S. 537.

The head-notes that prefixed the judgment of the Lordships are incorrect. Those head-notes are to the following effect:

"The appellant was tried at the Criminal Sessions of the High Court and convicted on an indictment, the first count of which contravened the provisions of Ss. 233 and 234 of the Code of the Criminal Procedure (which provide that every separate offence shall be charged and tried separately, except that there offences of the same kind may be tried together in one charge if committed within the period of one year), and did not fall within the provisions of S. 235 (1) (which provides that if, in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be

(17) (1895) 22 Cal. 176.
(18) (1896) 23 Cal 983.

charged with, and tried at one trial for every such offence). On a case certified under Article 25, Letters Patent, and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done, with the result that the conviction was upheld on one count only the sentence being reduced. Held by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by S. 537 of the Criminal Procedure Code. Such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. Nor could such an illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the Jury. To allow this would leave to the Court the function of the Jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside"

I have reproduced above the whole of the head-notes as I consider it of serious importance. I find, on comparing them with the judgment, that these head-notes contain more than what was held by their Lordships of the Privy Council, and in order to do this, it is, I think, necessary to mention here in some details the facts of that case. In that case the appellant was tried on an indictment in which he was charged with no less than forty-one acts, those acts extending over a period of two years. Their Lordships held this to be in contravention of the provisions of S. 234 of the Code (which provides that a person may only be tried for not more than three offences of the same kind if committed within a period of twelve months).

Their Lordships' views as to the scope of S. 537 of the Code as I make out are these:—

When a person was tried for 41 offences in direct contravention of the provisions of S. 234, their Lordships observed that the mischief sought to be avoided by the section having been committed, "the effect of the multitude of the charges before the Jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the Jury. It would in the first place leave to the Court the function of Jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court." Their Lordships did not regard this as curable by S. 537. The following remarks by their Lordships manifestly indicate that the illegality referred to was an utter disobedience of the law as contained in S. 234 of the Code. Those remarks are:—

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment."

The case before the Privy Council was not that any provision of the S. 233 was contravened. The only question before their Lordships was whether the mode of trial in which one indictment contained 41 Acts, spread over a period longer than 12 months, was or was not illegal by reason of the provisions of the S. 234 of the Code.

For the above reasons, I am of opinion that the head-notes, prefixed by the reporter, are misleading in so far as reference is made therein to the S. 233 of the Code.

During the course of arguments a number of authorities has been referred to in support of the contention that a disobedience of the first portion of S. 233, Criminal Procedure Code, is an illegality which vitiates the whole trial and not a mere irregularity curable by S. 537 of the Code.

I propose now to discuss the other authorities referred to during the course of argument in order to point out, assuming the correctness of the views expressed therein, that the facts of these cases were different from the facts of the present case:

(1) In the case of *Gul Mahomed* v. *Cheharu Mandal* (1) the charges were:—

1st. "That you, on or about the 15th or 16th day of January, 1905, at Khayarbari committed extortion of a *muchilika* and of Rs. 25 respectively, from Cheharu Mandal and thereby committed an offence punishable under S. 384, Indian Penal Code."

2nd. "That you, on or about the 15th of January, 1905 at Khayarbari assaulted Cheharu Mandal and thereby committed an offence under S. 352, Indian Penal Code."

In the above case the accused was convicted under Ss. 384 and 352, Indian Penal Code. The convicted person obtained a Rule from this Court. When the Rule came on for hearing Crown was unrepresented. This Court held that, assuming that these charges arose of one and the same transaction, and that the claim for Rs. 25 did not constitute extortion, a neglect to observe S. 233, Criminal Procedure Code, must be pronounced to be fatal to the case according to the ruling in *Subramania Aiyar* v. *Emperor* (4), because under that section there should have been a separate charge for the distinct offences.

Apparently, no doubt, the above authority is in support of the contention that to charge the accused in the present case for two acts of hurt caused by him on two different persons in one indictment was in direct contravention of the provisions of S. 233, Criminal Procedure Code. In this reported case, it must be remembered that the charges, as framed, referred to acts of the accused on two different dates ; it is possible, therefore, the accused may have been embarrassed in meeting with such a charge. In the present case, however, there was one rioting in the course of which the accused is said to have caused hurt to two men simultaneously or almost simultaneously, and during the whole trial he never objected to the alleged misjoinder of the charges ; on the contrary, he by examining witnesses for the defence indicated that he was not embarrassed at all.

What the Privy Council has prohibited is any contravention of any mode of trial laid down expressly by the law. To charge an accused person with two acts committed in one and the same transaction and committed simultaneously or almost simultaneously is a matter which was not before their Lordships of the Privy Council. The only passage in their Lordships' judgment which may be construed to have any reference to S. 233 of the Code is this : "the policy of such a provision (joinder of charges of more than three offences committed within a year) is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of Criminal Procedure." At the time, what was present before their Lordships was that 41 acts committed within the space of more than 12 months were included in one charge. I am of opinion that the above quoted passage is not in reference to S. 233, but is in reference to S. 234 of the Code.

(2) Another case cited on behalf of the petitioner is the case of *Tilakdhari Das* v. *Emperor* (6). In this case the Crown was unrepresented.

The facts of this case were :—

The petitioners were in the employ of the Darbanga Raj, Tilak Dhari being the *patwari*, Chaman Missir a *jeth raiyat*. It was the duty of the *patwari* to collect rents from the *raiyats* and to account for their collections. They collected three sums of money, namely, Rs. 2-12 from a tenant by the name of Kirty Jha and Rs. 6-4 and Rs. 1-4 from another tenant called Bhatoo Thakur, all the three items being collected on one and the same date, the 30th *Bhadra*, 1312. The Sub-Divisional Magistrate of Madhubani convicted the petitioners under S. 408, Indian Penal Code, in respect of all the three items and sentenced them to certain terms of imprisonment. The charge as framed was as follows :—

"That you, on or about the 30th *Bhadra*, 1312 *fasli*, at Pariharpur, being in service of the Maharaja of Darbhanga and entrusted with the duty of collection of rents from the *raiyats* of Pariharpur and being in charge of the collection of monies, dishonestly misappropriated three sums of collection money. *viz.*—(1) Rs. 2 12, realised from Kirty Jha; (2) Rs. 6-4 from Bhatoo Thakur and Rs. 1-4 from Bhatoo Thakur on 30th *Bhadra*, 1312, as shown in 3 receipts, and thereby committed an offence punishable under S. 408, Indian Penal Code."

The observations made by Caspersz, J., sitting with Chitty, J., are important as they distinguish that case from the present case. Their observations are :—

"The authorities we have cited doubtless carry the rule laid down by their Lordships of the Privy Council in the case of *Subramania Aiyar* v. *Emperor* (4) to an extreme length. But we are not prepared, as at present advise, and in a case which has not been fully argued (Crown was unrepresented), to dissent from the cases to which our attention was called. We are of opinion that the irregularity in the procedure of the Sub-Divisional Magistrate is not an irregularity such as can be cured by the provisions of S. 537 of the Criminal Procedure Code. We rather think that the irregularity has in fact occasioned a failure of justice and that the petitioner should be re-tried on charges properly framed. There should be separate charge for each distinct offence as provided by S. 233, Criminal Procedure Code. The two petitioners, being accused of different offences committed in different transactions relating to different *raiyats*, should be tried separately."

From the above remarks, it is clear that the omission to frame separate charges in that case was treated as an irregularity and not as an illegality. Separate trial and distinct charges were ordered, but not in consequence of an illegality, but in consequence of an irregularity which had occasioned a failure of justice.

(3) The third case cited was the case of *Budhai Sheikh* v. *Tarap Sheikh* (7). The facts of this case were these:—

Certain amount of linseed was looted on the 22nd February, and certain tobacco on the 23rd February by an unlawful assembly consisting of the same persons, of whom the petitioner was the leader. It was held that the events of the two different dates were not part of the same transaction and the trial was bad under S. 239, Criminal Procedure Code, and S. 234 of the Code by its term, referred to the case of a single accused, and is not applicable where several persons are jointly tried under S. 239 of the Code.

It is important to note that the facts discussed in this reported case do not disclose that the provisions of the S. 233 had been contravened.

(4) The fourth case cited is the case of *Srish Chandra Mukerjee* v. *Emperor* (8). The charge in this case referred to was of three acts of cheating, *i.e.*, in July, in August, and in October, or in November. This Court held that the charge was bad. Here also there were three different transactions and on three different dates. From the report it appears that this Court looked into the evidence on the record of that case, as I find in the judgment of that case the following passage:—

"The only question is whether we should send back the case for re-trial. We think, in the circumstances, it would be highly unprofitable to do so, and especially having regard to the evidence brought to our notice and to the statement elicited from Girish Chandra Ghosh in re-examination."

The conviction for the above reason was set aside.

It appears from this reported judgment, the learned Judges had relied on the case of *Johan Subarna* v. *Emperor* (5).

(5) The fifth case cited was the case of *Asgar Ali* v. *Emperor* (2). The charge in this case was to the following effect:—

"That you between the 15th *Jaista*, 1318 B.S. (29th May, 1911) and the 18th *Agrahayan*, 1318 B. S. (4th December, 1911) at Raman Ethernagar being entrusted with the collection made on account of *chaukidari* tax, in your capacity of a public servant as a collecting *panchayat* of Union VI of the Thana Dumkul, dishonestly misappropriated a total sum of ten annas and six pies (10 annas 6 pies), to wit, a sum of four annas six pies collected from Atal Mistri between the 15th *Jaista*, 1318 (29th May, 1911) and the 4th *Bhadra*, 1318 (1st August, 1911) and a sum of six annas collected from Rajni Nath between the 20th *Asarh*, 1318 (5th May, 1911) and the 18th *Agrahan*, 1318 (4th December, 1911) and thereby committed an offence under S. 409, Indian Penal Code."

It was held that a single charge relating to several distinct offences was illegal under S. 233, Criminal Procedure Code, there should have been a separate head of charge for each of such offences. The case of *Subramania Aiyar* v. *Emperor* (4) was relied upon.

I consider, however, the charge as framed was perfectly correct and in strict conformity with the provisions laid down in S. 222, Clause (2), Criminal Procedure Code, which enacts that

"when the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234, provided that the time included between the first and last of such dates shall not exceed one year."

There are other cases also in which it was held that a duplicity in the charge vitiates the trial and those cases appear to have followed the case of *Subramania Aiyar* v. *Emperor* (4) as reported in the head-notes. I have already pointed out that this Privy Council authority has no reference to S. 233 of the Code.

Now I desire to discuss the question of duplication. There is an authority of this Court, namely, the case of *Musai Singh* v. *Emperor* (3) in which the facts were similar to the facts of the present case, and it was held that this was a mere duplicity which had not occasioned any failure of justice. The learned Judges who decided that case refused to interfere. The learned Vakil for the petitioner admitted that he could not distinguish the facts of this reported case from the facts of the present case.

There is no doubt that according to the general principle a duplicity of the charge is not allowed. The indictment must not be doubled, that is to say, no one count of the indictment should charge the accused with having committed two or more offences, for instance, with

having committed murder and robbery or the like. But where the offence charged, whether felony or misdemeanour, is one single act, it may be made the subject of a single count. So the indictment may charge the prisoner in the same count with felonious acts with respect to several persons, as in robbery with having assaulted *A* and *B* and stolen from *A* one shilling and from *B* two shillings, if it was all in one transaction (see Archbold's Criminal Pleadings, 24th Edition, page 75).

S. 233 of the Code contains the general law, and the reason of it is that the mind of the Court might not be prejudiced against the prisoner, if he were tried in one trial upon different charges resting upon different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges. A charge is a first notice, to the prisoner, of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intended to prove against him and of which he will have to clear himself.

In cases similar to the present case the Court has to see whether the accused was bewildered and embarrassed by the duplicity of the charge.

In the case of *Rex* v. *James Andrew Thompson* (16), his Lordship the Chief Justice dismissed the appeal remarking.

"that even assuming the objection raised after plea to the defect in the form of indictment was not too late, no substantial miscarriage of justice has accrued and that we are, therefore bound to give effect to the proviso in S. 4, sub-S. (1). of the Criminal Appeal Act, 1907, which is as follows :—'Provided that the Court may, notwithstanding that they are of opinion that the point raised in appeal might be decided in favour of the appellant, dismiss it, if they consider that no substantial miscarriage of justice has occurred."

This provision appears to be similar to that laid down in S. 537 of the Code.

S. 233, as already observed, provides two things, *first*, for separate charge for each distinct offence, *second*, for separate trial except in four cases mentioned. What their Lordships of the Privy Council have prohibited is if law expressly provides a particular mode of trial, disobedience of that law vitiates the whole trial. I doubt if the framing of charges is a mode of trial, but joint trial of charges as to distinct offences would be a mode of trial and if an accused is tried jointly on several charges not coming under Ss. 234, 235, 236 and 239, that trial would be null and void.

Although illustrations have no force of law, but they go a great way to explain the intention of the Legislature. There is only one illustration attached to S. 233 of the Code which is this :—

"*A* is accused of a theft on one occasion, and of causing grievous hurt on another occasion. *A* must be separately charged and separately tried for the theft and causing grievous hurt."

If the intention of the Legislature had been that separate charge should be framed even in a case where more than one distinct offence has been committed in the same transaction (as in the present case), one would expect an illustration to that effect.

The words "every distinct offence" in S. 233 of the Code have some meaning. I understand, when two offences have been committed and each of these two offences has no connection with each other, they are distinct offences. The section does not say "for every offence," but "for every distinct offence." The illustration quoted above indicates the meaning of "distinct offence." In the illustration, the two offences were committed on two different occasions, one was theft and the other was grievous hurt.

The decision of the question involved in the present reference depends on whether the omission to frame two charges instead of one against the accused with respect to hurt caused by him to two individuals, is or is not curable by S. 537 of the Code as a mere irregularity which has caused no failure of justice. I have already shown that the qualifying expression at the beginning of S. 537 refers only to Chapter 45 and that omission in a charge, warrant or summons is not an illegality but is only an irregularity.

"An author must be supposed to be consistent with himself, and, therefore, if in one place he had expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author; and the language of every enactment must be construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal."

(See Maxwell's Interpretation of Statutes, 5th Edition, page 253).

"In determining either what was the general object of the Legislature, or the meaning of its

language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, justice, and legal principles, should, in all cases open to doubt, be presumed to be the true one," (Maxwell's Interpretation of Statutes, page 309.)

For the above reasons, I am of opinion that the omission complained of is but an irregularity. The objection taken in this Court could and should have been taken at an earlier stage of the proceeding.

The accused was convicted for rioting and hurt and was sentenced to undergo rigorous imprisonment for six months under S. 147, and two months under S. 323, Indian Penal Code, and both the sentences were made to run concurrently. He was further ordered under S. 106, Criminal Procedure Code, to execute a bond in Rs. 500 with a surety in like amount to keep the peace for a year and in default to undergo simple imprisonment for that period.

I have now to consider as to whether there has been any failure of justice. Ram Subhag, the petitioner, was charged in one count for having caused hurt, in one rioting to two men, namely, Ram Belas and Khalifa Ahir. The lower Appellate Court's finding is this:

"Also the individual charge against Ram Subbhag of voluntarily causing hurt to Khalifa has been proved, but not the individual charge for voluntarily causing hurt to Ram Belas, for apparently Ram Belas had no marks of injury."

From the judgment of the lower Appellate Court, it does not appear what nature of hurt was caused by Ram Subhag to Khalifa.

Referring to the judgment of the trying Court, I find that Court saying,

"P. W. No. 11 proves a number of injuries he found on the person of Khalifa, one being a simple fracture of the left ring-finger and the other a compound fracture near the middle part of ulna and radius bones."

This witness is a Sub-Assistant Surgeon. It does not, therefore, appear from the judgment of either Court what was the nature of the injury caused by the petitioner. The injury caused by him must have been a simple hurt to Khalifa, as he was charged under S. 323, Indian Penal Code I have been told that the petitioner has already served 19 days in jail, and there can be no doubt that he had to spend a large amount of money in defending himself in two Courts below, and in this Court. In the above circumstances, I reduce his sentence of six months to the portion already served. The order under S. 106, Criminal Procedure Code, will stand. He is discharged from the bail bond.

V.B./R.K.

Sentence reduced.

A. I. R. 1916 Calcutta 706

FLETCHER AND TEUNON, JJ

Prosonno Kumar Mukherjee and *others* —Defendants—Appellants.

v.

Kulada Prosad Mukherjee and *others* — Plaintiffs — Respondents.

Appeals Nos. 1791, 2062 and 2063 of 1911, decided on 20th April, 1915, from the Appellate Decrees of Dist. Judge, Bankura, dated 22nd May, 1911.

Bengal Tenancy Act (8 of 1885), S. 186-A—Landlord's title successfully denied—Suit by landlord—S. 186-A does not apply.

S. 186-A of the Bengal Tenancy Act does not apply to a case brought by a landlord in a Civil Court for possession when the tenants thereof have successfully denied the landlord's title in a rent suit. 34 Cal. 922; 5 I. C. 708 and 8 I. C. 660, ref. to. 9 C.W.N. 928, dist. [P. 706, C. 2.]

Sarat Chandra Bysack for *Brijendra Kumar Chakravarty*—for Appellants.

Samatul Chandra Dutta for *Satis Chandra Mukherjee* and *Khetra Gopal Banerjee*—for Respondents.

Judgment.—These are appeals by the defendants against the judgments of the learned District Judge of Bankura, dated the 22nd May, 1911. The suit was brought by the landlords to recover possession of a certain property held by the defendants, on the ground that the tenants have successfully and without reasonable and probable cause denied the landlords' title in a certain rent suit. The only question is, do the tenants incur forfeiture by their doing so? The argument in this case has been based upon S. 186-A of the Bengal Tenancy Act. To whatever class of cases S. 186-A may apply, it does not apply to this case because no damages have been awarded. Therefore, the position of the plaintiffs is exactly the same as if that section did not exist. The decided cases on this point seem to be clear, notwithstanding the doubt that was thrown upon the case of *Srimati Mallika Dassi* v. *Makham Lal Chowdhury* (1). It is not necessary

(1) (1905) 9 C. W. N. 928.

to go through all the cases which have gone the other way. It is sufficient to say that the cases of *Khater Mistri* v. *Sadruddi Khan* (2), *Sheik Miadhar* v. *Rajani Kanta Ray* (3) and *Ekabhar Sheik* v. *Harah Bewah* (4) are all authorities for the proposition that a suit of this nature does lie. The case of *Srimati Mallika Dassi* v. *Makham Lal Chowdhury* (1) does not seem to be borne out by the late authorities. That being so, the only other question that has been raised is whether the present plaintiffs can maintain the suit. That clearly they can on findings of fact made by the learned District Judge in the lower Appellate Court. These findings are conclusive and binding upon us and we must accept them and hold that the plaintiffs in fact represent the whole body of landlords.

The present appeals, therefore, fail and must be dismissed with costs.

V.B./R.K.

Appeals dismissed.

(2) (1907) 34 Cal. 922.
(3) (1910) 5 I. C. 708.
(4) (1910) 8 I. C. 660.

A. I. R. 1916 Calcutta 707 (1)

FLETCHER AND TEUNON, JJ.

Damoda Coal Co., Ltd.—Defendants—Appellants.

v.

Hurmook Marwari—Plaintiff—Respondent.

Second Appeal No. 3290 of 1912, decided on 16th March, 1915, against the Decree of Sub-Judge, Burdwan, dated 17th August, 1912.

Transfer of Property Act (4 of 1882), Ss. 108 (e) and 106—Property under lease destroyed by fire or other irresistible force—Notice to avoid lease—Time not necessary—S. 106 does not apply.

A notice avoiding a lease under S. 108 (*e*) of the Transfer of Property Act does not require any length of time for its operation. The lease becomes *ipso facto* void when the lessee serves a notice under S. 108 (*e*). S. 106 of the Transfer of Property Act does not apply where a lessee serves a notice on the lessor to avoid the lease on the ground of the destruction of the property by five or other irresistible force. [P. 707, C. 2.]

Mohendra Nath Ray and *Mohini Mohan Chatterjee*—for Appellants.

Judgment.—This is an appeal from a judgment of the learned Subordinate Judge of Burdwan, dated the 17th August, 1912, reversing the decision of the Munsif. The suit was brought to recover rent due on a lease. The defence was that the lease had come to an end. The lease was a lease of a colliery and the defendants alleged that the property had been destroyed by fire or other irresistible force, and that they had by notice avoided the lease. The learned Judge of the lower Appellate Court made findings of fact that are in favour of the defendants. He, however, found that the notice purporting to avoid the lease did not satisfy the terms of S. 106 of the Transfer of Property Act and that, therefore, the lease had not been validly determined.

The learned Judge was obviously in error in the view he took. The notice under S. 106 has nothing to do with the notice to avoid a lease under S. 108 (*e*) of the Transfer of Property Act. The notice avoiding a lease under S. 108 (*e*) does not require any length of time for its operation. The lease becomes *ipso facto* void when the lessee serves the notice under S. 108 (*e*), whereas fifteen days' notice is required under S. 106. The learned Judge has fallen into an error by applying the provisions of S. 106 to the notice in the present case. This notice did not require any time to take effect and it operated to avoid the lease immediately on its service. That being the case, the judgment of the learned Judge of the lower Appellate Court is wrong. We must, therefore, set aside his judgment and decree and restore the judgment and decree of the Munsif. The respondent must pay to the Appellants their costs, not only in this Court but also in the Courts below.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 707 (2)

CHITTY AND CHAPMAN, JJ.

Emperor.

v.

Durga Halwai and *others*—Accused.

Criminal Ref. No. 1 of 1915, decided on 31st May, 1915, made by Presy. Magte., Calcutta.

(a) Criminal P. C. (5 of 1898), Ss. 107 to 110—Scope of—Absence of word residing—Effect.

In none of the Ss. 107 to 110, Criminal Procedure Code, does the word "residing" occur,

and to read it into those sections would involve a complete alteration of their scope and effect. 27 Cal. 993, dist. [P. 708, C. 2.]

(b) Criminal P. C. (5 of 1898), S. 110—What is fit case under S. 110 is stated.

Where there is evidence of no less than 14 burglaries in respect of which suspicion has fallen upon the accused and their reputation as thieves is firmly establised by the evidence of a number of witnesses including those called for the defence:

Held, that it would be difficult to imagine a case in which the application of S. 110 is more necessary or proper. [P. 708, C. 2.]

Manmotho Nath Mukherjee and *Probodh Chandra Chatterjee*—for Accused.

S. R. Das, *Manindra Nath Banerjee* and *Tarak Nath Sadhu*—for the Crown.

Judgment.—This is a reference under S. 123, Criminal Procedure Code, in the matter of six persons, Durga Halwai, Mohendra Karmakar, Jai Gopal Das, Ganga Bissen, Dwarka Sukul and Sham Lal, who have been ordered to furnish security for good behaviour, the first four for three years, and the last two for two years, respectively, under S. 110, Criminal Procedure Code, and who have all failed to furnish such security. The case made against them is that they are all by habit house-breakers and thieves, and form part of a gang who have been operating in Calcutta during the past three years or thereabouts. On behalf of Mohendra Karmakar and Jai Gopal Das it was argued that the Presidency Magistrate had no jurisdiction to take proceedings against them under S. 110, because they were not within the local limits of his jurisdiction. There appears to be no force in this contention. Mohendra Karmakar may be a native of Midnapur, but it is proved that he was residing in Calcutta down to Agrahan last. He attempted (but without success) to show that he was carrying on a shop for the manufacture and sale of iron chests in a remote village in the Midnapur District. About December 1914 he disappeared. He was arrested in January in the Midnapur District in connection with a burglary committed at Serampore in December, 1914. He was brought under arrest from Serampore to be placed before the Magistrate in this case. Jai Gopal was arrested in Calcutta at the shop of Kedar Bania. For him it was said that he lived at Sinthi near Dum Dum. It appears that he used to go there to the house of his mother-in-law and that he used a bicycle to come and go. It was argued that "within the local limits of his jurisdiction" must be read as "residing within the local limits etc.," and the case of *Ketabai* v. *Queen-Empress* (1) was cited. The remarks in that judgment must be read in connection with the particular facts of that case, which were entirely different from those before us. In none of the Ss. 107 to 110 does the word "residing" occur, and to read it into those sections would involve a complete alteration of their scope and effect.

It was undoubtedly within the local limits of the Presidency Magistrate's jurisdiction that the habits of all these six persons, which are now complained of, were practised, and their evil reputation, if any, acquired. Of the merits of the case very little need be said. There is abundant and cogent evidence that all these six persons are habitual house-breakers and thieves. They have all been in jail, some of them once and once again, for similar offences. They all last emerged from jail at various dates from October 1911 to July 1912. Since then they have been associating in Calcutta with Parmessari and Sitanath, other offenders of the same class, and have formed a regular gang for the commission of house-breaking and theft. There is evidence of no less than 14 burglaries from 1912 down to 1914 in respect of which suspicion has fallen upon them. Their reputation as thieves is firmly established by the evidence of a number of witnesses including those called for the defence. It would be difficult to imagine a case in which the application of S. 110 was more necessary or proper. We accordingly confirm the order of the Presidency Magistrate and direct that Durga Halwai, Mohendra Karmakar, Jai Gopal Das and Ganga Bissen be detained in prison for three years each, and Dwarka Sukul and Sham Lal for two years each, or until within such periods they respectively give the security to the Magistrate as ordered by him. The imprisonment will in each case be rigorous.

V.B./R.K.

Order confirmed.

(1) (1900) 27 Cal. 993.

A. I. R. 1916 Calcutta 709

FLETCHER AND TEUNON, JJ.

Mohendra Nath Mandal and *another*—Defendants—Appellants.

v.

Narendra Krishna Chatterjee—Plaintiff—Respondent.

Second Appeal No. 3137 of 1913, decided on 22nd March, 1915, from the Decree of Addl. Dist. Judge, Hughly, dated 8th July, 1913.

Bengal Drainage Act (6 of 1880), Ss. 42 and 44—S. 44 is permissive—Mistake about year of instalment does not save limitation.

S. 44 of the Bengal Drainage Act is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalments under the two Ss. 42 and 44. [P. 709, C. 1 & 2.]

A mistake about the year of the instalment cannot save limitation. [P. 709, C. 2

Nandalal Sarkar—for Appellants.

Surendra Chandra Sen and *Hari Charan Mukherjee*—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned Additional District Judge of Hughly, dated the 8th July, 1913, affirming the decision of the Munsif. The suit was brought by the plaintiff to recover certain instalments in respect of the drainage charge. The facts which are simple appear to be as follows:—The defendants' father sold the property to the plaintiff. He concealed from the plaintiff at the time of sale the fact that the property was subject to the drainage charge. The plaintiff on his purchase granted a tenancy of the property to the defendants' father and he now sues the defendants in respect of the moneys that he has paid as such charge. As regards the claim, if it had been against the estate of the father of the defendants, apparently that would be barred under the provisions of the law of limitation, but the plaintiff claims to recover these instalments under the provisions of the Bengal Drainage Act. The only question that has been raised is as to whether, in order to enable the plaintiff to sue, it is essential that the mode and time of payment ought to be settled by the Collector under the provisions of S. 44. The Collector has not been applied to in this case. But it seems to me that that is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalment under the two Ss. 42 and 44. The limitation on the right of the landlord or the superior tenant is that the tenant shall not be liable to pay more than 1/10th of the total amount in one year. It is not suggested that the amount sued for in the present case is more than 1/10th of the total amount.

The only point that has got any substance in this case is as to the instalment which became due in 1907. The learned District Judge has said: "It is conceded for the defendants that if the Bengal Tenancy Act regulates the question the claim for 1907 is in time." That concession might or might not have been made. But the gentleman who conducted the case in the Court below on behalf of the defendants was not authorised to concede anything that was not in accordance with the law, and, it it is shown that that is an error, we are bound to put it right. The fact is that the parties have got a difficulty in dealing with the European dates as compared with the dates of the Bengali Calendar. That is not an important thing. But what did really happen is that this instalment fell due on 30th *Chaiyat*, 1313 B. S. That was the last day of the Bengali year. That date corresponds with the 13th April, 1906. It was urged in the lower Appellate Court that the date was in 1907. That was clearly a mistake. The last date on which the suit could be maintained for that instalment would be 1st *Bysakh*, 1317 B. S. The Judge considered it to be 1318. If that is so, that instalment which was called the 1907 instalment but which was really the 1906 instalment, was barred by limitation.

Another question that has been raised in this appeal is as to interest. Interest was claimed in the plaint in a lump sum. It is not shown on what principle that sum was arrived at or what was the rate charged. S. 26 (1) of the Bengal Drainage Act provides that interest shall have to be paid at the rate of 4 per cent. No question was raised as regards this in either of the Courts below, and we must take it that the parties were content that the interest charged for had been properly arrived at, if payable. The question is not purely a question of law but a mixed question of law and fact, on which no finding has been made by the lower Appellate Court to enable us to

consider whether the question has been purely considered or not. The result is that subject to the variation that I have stated, namely, as to the instalment that is called the 1907 instalment but which is really the 1906 instalment being barred by limitation, the present appeal stands dismissed. In the circumstances, as both parties have partly succeeded in the appeal, I think there should be no order as to costs of this Court.

Teunon, J.—I agree.

V.B./R.K.

Appeal partly allowed.

A. I. R. 1916 Calcutta 710

MOOKERJEE AND N. R. CHATTERJEA, JJ.

Abdul Rahman — Judgment-debtor—Appellant.

v.

Sarat Ali and *another*—Decree-holders—Respondents.

Second Appeal No. 597 of 1914, decided on 24th August, 1915, from the Order of Dist. Judge, Noakhali, dated 14th November, 1913.

(a) Execution sale—Setting aside—Power of Court to take notice of events happening after filing application.

A Court is competent to set aside a sale held in execution of a decree on a ground which was not mentioned in the application to set aside the sale and which did not in fact exist when that application was made. [P. 711, C. 1.]

(b) Practice—Duty of Court—Events happening after institution of proceedings—Court entitled to take notice.

A Court, may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions. 26 I. C. 410; 6 C. L. J. 92 and 6 C. L. J. 102, ref. [P. 711, C. 1.]

(c) Execution sale—Rights of purchaser—Sale—*Ex parte* decree set aside—Sale held cancelled—Subsequent fresh decree does not validate sale.

As soon as an *ex parte* decree is set aside, the sale held thereunder to the decree-holder, is cancelled and it is immaterial that the property has meanwhile been assigned away by the decree-holder auction-purchaser. A fresh decree subsequently made, does not validate the sale. [P. 711, C. 2.]

(d) Execution sale—Rights of purchaser—Assignee of decree-holder-purchaser—Protection to.

An assignee of a decree-holder auction-purchaser stands in no better position than his assignor. 31 I. C. 894=10 All. 166 (P. C.). 30 Mad. 295, diss from. [P. 711, C. 1.]

(e) Execution sale—Rights of purchaser—Stranger purchaser—Assignee of decree-holder auction-purchaser—Position of.

The special protection afforded to a stranger who purchases at an execution sale, is not extended to an assignee of the decree-holder auction-purchaser. 27 I. C. 139, ref. [P. 711, C. 1 & 2.]

Jyotish Chandra Hazra—for Appellant.

Kali Prosanna Piplai for *A. K. Fazlul Huq*—for Respondents.

Judgment.—We are invited in this appeal to consider whether a sale of the properties of the appellant in execution of an *ex parte* mortgage-decree, should stand confirmed. The sale was held on the 2nd November, 1911 and was confirmed on the 13th December following. The decree-holder, who had himself become the purchaser, forthwith transferred the property to another person. On the 19th August, 1912, the judgment-debtor applied to have the sale set aside; he alleged that the sale had been irregularly and fraudulently held and had caused him substantial injury. He joined as opposite parties to his application, both the decree-holder auction-purchaser and the assignee from him. At the same time, he instituted proceedings to have the *ex parte* decree itself set aside. On the 22nd February, 1913, the application to set aside the *ex parte* decree was granted. Thus, on the 28th July, 1913, when the Munsif took up for disposal, the application to set aside the sale, he found that the *ex parte* decree had already been set aside. He consequently held that the sale must be set aside on the authority of the decision in *Set Umedmal* v. *Srinath Ray* (1), although in the interval, the decree-holder auction-purchaser had transferred the property to the stranger. In this view, he declined to take evidence as regards the merits of the case and set aside the sale without enquiry into the allegations of fraud irregularity and substantial injury. On appeal by the assignee from the decree-holder auction-purchaser, the District Judge has reversed this order and has directed that the sale do stand good. He has held that the assignee from the decree-holder stands, in a better footing than his assignor and is entitled to retain the property, notwithstanding the

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(1) (1900) 27 Cal. 810.

cancellation of the *ex parte* decree which was the foundation of the sale. The judgment-debtor has now appealed to this Court and has invited us to hold that the sale stood cancelled as soon as the *ex parte* decree was set aside and that it was immaterial that the property had meanwhile been assigned away by the decree-holder auction-purchaser. We are of opinion that this contention is well-founded and must prevail. In the *first* place, it is clear that the primary Court was competent to set aside the sale on a ground which was not mentioned in the application of the judgment-debtor and did not in fact exist when that application was made. It is well settled that the Court may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions. The decisions which recognise this principle, are reviewed in *Rai Charan Mandal* v. *Biswanath Mandal* (2) and reference may be made particularly to *Hazari Mal* v. *Janaki Prasad* (3) and *Romyad Sahu* v. *Bindeswari Kumar Upadhay* (4).

In the *second* place, it is clear that the effect of the cancellation of the *ex parte* decree on the execution sale held thereunder is not touched by the fact that the decree-holder auction-purchaser has assigned away the property sold. As fully explained by Jenkins, C.J., in *Satis Chandra Ghose* v. *Rameswari Dasi* (5), the assignee stands in no better position than his assignor. This is borne out by the decision of the Judicial Committee in *Zainul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (6), and it is plain that the contrary view adopted in *Sheik Ismal Kowther* v. *Rajab Rowther* (7), is supported neither by principle nor by authority. The theory whereby a special protection is afforded to a stranger who purchases at an execution sale will be found expounded in the case of *Krishna Chandra Mandal* v. *Jogendra Narain Roy* (8); that rule cannot be extended to an assignee of the decree-holder auction-purchaser.

We are informed that on re-trial of the suit a decree has been made in favor of the plaintiff against the defendant; but as Maclean, C. J., pointed out in *Set Umedmal* v. *Srinath Ray* (1) that does not affect the question of the effect of the cancellation of the *ex parte* decree upon the sale held thereunder; as soon as the *ex parte* decree was set aside, the sale fell through, and the fresh decree subsequently made, could not possibly validate that sale. On this ground, the present case is distinguishable from the decisions in *Hazari Mal* v. *Janaki Prasad* (3) and *Ramyad Sahu* v. *Bindeswari Kumar Upadhya* (4), where the very decree which was the basis of the sale, though temporarily nullified, was ultimately maintained.

The result is that this appeal is allowed, the order of the District Judge set aside and that of the Court of first instance restored. Each party will pay his own costs throughout the proceedings.

V.B./R.K.

Appeal allowed.

(2) (1915) 26 I. C. 410.
(3) (1907) 6 C. L. J. 92.
(4) (1907) 6 C. L. J. 102.
(5) (1915) 31 I. C. 894.
(6) (1883) 10 All. 166=15 I.A. 12=5 Sar 129 (P, C.).
(7) (1907) 30 Mad. 295.
(8) (1915) 27 I. C. 139.

A. I. R. 1916 Calcutta 711

FLETCHER AND BEACHCROFT, JJ.

Abdul Gani—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1751 of 1914, decided on 26th January, 1915.

Indian Penal Code (45 of 1860), Ss. 467 and 471—Sanction—Not necessary in case of S. 471 but is required in case of S. 467—Forged document used out of Court—Sanction of Court is not necessary—Criminal Procedure Code (5 of 1898), S. 195.

The accused presented before the Registrar a certain document for registration, the execution of which was denied by the complainant but the Registrar directed it to be registered. Thereafter as the result of a civil suit instituted by the complainant, the document was found by the Court to be a forged one. A complaint was then presented before the Sub-Divisional Officer under Ss. 467 and 471, Indian Penal Code, and process was issued under S. 467, Indian Penal Code:

Held, that the Magistrate could proceed under S. 471, Indian Penal Code, without obtaining the sanction of the Civil Court, but that so far as the proceedings founded on the offence under S. 467, Indian Penal Code, were concerned he could not proceed without the previous sanction of the Civil Court. 5 I. C. 879, ref. to.

[P. 712, C. 1 & 2.]

Sanction of the Civil Court is not necessary in the case of an offence that was committed by a prior use of the forged document outside the Court. 4 Bom. L. R. 268, apprd. and foll.

[P. 712, C. 2.]

Hemendra Kumar Das—for Petitioner.

Orr—for the Crown.

Judgment.—This is Rule calling upon the District Magistrate to show cause why the proceedings should not be quashed on the ground that there was no such sanction as was requisite under S. 195, Clause (*c*) of the Code of Criminal Procedure. The accused presented before the Registrar a certain document for registration. The complainant denied the execution of the document, but the Registrar directed it to be registered. Thereupon a civil suit was instituted by the complainant before the Munsif to have it declared that the document was a forgery and the Munsif declared it to be a forgery. A complaint was then presented before the learned Sub-Divisional Officer under sections, amongst others, Ss. 467 and 471, Indian Penal Code, and the Magistrate issued process under S. 467, Indian Penal Code. The present petitioner, that is the accused, thereupon applied for and obtained the present Rule. The point that has been argued in this case is solely as to whether sanction is required for prosecution on a charge under S. 467, Indian Penal Code. The point, so far as we are concerned, is covered by the decision of this Court in the case of *Teni Shah* v. *Bolahi Shah* (1). It is not necessary for us to state whether we concur in that decision or not because, in our view, the Magistrate could and can proceed under S. 471, Indian Penal Code, without obtaining the sanction of the Munsif. The punishment that the Court can inflict for an offence under S. 471, Indian Penal Code, if it is proved, is the same as that under S. 467, Indian Penal Code. It has been decided by the High Court at Bombay in the case of *Noor Mahomed Cassam* v. *Kaikhesru Maneckjee* (2) that where an offence punishable under S. 471, Indian Penal Code, is made out in a complaint, the use complained of being prior in date to the use of the document in question in evidence in a Civil Court, the sanction of such Court is not necessary under S. 195 (1) (*c*), Code of the Criminal Procedure, before a Criminal Court can take cognizance of such offence. The decision seems to us to be correct and founded on good sense, namely, that sanction of the Civil Court is not necessary in the case of an offence that was committed by a prior use of the forged document outside the Court. If the story as told by the complainant in the present case be true, namely, that the forged document was used before the Registrar, then in the case of a prosecution for that offence, namely, for the use before the Registrar sanction of the Munsif would not be necessary. But so far as the proceedings founded on the offence under S. 467, Indian Penal Code, are concerned, having regard to the decision of *Teni Shah* v. *Bolahi Shah* (1), referred to above, they cannot proceed without the previous sanction of the Munsif. The present Rule must, therefore, be made absolute to the extent we have mentioned.

V.B./R.K.

Rule made absolute.

(1) (1910) 5 I.C. 879.
(2) (1902) 4 Bom. L.R. 268.

A. I. R. 1916 Calcutta 712

CHATTERJEE AND CHAPMAN, JJ.

Abdul Ghafoor Miah—Defendant—Appellant.

v.

Altaf Hosain and *others*—Plaintiffs and Defendants—Respondents.

Appeal No 289 of 1911, decided on 31st March, 1915, from the Original Decree of Sub-Judge, Murshidabad, dated 27th May, 1911.

(a) Civil P. C. (5 of 1908), S. 92—Suit for mere declaration of being a *Mutwalli* without claiming possession is not tenable.

Where the plaintiff does not claim any of the reliefs under S. 92 of the Code of Civil Procedure and does not ask the Court to appoint him a *mutwalli*, but only asks to declare that he is the rightful *mutwalli*, and where the defendant is not sued for recovery of possession:

Held, that the suit is incompetent.

[P. 713, C. 2.]

(b) Mahomadan Law—*Wakf*—*Mutwalli*—*Mutwalli* who is not appropriator cannot appoint another—Renouncement must be made before *Kazi* who will remove him.

A *mutwalli* who is not himself the appropriator cannot renounce and appoint another *mutwalli*.

If the *mutwalli* appointed by the founder says, "I resign my *mutwllishiр*", this declaration has no effect unless it is made in the presence of the founder or the *Cadi*, who would thereupon remove him. [P. 714, C. 1.]

(c) Mahomadan Law—*Wakf*—*Mutwal i*—*Mutwalli* appointed against original deed of *Wakf* cannot continue beyond appointer's life-time.

An appointment of *mutwalli* by the founder cannot enure against the express terms of the original deed of *wakf* and must terminate with the life of the *wakf*. 37 Cal. 263, dist.

[P. 714, C. 1.]

Mohendra Nath Roy and *Nares Chandra Sinha*—for Appellant.

Z. R. Zahid and *Hari Bhusan Mukherjee*—for Respondents.

Judgment.—*Musammat* Atibunnissa and her husband, Hossein Ali, jointly executed a deed of *wakf* on the 4th of *Sravan*, 1270. Certain properties mentioned in schedule *ka* to the plaint were the subject of dedication. Under this deed Hossein Ali was to be *mutwalli* for his life and Atibunnissa after him for her life. After their death without children the nearest relative, who was also *dianutdar* or honest, was to succeed as *mutwalli*, but on his death the successor would be not necessarily his heir-at-law but one amongst the near relatives of the dedicators who was *dianutdar*.

Hossein Ali died in 1279 and in 1282 Atibunnessa executed another deed of *wakf* in respect of the properties in schedule *ka* and additional properties in schedule *kha*. This *towliatnama* was revoked and in 1284, 1289, 1291 and 1297, she executed different *towliatnamas*, but none of them came into operation and she continued to act as *mutwalli* until 1894, when she executed three documents one after another in favour of Abdul Gafoor, father of defendant No. 1. The first document was dated the 25th March, and relinquished some of the *wakf* properties in favour of Abdul Gafoor. The second document was a *towliatnama* in favour of Abdul Gafoor in respect of *ka* and *kha* properties and the third document was an *ekrarnama*, dated the 27th September, confirming the *towliat*, and agreeing that neither she nor her heirs or representatives would object to the same. In 1899 she applied for permission to sue as a pauper for setting aside the documents of 1894 as procured by fraud and undue influence. The permission was refused and she died in 1905 without bringing any suit. In 1907, Khoka Mia, the father of the plaintiff, brought a regular suit for declaration of his title to the *wakf* properties and recovery of possession. To that suit defendant No. 1 pleaded, saying he was in lawful possession as *mutwalli* under the *towliatnama* of 1894. Khoka died pending suit and the plaintiff and his brothers, defendants Nos. 2 and 3 were brought in as his heirs. The suit was decreed by the first Court, but was dismissed by the High Court on the ground that all the heirs of Khoka Mia could not be *mutwallis*. A fresh suit by the person who would be the *mutwalli* was permitted, and accordingly this suit has been brought.

The pleas of the defendant, amongst other things, were that Khoka Mia was not the step-brother of Atibunnissa and that the suit was barred by limitation.

The first Court decreed the suit in respect of the properties in schedule *ka*, holding that Khoka was the step-brother of Atibunnissa and that the suit was not barred by limitation.

Defendant No. 1 appeals and on his behalf it has been argued (1) that the suit is incompetent as not in compliance with the provisions of S. 92 of the Civil Procedure Code, (2) that Khoka Mia is not proved to be the step-brother of the *wakif*, Atibunnissa, and (3) that the suit is barred by limitation.

As regards the *first* point, it was not taken in the Court below, and even if it had been taken, the plaintiff does not claim any of the reliefs under S. 92. He does not ask the Court to appoint him a *mutwalli* but to declare that he is the rightful *mutwalli* and that defendant is not, and for recovery of possession.

As regards the *second* point, we agree with the learned Subordinate Judge that Khoka Mia was the son of Naziruddin and the step-brother of Atibunnissa. We are not prepared to believe the document called *shafeenama* as a genuine document. It never saw the light of day before it was produced in this case; the entry of its being filed in a previous case is suspicious. In any case it was not filed in the previous suits of Khoka Mia in which it would have been very cogent evidence. Nor are we very much pressed by the application made by Hossein Ali and Dost Ali ignoring its existence, or by the petition of Atibunnissa for drawing the pension of her father. Khoka was admittedly illiterate and Hossein Ali and Dost Ali were influential men. They succeeded in keeping him in the background as if he were nobody. It is proved, however, by the evidence of respectable relatives that he and his family lived in the family residence at Shahpore, until in consequence of an open rupture he had to leave the place.

The most potent evidence, however, in his favour is the *kobala* executed in his favour by Atibunissa Bibi on the same date on which she executed the *wakf-nama* of 1282. The two documents are executed on the same date, attested by many of the same witnesses and registered by the same *am-mukhtar*, this *kobala* describing Khoka as the son of Khondkar Naziruddin. There is no explanation why he was so described and why the relative witnesses attested the document containing such a description. There is a rent-decree which described Khoka as the son of Moyez, but assuming that the same person is meant, this was after the rupture and even then it is not made out that he was so described to the knowledge of Atibunnissa. It is quite possible, as is suggested at the Bar, that his mother was not of the same rank with the father and he was not, therefore, looked upon as the equal of Atibunnissa, but there is no evidence of that even and the admission of Atibunnissa cannot be got over.

The *next* question is limitation. It is contended that as Abdul Gafoor was put in possession under the *towliatnama* of 1894, his possession became adverse from that time or at all events from July 1898 when, according to the application of Atibunnissa for permission to sue as a pauper. he set up a title in denial of her rights.

It is said that *mutwalli* cannot renounce and appoint another *mutwalli*. That may be so in respect of a *mutwalli* who is not himself the appropriator. Atibunnissa in the *towliatnama* of 1894 expressly says that she was acting in her double capacity. She renounced in her capacity of *mutwaili*, but appointed Gafoor in her capacity of the *wakif*. It is laid down in the Kunyah: "If the *mutwalli* appointed by the founder says, "I resign my *mutwalliship* this declaration has no effect unless the declaration is made in the presence of the founder or the *Cadi*, who would thereupon remove him:" Fatawa Mahdiya, Volume II, page 575, quoted in *Nawab Khajeh Salimulla Bahadur* v. *Abdul Khayer Mohammad Mustafa* (1). Here the founder herself made the renouncement to herself and made the appointment herself; such an appointment by the founder is quite distinguishable from an appointment by one *mutwalli* of another without the intervention of the founder or the *Cadi*. This appointment, however, cannot enure against the express terms of the original deed of *wakf*, and must terminate with the life of the *wakif*. This case is, therefore, clearly distinguishable from the case of *Nawab Khajeh Salimulla Bahadur* v. *Abdul Khayer Mohammad Mustafa* (1).

So far as the *wakf* of 1270 was concerned, *i. e.*, in respect of the *ka* properties, the vacancy occurred on the death of Atibunnissa in 1905 and the plaintiff was quite within time in 1910.

As found by the learned Subordinate Judge the plaintiff is quite eligible for the post of *mutwalli* and his brothers do not compete with him.

We, therefore, agree with the learned Subordinate Judge and dismiss this appeal with costs. Hearing-fee Rs. 150.

V.B./R.K.

Appeal dismissed.

(1) (1910) 37 Cal. 263=3 I. C. 419.

A. I. R. 1916 Calcutta 714

RICHARDSON AND FLETCHER, JJ.

Suressur Misser and *another*—Plaintiffs—Appellants.

v.

Mt. Mohesh Rani Mesrain and *others*—Defendants—Respondents.

Second Appeal No. 261 of 1913, decided on 21st July, 1915, from the Decree of Addl. Sub-Judge, Darbhanga, dated 30th May, 1913.

(a) Hindu Law—Widow—Surrender—Acceleration of reversioner's interest—Widow's relinquishment for benefit—Effect.

A Hindu widow may relinquish her estate with the effect of accelerating the estate of the next reversioner and is not precluded from obtaining a benefit for such relinquishment.

[P. 716, C. 2.]

(b) Hindu Law—Widow—Alienation of whole estate with consent of reversioners valid.

A Hindu widow's alienation of the whole estate is valid where there is consent of the next heirs, inasmuch as the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs.

[P. 716, C. 2.]

(c) Hindu Law—Succession—Widow—Absolute interest in movables—Mithila Law.

Under the Mithila Law a widow takes an absolute interest in the movables of her deceased husband.

[P. 717, C. 1.]

(d) Movable Property—Mortgage—Land merely pledge or security for money lent.

Under the Hindu Law, as under the English Law, a mortgage is treated as personal or movable property, the land being considered as merely a pledge or security for the money lent. [P. 717, C. 2.]

(e) Practice—Pleadings—Relief—Fraud alleged in plaint not established—Effect.

Quære.—Whether where the plaintiff's claim to relief rests solely on the allegations of fraud made in the plaint and fraud is not established, the suit should fail. [P. 715, C. 2.]

S. P. Sinha, Dwarkanath Chakrabarty and *Chandra Sekhar Banerjee*—for Appellants.

Dwarkanath Mitter, Sorashi Charan Mitter, Sailendra Nath Palit and *Ajendra Nath Dutt*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs against the judgment of the learned Additional Subordinate Judge of Darbhanga dismissing their suit.

The plaintiffs are the sons of one Kesab Misser deceased. Kesab was step-brother of Madhab, the father of the defendants third party. The defendant No. 1 is the widow of and the defendants Nos. 2 to 5 the daughters of Nunoo Pershad Misser who died on the 18th of *Baisakh* 1313. Nunoo also left him surviving a son of Nageswar Pershad. He died childless on the 24th *Bhadro* 1313.

The plaint in this suit alleges that on the death of Nunoo, his son Nageswar succeeded to his properties and that on the death of Nageswar his mother, the defendant No. 1, took the properties. Further, that the defendant No. 1 wishing to benefit her daughters, the defendants Nos. 2 to 5, caused a false will of Nanoo to be filed before the District Judge of Darbhanga by her daughters and that in that case, Madhab Misser at the instigation of the defendants Nos. 8 and 9 (who are alleged to be servants of the defendant No. 1) filed a fictitious objection which was rejected by the Judge. That the servants of the defendant No. 1 knew full well (the word is given in the translation of the plaint as "probably" but this must be a mistranslation) that the will was invalid; so with a view to establish a permanent title in future got a Suit No. 277 of 1907 instituted by Madhab for declaring the said will (of which Letters of Administration with the will annexed had been already granted) declared invalid. That with a view to deprive the plaintiffs of their rights, the parties to that suit entered into a fraudulent and collusive *solenama* under which the immovable properties described in the Schedule (*i*) to the plaint and forming a portion of the estate of Nageswar Pershad Misser, were given to Madhab, the properties described in the Schedule (*ii*) to the defendants second party, and the properties described in the Schedule (*iii*) to the defendants fourth party.

The plaintiffs further allege that the defendant No. 1 was won over and on the 25th of June, 1909, executed a deed of relinquishment and that the defendant No. 1 is still in possession of the properties of Nageswar.

On these allegations, the plaintiffs asked the Court to make a declaration that the *solenama* and *bainama* are invalid, null and void and are not binding on the plaintiffs and cannot prejudice their right of inheritance.

The learned Judge at the trial found that all the transactions challenged by the plaintiffs in their plaint as being fraudulent, were in fact made and done in good faith.

On opening this appeal before us, Sir S. P. Sinha, Counsel for the appellants, stated that he did not intend to challenge the findings of the learned Judge negativing fraud. That being so, it is open to doubt whether the appeal should not be dismissed on that ground. The claim of the plaintiffs to relief in this suit, rests solely on the allegations of fraud made in the plaint. The plaintiffs having failed to establish fraud, are not at liberty to pick out allegations in the plaint which might have warranted them in asking for relief on some other ground. [*Hickson* v. *Lombard* (1) and *Rajendra Kumar Bose* v. *Gangaram Koyal* (2).]

The material facts relating to the case when they are disentangled from the allegations of fraud and collusion, are simple. The deceased Nunoo Pershad Misser made his will, dated the 21st of April, 1906, and which was registered two days later.

Under the terms of the will, Nunoo gave the whole of his estate to his only son Nageswar subject to certain bequests in favour of his daughters and other relatives. The widow, the defendant No. 1, took no interest under the will.

(1) (1866) 1 E. & Ir. App. 324.
(2) (1910) 37 Cal. 856=6 I. C. 472.

By Clause 6 of his will, the testator provides that if Nageswar died without issue, his four daughters should succeed to his estate. As I have already said, Nageswar died, shortly after the testator, a minor and without ever having had any issue. The learned Judge has observed in the course of his judgment that,

"It is clear that Choudhury Nunoo Pershad had no right to make this will while he and his son lived in a joint family."

The learned Judge, however, overlooked the fact that the testator states in his will,

"I have many movable and immovable properties, both ancestral and self-acquired and it is necessary to give to the said daughters and their heirs, something out of the said properties according to the custom of the family."

There was also evidence before the learned Judge that the testator was possessed of self-acquired properties. A person claiming under the will, if acting in good faith, might not unreasonably suppose that there were properties of the testator which passed under the terms of the will. Next the three adult daughters of Nunoo applied to the District Judge for grant of Letters of Administration with the will annexed. This application was opposed by Madhab Misser who was then the sole reversionary heir. A perusal of the order-sheet of the learned District Judge, shows that his opposition was genuine and strenuous. The Letters of Administration were issued to the three adult daughters of the testator on the 3rd of October, 1907.

On the 11th of August, 1907, that is, before the grant of the Letters of Administration, Madhub instituted a regular suit asking for a declaration that Nageswar took the whole of the properties on the death of Nunoo by right of survivorship and alternatively if Nageswar came into possession of the properties under the will, for a declaration that Nageswar took an absolute interest under the terms of the will. This suit came on for trial and after the trial had proceeded for several days, the parties came to a settlement.

On the 22nd of February, 1909, the parties filed the petition of compromise in Court and on the next day, the suit was decreed in terms of the compromise.

By the compromise, the property was dealt with as follows :—

(*a*) The whole of the properties were deemed to be the estate of Nageswar.

(*b*) The movable properties were declared to be the absolute property of the defendant No. 1.

(*c*) The defendant No. 1 relinquished in favour of Madhab her widow's estate in the whole of the immovable property.

(*d*) Madhab granted to the daughters of Nunoo half of the immovable properties.

(*e*) Madhab granted to the defendant No. 1, 50 *bighas* of land for her life with remainder to Madhab and his heirs. Similarly, the daughters of Nunoo granted to the defendant No. 1 another 50 *bighas* with remainder to the daughters and their heirs.

The other terms of the compromise are not material and have not been referred to on the hearing of this appeal. The terms of the compromise have been given effect to by deeds executed by and between the parties.

The sole argument addressed to us on behalf of the appellants turned on the question as to whether or not the compromise was valid and binding.

The cases dealing with the power of a Hindu widow or mother to deal with the estate of her deceased husband or son to which she has succeeded as heiress, are numerous. It is not necessary for us to go through the long list of authorities as they have all been considered by a Full Bench of this Court in the case of *Debi Prosad Chowdhry* v. *Golap Bhagat* (3). In that case, all the earlier authorities were reviewed. First, it may be taken as established without doubt that a Hindu widow may relinquish her estate and this will have the effect of accelerating the estate of the next reversioner. Further, an alienation by a Hindu widow will be valid where there was a consent of the next heirs and the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs. But the alienation in such a case must be of the whole of the estate.

The authorities, however, appear to show that the widow is not precluded from obtaining a benefit for relinquishing her estate. As was observed by Garth, C. J., in the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (4). "But

(3) (1913) 40 Cal. 721 = 19 I. C. 273.
(4) (1884) 10 Cal. 1102.

there is no concealing the fact that although such a relinquishment may be made by a widow in perfect good faith, and even under such circumstances, as to be a meritorious self-sacrifice, it is nevertheless possible and, indeed, it not unfrequently happens that a widow who is anxious to turn her husband's estate into money, may arrange with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such a transaction; and it sometimes happens, that in this way, the estate his alienated from the husband's family, so that the person who would be the next male heir at the widow's death, is virtually deprived of his rights. But, if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make. And it seems equally impossible to deny, that for a long series of years, this Court has treated and considered such alienation as lawful." The latter part of this statement was approved of by the Privy Council in the case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (5). In the present case, the compromise was challenged on the following grounds:—

First, it was said that the deed of relinquishment (Exhibit H) executed by the defendant No. 1 pursuant to the terms of the compromise, does not include a house at Nadat. But the learned Subordinate Judge remarks that there is no evidence to support this argument. It is further to be observed that Exhibit H was intended to apply to the whole of the immovable properties and in the Schedule there is mentioned a property at Nadat which may be the house that is alleged to be there.

Next, it was objected that the whole of the movable properties had been given to the defendant No. 1. But under the Mithila Law, the widow takes an absolute interest in the movables [*Birajun Koer* v. *Luchmi Narain Mahata* (6)]. A further point was raised under this head, namely, that the defendant No. 1 was given absolutely the mortgage-bonds. It was argued that under the terms of the Transfer of Property Act, a mortgage is immovable property. But even if that be so, the Transfer of Property Act does not regulate the right of a Hindu widow or mother to succeed to the estate of her deceased husband or son. Under the Hindu Law, as under the English Law, a mortgage is treated as personal or movable property, the land being considered as merely a pledge or security for the money lent. Further, it is to be noticed that in the 4th Schedule to the plaint the plaintiffs treat the mortgages as movable property, the two decrees mentioned in the 4th Schedule being decrees on mortgages. The clause of the compromise that was most strongly relied on, was Clause 6 under which Madhab and the daughters of Nunoo respectively undertook to give to the defendant No. 1, 50 *bighas* of land. It is argued that under this clause, the widow's estate in a portion of the property remained. This, however, in my opinion, is not so. In one case the 50 *bighas* were given to the defendant No. 1 for her life with remainder to Madhab and his heirs and in the other case, it was given to the defendant No. 1 for life with remainder to the daughters of Nunoo and their heirs. This can in no way be considered as a reservation or restoration of the widow's estate that the defendant No. 1 formerly enjoyed in the property. The life-estate in the 100 *bighas* is essentially different from the widow's estate which the defendant No. 1 formerly enjoyed. For example, if a case of legal necessity arose, the defendant No. 1 would not be at liberty to mortgage the 100 *bighas* and the course of succession thereto would be different to what it would have been if the defendant No. 1 had retained her estate as a Hindu widow.

I think that under the terms of the compromise and the deed of relinquishment (Exhibit H), the defendant No. 1 effectually relinquished and destroyed her estate as a Hindu widow. That being so, having regard to the decisions mentioned above, the parties were at liberty to make any bargain they thought fit for the division of the property.

I may further mention that I consider that the compromise might be supported as a family arrangement between all the parties competent to deal with the whole of the property, namely, the daughters

(5) (1908) 30 All. 1 = 35 I. A. 1 (P. C.).
(6) (1884) 10 Cal. 392.

who claimed under the will on the one hand and the defandant No. 1 and Madhab, the sole reversioner, on the other hand. On the principles laid down by the Privy Council in the case of *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (7), the compromise in this case would be binding as acknowledging and defining the antecedent title in the parties.

In the result, the present appeal fails and must be dismissed with costs. Two sets of costs are allowed, one set to Dr. Mitter's client and another set to Babu Sorashi Charan Mitter's client.

Richardson, J.—I agree.

V.B./R.K.

Appeal dismissed.

(7) (1911) 33 All. 356=10 I. C. 477=38 I. A. 87 (P. C.).

A. I. R. 1916 Calcutta 718

SHARFUDDIN AND COXE, JJ.

Ram Sarup Bhagat—Plaintiff.

v.

Bansi Mandar—Defendant.

Civil Ref. No. 3 of 1915, decided on 15th March, 1915.

Contract Act (9 of 1872), S. 23—What contract of service is against public policy is pointed out.

A bond which binds down the executant to daily attendance and manual labour until a certain sum is re-paid in a certain month and penalises default with overwhelming interest is opposed to public policy and is not enforceable.

[P. 719, C. 1.]

Facts.—The suit was on a *harwahi* bond printed as foot-note to the judgment. Further facts appear from the following extract from the letter of reference of the Munsif:—

"The case of the plaintiff is that the defendant left his service without paying the debt in the month of *Jeth* 1319. Hence this suit for the recovery of Rs. 13 principal and Rs. 22 as interest, total Rs. 35.

The defendant has not appeared to contest the suit and hence it has been heard *ex parte*. This is very probably due to the fact that he is too poor to contest the claim.

Bonds of this nature are very common in this sub-division and I am told that there is no agriculturist who has not taken such a bond from his labourers. It is very difficult for agricultural operations in this sub-division to go on smoothly without such bonds. But it is said that such bonds are really slavery bonds, and reference to such bonds, was made in a recent Administration Report of the Government of Bihar and Orissa. If these bonds are really slavery bonds they should be declared null and void by the Courts. But in my opinion these are not slavery bonds. The contract, though for indefinite period, is determinable by the labourer on payment of money secured by the bond. The labourer is moreover to get his customary wages from the employer so long as he serves him. No doubt the provision to pay exorbitant rate of interest is such as to deter the labourer from leaving the service. The object and poor condition of majority of these labourers are such that they are never able to pay the money secured, unless there is another employer who pays him a higher value, out of which he may redeem himself. Under such a circumstance, the stipulation to pay an exorbitant rate of interest often serves as a check on him and prevents him from leaving the service. The result is that the same family of labourers goes on serving the same family of employer from generation to generation. But this is a circumstance which is not the result of the contract itself, but of extraneous circumstances. The provision to pay interest is really a penal provision which may be relieved against by the Court.

As I entertain reasonable doubt on the point of law involved in this case, I refer under O. 46, R. 1 of the Civil Procedure Code, for the decision of the Hon'ble High Court the following question :—

"Whether the bond in suit is a slavery bond? Are its terms enforceable?"

Judgment.—This is a reference by the Munsif of Banka, under O. 46, R. 1 of the Civil Procedure Code, for a decision whether a certain bond* is enforceable at

*The bond was as follows :—

* * * *

"I have borrowed Rs. 13 in cash from Ram Sarup Bhagat inhabitant of Bandara, to meet my household expenditure. In satisfaction of interest, I shall daily remain in attendance, and plough the land of the said Bhagat, work with spade in his land, transplant his seedlings, thresh his crops by means of *danni*, etc., and shall perform and manage all works required from me. I shall take wages and *butad* (food) according to the usage of the said village. In the year . . . . . I wish to re-pay the money, I shall re-pay it in the month of *Baisakh*

law. It appears to us that it is not so enforceable. It binds down the executant to daily attendance and manual labour until a certain sum is re-paid in a certain month and penalises default with overwhelming interest. It is remarkable that the suit, which is brought on this bond, is not contested, and this, in the Munsif's opinion, is probably due to the fact that the executor is too poor to defend himself. Such a condition is indistinguishable from slavery, and such a contract is, in our opinion, opposed to public policy and not enforceable.

V.B./R.K.

Reference answered.

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of that year in one lump sum, and then I will leave his work. I shall not re-pay money in any other month except the month of *Baisakh*. If I absent myself from work without re-paying the money, then I shall pay interest at the rate of Rs. 6-4 per cent. per mensem from the date of absence to the day of realization. I have, therefore, executed this *harwahi* (ploughman's) bond on the above conditions so that it may be of use, when required."

A. I. R. 1916 Calcutta 719

N. R. CHATTERJEA AND MULLICK, JJ.

Nobin Chandra Chowdhury and *others* —Petitioners.

v.

Bepin Chandra Roy Chowdhury—Opposite Party.

Civil Rule Nisi No. 1137 of 1914, decided on 23rd March, 1915, from the Judgment of Dist. Court Judge, Rangpur.

(a) Bengal Tenancy Act (8 of 1885), S. 153, explained—Question of irregularity in sale proceedings is not a question relating to land between the parties.

Per *N. R. Chatterjea, J.*—Under Explanation to S. 153 of the Bengal Tenancy Act (Eastern Bengal and Assam Tenancy Act) a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. [P. 720, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), S. 153—Appellate Court deciding whether a case falls under proviso to S. 153, Bengal Tenancy Act—Not, question that may be raised but that which has been decided should be considered.

The question whether, or not, a case comes under the proviso to S. 153, Bengal Tenancy Act, is to be determined by the Appellate Court not with reference to the question which may be raised in appeal, but with reference to the question decided by the order of the Subordinate Court. [P. 720, C. 2.]

(c) Bengal Tenancy Act (8 of 1885), S. 153—Order setting aside sale—Decree-holder purchaser—Order falls under S. 153 and is appealable though the decree in that suit is not.

An order setting aside or declaring to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to S. 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section. 32 Cal. 957 (F. B.), foll. [P. 720, C. 1.]

(d) Bengal Tenancy Act (8 of 1885), S. 153—Irregularity in publishing or conducting sale is not fraud—Question of fraud does not come under S. 153, but irregularity does fall—(Per *Mullick, J.*)—An irregularity may be coupled with fraud—Irregularity tainted with fraud is not excluded from scope of S. 153.

An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of sale. [P. 720, C. 2.]

S. 153, Explanation applies only to cases where there is a question as to irregularity in publishing or conducting a sale. [P. 721, C. 1.]

An application to set aside a sale made by a person (who prior to the sale had purchased the holding) more than a month after the sale comes within S. 47 of the Civil Procedure Code and is not time-barred, S. 18 of the Limitation Act being applicable to the circumstances of the case. A. I. R. (1915) Cal. 268, ref. to. [P. 721, C. 1.]

A question as to fraud in publishing or conducting a sale is not covered by the Explanation to S. 153 of the Bengal Tenancy Act. [P. 721, C. 2.]

Per *Mullick, J.*—An irregularity in publishing or conducting a sale may be accompanied with or without fraud. [P. 722, C. 1.]

S. 153, Explanation, does not expressly exclude from its scope an irregularity tainted by fraud. [P. 722, C. 1.]

Atul Chandra Gupta—for Petitioners.

Mohini Mohan Chakravarti—for Opposite Party.

N. R. Chatterjea, J.—The question raised in this Rule is, whether an appeal lay against an order of the Munsif refusing to set aside a sale held in execution of a decree passed in a suit for recovery of rent, in which the amount claimed did not exceed fifty-rupees, the Judicial Officer, who passed the decree and order, having been empowered to exercise final jurisdiction under S. 153 of the Bengal Tenancy Act.

The determination of the question depends upon whether the order of the Munsif has decided a question relating to title to land or to some interest in

land as between parties having conflicting claims thereto, within the meaning of S. 153 of the Act.

Now, the Full Bench in the case of *Kali Mandal* v. *Ramsarbaswar Chakravarti* (1) held that an order setting aside or declining to set asside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to S. 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section.

The Explanation which has been added to S. 153 of the Bengal Tenancy Act, by the Amending Act I of 1908 (Eastern Bengal and Assam Tenancy Act) lays down that "a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between the parties having conflicting claims thereto." The learned District Judge held that the real question in this case was whether there was any material irregularity in publishing the sale, and that such a question according to the explanation to S. 153 is not a question relating to title to land or to some interests in land as between parties having conflicting claims thereto. He accordingly held that no appeal lay to him and rejected the appeal.

The allegations, however, made in the application to set aside the sale are to the effect that no processes of attachment or proclamation were served upon the properties, and that the decree-holder, fraudulently and in collusion with the peon, got all the said processes suppressed and false returns to be submitted and thus brought about the sale. The sale, therefore, was sought to be set aside not merely on the ground of material irregularity as contended on behalf of the opposite party, but also on the ground of fraud in publishing the sale, if not on the latter ground alone.

The application, it appears, was made more than 30 days after the sale, and the Munsif refused to set aside the sale on the ground that there was no such fraudulent concealment of the execution proceedings on the part of the decree-holder as to bring the case within S. 18 of the Limitation Act. He did not decide any question as "to the regularity of the proceedings in publishing or conducting the sale." It is to be observed that the question whether, or not, a case comes under the proviso to S. 153, is to be determined not with reference to the question which may be raised, but with reference to the question *decided* by the order.

The Explanation, therefore, to S. 153 of the Bengal Tenancy Act has no application to the present case, and an appeal lay against the order of the Munsif under the Full Bench decision referred to above. But even if it be held that the Munsif's order by implication decided a question as to fraud in publishing the sale, we have to see whether a question as to fraud in publishing a sale is "a question as to the regularity of the proceedings in publishing or conducting a sale" within the meaning of the explanation to S. 153 of the Bengal Tenancy Act, and whether the effect of the Full Bench decision has been nullified by the said explanation as contended on behalf of the opposite party.

Now a sale may be set aside under O. 21, R. 90 of the present Code of Civil Procedure, on the ground of material irregularity *or* on the ground of fraud in publishing or conducting a sale. O. 21, R. 90 of the present Code of Civil Procedure, therefore, covers a case of material irregularity provided for by S. 311, as well as a case of fraud coming under S. 244 of the Civil Procedure Code of 1882. The distinction between an *irregularity* in publishing a sale and *fraud* in publishing a sale was well defined under the old, and is so under the present Code, and I do not think that the Legislature by using the words "a question as to the regularity of the proceedings in publishing or conducting a sale" meant to include not only cases where a question arises as to the irregularity in publication or conduct of the sale, but also cases where there is a question of fraud in publishing or conducting the sale. An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of the sale, and I think that if it was the intention of the Legislature to bar an appeal

(1) (1905) 32 Cal. 957.

in cases where a question as to fraud in publishing or conducting a sale is decided, it would have expressed itself clearly by stating that "a question as to fraud or as to the regularity of the proceedings in publishing or conducting a sale" is not a question of title relating to land, etc. It seems to me that the Explanation applies only to cases where there is a question as to irregularity in publishing or conducting a sale, and that the effect of the Full Bench decision has been restricted to that extent only.

I am fortified in the view I take by the case of *Arjun Das* v. *Gunendra Nath Basu Malik* (2) In that case proceedings to execute a decree for rent having been started more than a year after the judgment-debtor's death, writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served, and the decree-holder himself purchased the holding at the sale which followed. In an application to set aside the sale by a person (who prior to the sale had purchased the holding) more than a month after the sale, it was held that the application came within S. 47 of the Civil Procedure Code, and was not time-barred, S. 18 of the Limitation Act being applicable to the circumstances of the case, and the sale was set aside. The learned Judges (Mookerjee and Beachcroft, JJ.,) observed:

"We may finally add that although the application must be deemed to have been made under S. 47 of the Code of 1908, a second appeal may at first seem barred under S. 153 of the Bengal Tenancy Act, as the claim in the suit for rent was under Rs. 100 [*Shyama Charan Mitter* v. *Debendranath Mukerjee* (3)] but a second appeal does apparently lie in this case on the authority of the decision of the Full Bench in *Kali Mundall* v. *Ramsarbaswar Chakravarti* (1), the effect of which, as explained in *Beni Madhab* v. *Biseswar* (4), has not been completely nullified by the explanation added to S. 153."

It was contended that we should not refer to the distinction between irregularity and fraud in the Code of Civil Procedure in construing a section of the Bengal Tenancy Act. But the provisions of the Civil Procedure Code, for setting aside a sale either on the ground of fraud or irregularity in publishing or conducting a sale, are applicable to sales held under the Bengal Tenancy Act, and the words "regularity of the procedure in publishing or conducting a sale" in the Explanation to S. 153 evidently refer to such a ground for setting aside a sale under the Civil Procedure Code, and I am accordingly justified in referring to the provisions of that Code on the point.

I am of opinion that a question as to fraud in publishing or conducting a sale is not covered by the Explanation to S. 153 of the Bengal Tenancy Act, and that the Full Bench decision still applies to a case where such a question is decided. Assuming, therefore, that the Munsif's order decided a question as to fraud in publishing the sale, I think that an appeal lay in this case against the order of the Munsif under the proviso to S. 153 of the Bengal Tenancy Act.

The Rule is accordingly made absolute, the order of the District Judge set aside, and the case is remanded to the lower Appellate Court for the hearing of the appeal on the merits. Costs of this Rule, one gold *mohur*, will abide the result.

Mullick, J.—The petitioners who consist of two judgment-debtors and a purchaser from a judgment-debtor after the rent decree but before the sale, applied to the Munsif to set aside the sale on the ground of material irregularity and fraud. The Munsif found that the application was made more than 30 days after the sale and that the petitioners were not entitled to the benefit of S. 18, Limitation Act, inasmuch as they had failed to show that they had been kept by the fraud of the opposite party from knowing about the sale and applying within time. This was not a finding upon a question as to the irregularity of the proceedings in publishing or conducting the sale and the Explanation to S. 153. Bengal Tenancy Act, does not apply. An appeal, therefore, was competent having regard to the decision in *Kali Mondal* v. *Ram Sorbeswar Chakravorti* (1)

I agree, therefore, with my learned brother that the District Judge's order holding that no appeal lay was an order wrongly declining jurisdiction, and that the Rule should be made absolute with costs.

But with that part of my learned brother's judgment in which he expresses the opinion that an irregularity in conducting and publishing a sale caused by fraud

(2) A. I. R. (1915) Cal. 268=27 I. C. 294.
(3) (1900) 27 Cal. 484.
(4) (1912) 15 I. C. 436.

is not covered by the Explanation to S. 153, I respectfully venture to express a doubt. An irregularity in publishing or conducting a sale may be accompanied with or without fraud. The Explanation under consideration does not expressly exclude from its scope an irregularity tainted by fraud and there is nothing in the Civil Procedure Code of 1882, and much less in the Code of 1908, which compels us to limit the generality of the terms of the explanation and to give to it a meaning different from its apparent meaning.

The Rule, however, must be made absolute on the first ground and the appeal sent down to be heard on its merits.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 722

N. R. CHATTERJEA AND ROE, JJ.

Khagendra Nath Chatterjee and *others* —Plaintiffs—Appellants.

v.

Sonatan Guha and *others*— Defendants —Respondents.

Second Appeals Nos. 2902 and 3624 to 3627 of 1912, decided on 19th August, 1915, from the Decrees of Offg. Sub-Judge, Barisal, dated 5th July, 1912.

(a) Execution Sale—Rights of purchaser—Purchaser's right relinquishable without registered conveyance.

Where a share in a certain *taluk* belonging to *G* was purchased by *C* in execution of a mortgage-decree, who after his purchase without taking possession or disturbing *G's* possession, gave up for a consideration his rights as purchaser in favour of *G*, without executing a registered conveyance.

Held, that the relinquishment thus made divested *C* of the rights he had acquired by his purchase, as any suit brought afterwards by *C* against *G* for recovery of the share, would have been successfully resisted by *G*. Case-law discussed. [P. 726, C. 2.]

(b) Contract—Right to enforce—Equities arising from part performance of—Title does not pass by mere admission or disclaimer of owner.

A mere admission or disclaimer of the owner cannot operate to pass title to property where a conveyance is required under the law to transfer title, but a different result might follow from equitable principles of part performance of a contract. [P. 724, C. 1.]

Equities, arising from part performance and from acts done in execution of a contract discussed.

Rash Behary Ghose, Tara Kishore Choudhury and *Brojo Lal Chakravarti* — for Appellants.

Jogesh Chandra Roy and *Gunada Chandra Sen*—for Respondents.

Judgment.—The facts connected with the litigation out of which these appeals arise, may be stated as follows :—

The lands in dispute are included in a permanent tenure called Taluk Kamdeb Guha appertaining to the *zemindari mahal* No. 2694 belonging to the plaintiff-appellant. The *taluk* was sold in execution of a rent-decree and purchased by one Ganga Charan in 1864, who sold it to four persons, Ramsagar, Gokul Krishnapriya and Chandrakala, who were members of the Guha family to whom the *taluk* belonged before the sale under the rent-decree. The first three mortgaged a 14-annas 4-*gundas* share of the *taluk* to certain persons who sued and obtained a decree upon the mortgage and one Chandra Kumar Bose ostensibly purchased the said share at the sale held in execution of the said decree, but it has been found that Chandra Kumar was the *benamdar* of the said mortgagors. The fourth purchaser from Ganga Charan, *viz.*, Chandrakala, appears to have had a 1-anna 16-*gundas* share in the *taluk*, which on her death devolved on her three sons in equal shares, two of whom Ananda and Iswar mortgaged their 1-anna 4-*gundas* share to one Kashinath, whose successors-in-interest (who are described in these cases as the Chakravartis and the Kanjibalis) purchased the said share at a sale held on the 1st June, 1888 in execution of a decree obtained upon the said mortgage. These Chakravartis and Kanjibalis deposited the landlord's fee as required by S. 12 of the Bengal Tenancy Act but it was not accepted by the plaintiff, as Iswar and Ananda whose interest they purchased or their mother had not got their names registered in the plaintiff's *sherista*. It appears that out of the four persons named above who purchased the *taluk* from Ganga Charan in 1864, only Ramsagar and Gokul got their names registered in the landlord's *sherista* and it was from them that the landlord used to realise rent for the tenure amicably or by suit. After the death of Ramsagar and Gokul, the landlord in 1889 brought a suit for rent against the four sons of Ramsagar and the widow of Gokul

and the *taluk* having been sold in execution of the decree was purchased by one Chandra Kumar Chakravarti on the 17th March, 1890. Then another decree was obtained for rent in 1890 for the period prior to the said sale. When execution of this decree was taken out, a mortgage (*kistibandi*) bond was executed by Chandra Kumar Chakravarti, Dinamani (widow of Gokul) and by three other persons who were members of the Guha family, *viz.*, Rasik, Sonatan and Amar, in which it was stated that Chandra Kumar Chakravarti was the real owner of the *taluk* by purchase. From that time, the *zemindar* sued Chandra Kumar alone for rent, the last suit being No. 2767 of 1893. At the sale in execution of the decree passed in that suit, the *taluk* was purchased by one Manitara on the 29th April, 1895. By this time, the *zemindar* suspected that Chandra Kumar and Manitara were *benamdars* for the Guhas, and in the next two rent suits Nos. 1572 of 1895 and No. 1574 of 1895, he joined the four sons of Ramsagar and the widow of Gokul (who were the defendants Nos. 4 to 8 in that suit), and Rasik, Sonatan and Amar who had joined Chandra Kumar in the *kistibandi* mortgage-bond and were made defendants Nos. 1 to 3, the 9th defendant in the 1st suit being the said Chandra Kumar and the 9th defendant in the second being Manitara. The defence of the first eight defendants in those two rent suits was that defendants Nos 4 to 8 (the heirs of Ramsagar and Gokul) were the real owners of the *taluk*, that the defendants Nos. 1 to 3 had no interest therein and that the defendant No. 9 Chandra Kumar in the first suit and defendant No. 9 Manitara in the second, were the real auction-purchasers and decrees for rent should be passed against the said purchasers in each suit. The Court, however, found that Chandra Kumar and Manitara were *benamdars*, that defendants Nos. 1 to 3 had no interest in the *taluk* and that defendants Nos. 4 to 8 were the real owners of the *taluk*, and accordingly passed decrees against them. In execution of the decree in suit No. 152 of 1895, the *taluk* was sold and purchased by the *zemindar* decree-holder on the 20th June, 1898 and he obtained delivery of possession through Court on the 29th July, 1899. The judgment-debtors applied to have the sale set aside, but the application was dismissed and the order of dismissal upheld up to this Court. On the plaintiff attempting to take *khas* possession, the judgment-debtors set up several under-tenures and notices under S. 167 of the Bengal Tenancy Act were thereupon served upon them and the plaintiff instituted several suits for recovery of possession.

In three cases, it was found that the notices were not served within the time allowed by law and with respect to those three, the plaintiff instituted three rent suits which gave rise to Second Appeals Nos. 3625 to 3627. In the other two cases, the notices were served in proper time and they were for possession of the lands in respect of which the defendants had set up under-tenures.

The defence of the defendants, so far as it is necessary to state for the purpose of the present appeals, substantially was that as some of the owners of the *taluk*, *viz.*, the Chakravartis and Kanjibalis, were not made parties to the rent suit of 1895, the decree cannot operate as a decree for rent under the Bengal Tenancy Act and the sale held in execution of such a decree could not pass the *taluk* free of incumbrances, and the under-tenures held by the defendants, therefore, were not affected by the sale.

These two suits (which gave rise to Second Appeals Nos. 3624 and 2902) were decreed by the Munsif, but on appeal, the suits were dismissed; on second appeal (Second Appeal No. 2719 of 1914) the cases were remanded to the lower Court and that Court again decreed the suits. There were again second appeals (Second Appeal No. 2627 of 1907 and analogous appeals) and this Court was of opinion that if the Chakravartis and Kanjibalis had any subsisting interest at the date of the institution of the rent suit in 1895, the suits must be dismissed, but if they had no subsisting interest at that time, the suits must be decreed, and the Court below was directed to determine the said question.

On remand, the learned Subordinate Judge came to the conclusion that the Chakravartis and Kanjibalis had a subsisting interest in the *taluk* at the date of the rent suit, and accordingly dismissed the suits. The Second Appeals Nos. 3624 and 2902 have been preferred by the plaintiffs against the said decision.

The question for consideration in these appeals, therefore, is whether the Chakravartis and Kanjibalis had any subsisting interest at the date of the rent suit in 1895.

As regards the question of possession of the 1-anna 4-*gundas* share, the learned Subordinate Judge said:—

"were it necessary to come to a decision on this point, I would have unhesitatingly held that the Guhas were all along in possession of the land, that the Chakravartis and Kanjibalis never received rent from them and that evidence of payment of rent to and grant of *dakhilas* by the latter is concoction, pure and simple, to defeat the claim of the plaintiffs,"

but he was of opinion that as there was no conveyance by the Chakravartis and Kanjibalis in favour of Iswar and Ananda, nor possession for the statutory period by the latter, the former were not divested of their right and no title was created in favour of the latter. But his finding as to whether the Chakravartis and Kanjibalis relinquished their right on receipt of the decretal amount, was not clear and definite. We accordingly remanded the case for a definite finding on the point. The finding has now been returned to this Court and the Court below has clearly found that the Chakravartis and Kanjibalis relinquished the share purchased by them on receipt of the decretal amount from the Guhas. As stated above, the Court below was of opinion that notwithstanding that the Chakravartis and Kanjibalis disclaimed their title to and possession of, the share purchased by them, the Guhas could not have acquired any title to the share for want of a registered conveyance and relied upon the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (1).

We think that the Court below is wrong in the view it took of the legal effect of the relinquishment in the present cases. It is true a mere admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title. In the case relied upon, there was a release executed by the real owner in favour of another person in order to protect his property from the claims of his creditors. The nominal transferee sold a portion of the property to another. The creditors were not defrauded and it was held that the real owner could recover the property from the *benamdar* and the transferee from him. There is an observation of Mookerjee, J., that the title of the real owner could not pass by an admission. But in that case, the original transferee and the purchaser from him, were found not to be *bona fide* purchasers for value, and they were fully aware of the real nature of the transaction. It was under these circumstances, that Mookerjee, J., observed that title could not pass by a mere admission. In the case of *Musammat Oodey Koowur* v. *Musammat Ladoo* (2), in a suit to redeem a mortgage of an estate *A*, in order to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate. The Judicial Committee held that in the circumstances and in the absence of any consideration given to *A*, the petition did not operate as a conveyance of *A*'s right or as an estoppel to a suit by her for possession of the estate. Mookerjee, J., relied upon that case and observed that although under certain circumstances a person may be estopped from setting up a title in himself, title of the real owner could not pass by mere admission. The opinion expressed in that case was followed by Mookerjee and Beachcroft, JJ., in *Dharam Chand Boid* v. *Mouji Shahu* (3) There a partnership business was sought to be transferred by means of a deed of release. It does not appear that any consideration was paid or that there were circumstances which would in equity have precluded the transferor from challenging the validity of the transfer.

In the present case, the matter did not rest upon a mere admission. The Chakravartis and Kanjibalis on receipt of consideration gave up their rights as purchaser in favour of the Guhas and it is found that the former never took possession and the latter were allowed to remain in possession of the property. There is no doubt that the Guhas could sue the Chakravartis and Kanjibalis for specific performance. They could have successfully resisted a suit by the latter if they sued the Guhas for possession of the share. It is contended on behalf of the respondents, that under S. 54 of the

(1) (1906) 33 Cal. 967.

(2) (1869-70) 13 M. I. A. 585=15 W. R. 16 (P. C.).

(3) (1912) 16 I. C. 440.

Transfer of Property Act, and S. 12 of the Bengal Tenancy Act, there can be no transfer except by a registered conveyance. But the equitable principle is well-established and we need only refer to *Walsh* v. *Lonsdale* (4) and *Puchha Lal* v. *Kunj Behary Lal* (5), decided by Jenkins, C. J. and Mookerjee, J. In the latter case, a purchaser under an unregistered conveyance paid the agreed price to his vendor and was placed in possession, and it was held that in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover possession of the property from the former purchaser. Coxe, J., relied upon the provisions of S. 54 of the Transfer of Property Act and was of opinion that the transaction was a nullity and that the vendor himself was not estopped from disputing the validity of the transaction. He was, however, overruled by the Court of Appeal and Jenkins, C. J., observed :—

"There is no invasion or evasion of the Registration Act. It is merely securing a party those rights to which he is entitled apart from the Act —rights to which he has a good title in Courts to which the abiding direction has been given to proceed in all cases according to equity and good conscience."

In the recent case of *Mohamed Musa* v. *Aghore Kumar Ganguli* (6), where by a compromise made in a suit in 1873, it was agreed that mortgaged property should be released from two mortgages, the *malikana* being thenceforth allotted in agreed proportions to the two mortgagees and the mortgagor, and that the latter should execute deeds of absolute sale or transfer of the proportions allotted to the respective mortgagees, a decree was made in pursuance of the compromise, but the compromise agreement was not registered, nor were the transfers executed. All parties, however, thenceforward acted in every respect as if the transfers had been made, and there were dealings both by the mortgagor and the mortgagees with the shares allotted to them under the agreement. In 1908, a suit was instituted to redeem the mortgages and it was held by the Judicial Committee :—

"That whatever defects of form there might be in relation to the compromise agreement as a transfer of the equity of redemption, were cured by the conduct of the parties in continuously acting upon it, and that the right to redeem the mortgages was extinguished."

Their Lordships observed :

"The point which is made against giving effect to this compromise, is that a conveyance was not made by Khodajanessa in completion of the contract of purchase narrated in the *razinama*. This is true. But no written conveyance by the law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882."

"But even if transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction, are manifold and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors-in-title from that date to this."

Then referring to the case of *Maddison* v. *Alderson* (7), their Lordships observed :—

"Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson* (7), founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation, would follow."

It is contended on behalf of the respondents that all the cases where the above principles were applied were cases between parties claiming under the contract, that the Chakravartis and Kanjibalis are no parties to these suits, and neither the plaintiffs nor the Guha defendants claim under them. But the plaintiffs purchased the tenure of which the Chakravartis and Kanjibalis were at some time part owners and they had given up their rights in favour of Iswar and Ananda, and the Guhas set up the rights of those persons as having had a subsisting interest in the *taluk* when the

(4) (1882) 21 Ch. D. 9=52 L. J. Ch. 2=46 L. T. 858=31 W. R. 109.
(5) (1913) 20 I. C. 803.
(6) (1915) 42 Cal. 801=28 I. C. 930=42 I. A. 1 (P. C.).
(7) (1883) 8 A. C. 476=52 L. J. Q. B. 737=49 L. T. 303=31 W. R. 820.

rent suit was brought. If the contention of the respondents were valid, a creditor cannot avail himself of any estoppel or equities to which his debtor is entitled. If the debtor paid the purchase-money for a property and the vendor delivered possession of the property to him, the creditor cannot according to the respondents' contention avail himself of the equities arising from the transaction. We do not think that this case can be distinguished in principle from the cases cited above; and we are of opinion that the Chakravartis and Kanjibalis having given up their rights on receipt of consideration and allowed the Guhas to remain in possession of the 1-*anna* 4-*gundas* share, were precluded from setting up any title against the Guhas, and they had no subsisting right to the share at the date of the suit for rent. In the rent suits, the Guha defendants stated that they were the only owners of the *taluk*, but that their interest had passed to Chandra Kumar and Manitara who had purchased the *taluk* at sales held in execution of previous rent decrees. They did not say a word about the Chakravartis and Kanjibalis having any subsisting interest in the *taluk*. Kamini Chakravarti, the head of the Chakravartis, was examined in the rent suits, and he disclaimed all interest, in the *taluk*. The Court found that Chandra Kumar and Manitara were *benamdars* for the Guhas, and it was the Guhas (the defendants Nos. 4 to 8 in these suits) who were the real owners of the *taluk* and exclusively liable for rent, and it is they who now plead that the Chakravartis and Kanjibalis had a subsisting interest at the date of the suit.

It is contended on behalf of the respondents that the question of relinquishment or estoppel was never raised before; the only question raised being whether the Chakravartis and Kanjibalis were *benamdars* and that the order of remand made by Mookerjee and Beachcroft, JJ., precludes us from considering the said questions. We do not think that there is any substance in this contention. The plaintiffs did not allege in their plaint that the Chakravartis and Kanjibalis were *benamdars*; it was the defendants who set up their title, and when Kamini Chakravarti was examined, the question of relinquishment was raised. The question of relinquishment was considered by the Munsif so far back as the 15th February, 1907 in certain suits between the parties. The question of relinquishment and the equities arising from it are involved in the decision of the question whether the Chakravartis and Kanjibalis had any subsisting interest, which Mookerjee and Beachcroft, JJ., by their remand order directed the lower Court to determine. It is contended that the only question for decision which the remand order contemplated was whether the Chakravartis and Kanjibalis were *benamdars* for the Guhas. But if they were *benamdars* for the Guhas, we fail to see how any question of their having a subsisting right, could arise. Then it is said that the learned Judges who remanded the case would have gone into the question of relinquishment and the other contentions found upon it, had the question been raised before them. But the fact of relinquishment on receipt of consideration had not been found before the case was remanded, and in the absence of such a finding, the question of equitable considerations could not be gone into. Admittedly the Chakravartis and Kanjibalis did not execute any conveyance. The question whether their interest had determined otherwise than by execution of a conveyance for example, by relinquishment operating as estoppel or giving rise to equitable considerations was, therefore, involved in the order of remand and in no way inconsistent with it, and we do not see how we are precluded by the remand order from going into those questions when the remand order directed the Court below to decide the question whether the Chakravartis and Kanjibalis had any subsisting right at the date of the rent suit.

From what we have said above, it is clear that the Chakravartis and Kanjibalis had no subsisting interest at the date of the rent suit and that their rights had vested in the Guhas. The suit for rent, therefore, was brought against proper parties and the sale held in execution of the rent-decree passed the entire *taluk* with power to annul incumbrances. Notices under S. 167 of the Bengal Tenancy Act having been served in the two title suits, the under-tenures set up by the Guhas, must be held to have been cancelled.

These two appeals (Appeals Nos. 3624 and 2902 of 1912) are accordingly

decreed, the decrees of the Court of Appeal below are set aside and those of the Court of first instance are restored with costs here and in the Court below.

Appeals Nos. 3625, 3626 and 3627 arise out of three rent suits mentioned above. The lower Appellate Court gave a decree for rent in respect of only 14-*annas* and odd *gundas* share, but having regard to our finding that the Chakravartis and Kanjibalis had no subsisting right, the plaintiffs should get a decree for the entire rent and the decrees of the lower Appellate Court will be varied accordingly, the result being that the suits will be decreed in full with costs in all Courts.

V.B./R.K.

Appeals allowed.

A. I. R. 1916 Calcutta 727

CHITTY AND BEACHCROFT, JJ.

Hari Das Samanta and *another*—Petitioners.

v.

Abdul Matleb Mallick and *others*—Opposite Parties.

Criminal Revn. No. 503 of 1915, decided on 14th May, 1915, against the Order of Sub-Divl. Officer, Uluberia.

(a) Criminal Procedure Code (5 of 1898), S. 145—Scope—Finding of no dispute with respect to some plots in possession of tenants—Order of confirming possession in respect of all plots with persons receiving their rent is bad in absence of tenants of the remaining plots.

Where in proceedings under S. 145, Criminal Procedure Code, it is found that out of a few plots of land there is no dispute regarding some of them as to what tenants are in possession and there is a dispute as to the remaining plots, and it is declared by the Magistrate that each party should remain in possession of the plots of which they have been respectively receiving the rents.

Held, that with regard to these remaining plots of land the Magistrate ought not to have passed any order in these proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings. [P. 727, C. 2.]

(b) Criminal Procedure Code (5 of 1898), S. 145—S. 145 does not apply to joint property but it applies where rent is to be divided and no dispute with respect to share exists.

Where it is a question of dividing a hitherto undivided share, S. 145 of the Criminal Procedure Code may not apply, but where it is a question of rent and it so appears that the rent is half the share of the produce, but there is no question of shares as between the two parties to the proceeding, S. 145 applies. The question of the division of the produce only arises where the tenant comes to pay his rent. [P. 728, C. 1.]

Atulya Charan Bose—for Petitioners.

Jyotish Chandra Hazra for *A. K. Fazlul Huq* for Opposite Parties.

Judgment.—This is a Rule granted in respect of S. 145, Criminal Procedure Code, proceedings taken by the Sub-Divisional Officer of Uluberia with regard to 33 plots of land. All these plots are held by the tenants on a yearly rent of half the produce. The parties to these proceedings are first party, the purchaser at a *putni* sale and so no *putnidar*, and second party, the *lakherajdar*. The dispute between them is, which of them has the right to collect this rent. The order of the Magistrate is not very happily worded but it is easy to see what he means. He has found that the rent of certain plots has been received by the first party and of certain other plots by the second party, and has declared that each party should remain in possession of the plots of which they have been respectively receiving the rents.

As regards 20 of the plots, there is no dispute as to what tenants are in possession. As to the remaining 13 there is a dispute. It is obvious that with regard to those 13 the Magistrate ought not to have passed any order in these proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings.

With regard to plots No. 10 in Nasirchak, Nos. 1 and 6 in Salageria and No. 1 in Gharberia, they are not claimed by the second party and the first party may properly remain in possession of the rents of these plots. So also with regard to plots Nos. 1 and 15 in Panadhara. That makes six plots of which the first party is entitled to collect the rents. With regard to plots Nos. 1 to 5 and 7, 8, 9 and 11 of Nasirchak, there is no dispute as to which tenants are in possession, nor is there any dispute as to the tenancy of plots Nos. 8 and 9 in Panadhara and Nos. 3, 4 and 5 in Salageria. The order, therefore of the Magistrate with regard to these plots may stand.

The plots in respect of which the tenancy is in dispute are plots Nos. 1 to 7 and 10 to 14 of Panadhara and No. 2 in Salageria. As to those 13 the order must be set aside.

We should refer to the argument which has been put forward on behalf of the first party that S. 145, Criminal Procedure Code, could not refer to a half share of the produce. That argument appears to us to be based on a fallacy. It is perfectly true that if it was a question of dividing a hitherto undivided share, the section might not apply. But here it is a question of rent and it so happens that the rent is half the share of the produce, but there is no question of shares as between the two parties to the proceedings. The question of division of the produce only arises when the tenant comes to pay his rent.

V.B./R.K.

A. I. R. 1916 Calcutta 728

FLETCHER AND TEUNON, JJ.

Rameshwar Malla and *others*—Defendants—Appellants.

v.

Jiu Thakur and *others*—Plaintiffs—Respondents.

Appeal No. 7 of 1912, decided on 18th March, 1915, from the Original Decree of Sub-Judge, Bankura, dated 21st September, 1911.

(a) Hindu Law—Religious Endowment—*Shebait*—**Powers—Permanent lease without necessity by** *shebait* **is invalid.**

The grant of a permanent lease without legal necessity is in excess of the powers of the *shebait* who grants the lease. [P. 728, C. 2 & P. 729, C. 1.]

(b) Limitation Act (15 of 1877), Art. 134—Scope of Art. 134—Does not apply to grant of perpetual lease.

Article 134 of the second Schedule to the Limitation Act of 1877 only applies to the purchase of an absolute interest and not to the grant of a permanent lease. Case-law referred. [P. 729, C. 1.]

(c) Limitation Act (9 of 1908), Art. 134—Reason for the change of the word 'purchased' into 'transferred' stated—Perpetual lease at high rent is a transfer for valuable consideration.

In the Limitation Act IX of 1908 the word "transferred" was deliberately inserted in place of the word "purchased," in view of the decisions on the meaning of the word "purchased" in Article 144, Schedule II of the Limitation Act of 1877. [P. 729, C. 2.]

The grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. *Currie* v. *Musa*, (1875) 10 Ex. Cases 153, ref. to. [P. 729, C. 2.]

(d) Limitation Act (9 of 1908), S. 30—Scope of—When applicable stated.

S. 30 of the Limitation Act, 1908, only applies where there is a period of limitation "prescribed," both by the Act of 1877 and the Act of 1908. Where the plaintiff cannot bring his case under S. 30 the suit is barred by limitation under Article 134 of the first Schedule to the Limitation Act of 1908. [P. 730, C. 1.]

(e) Landlord and Tenant—Lease termination—Lease granted by usufructuary mortgagee cannot be determined without his consent.

In a usufructuary mortgage of a *debuttar* property in favour of the Raja of Pachete the validity of the mortgage was not questioned:

Held, that, it was not open to the *shebait* to determine, without the Raja's consent, the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him, and the receipt of rent by the Raja after the institution of the suit proved the existence of the lease at least in the mind of the Raja. [P. 730, C. 1 & 2.]

Dwarka Nath Chakravarti and *Bankim Chandra Mukherjee*—for Appellants.

Rash Behary Ghose, Dwarka Nath Mitter, Bijoy Kumar Bhattacharyya and *Hem Chandra Mukherjee*—for Respondents.

Fletcher, J.- This is an appeal by the defendants Nos. 9 and 13 against the Judgment of the learned Subordinate Judge of Bankura, dated the 21st September, 1911.

The suit was brought by the plaintiff, an idol, through his *shebait* to recover possession of the properties mentioned in the plaint, on the ground that they formed part of the *debuttar* estate of the idol and that a *putni* settlement, dated the 29th of *Baisakh*, 1261, granted by a former *shebait* in favour of the predecessors of the defendants Nos. 1 to 13 was invalid.

On the present appeal it was not argued by the appellants that the idol had no interest in the properties in suit. Having regard to the evidence which has been considered at great length by the learned Subordinate Judge, it is clear that the endowment is an ancient one. It was, however, argued before us, though somewhat faintly, that the properties were the private property of the *shebait*, subject nevertheless to a charge for the maintenance of the worship of the idol. On the evidence before us I think we can come to only one conclusion, namely, that there was an absolute dedication of the properties in favour of the idol.

The next question is, whether the present suit is barred by limitation.

The grant of a permanent lease without legal necessity was in excess of the

powers of the *shebait* who granted the lease. The *shebait* who granted the lease died in the year 1859. Next came an infant who held the office until the year 1863. His adoptive mother then held the office for a few months and was succeeded by the father of the present *shebait*. The present *shebait's* father died on the 28th of July, 1893 and since that date the present *shebait* has held the office. The rent has been duly paid.

Now the question as to whether a suit of the present nature is barred after 12 years from the date of the permanent lease under Article 134 of Schedule II of the Limitation Act (XV of 1877), has been considered in two judgments of the Privy Council in the cases of *Abhiram Goswami* v. *Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2). The facts in those two cases cannot be distinguished from the facts in the present case. The view that the Privy Council took with regard to Article 134 of the Schedule II to the Act of 1877 was that the Article only applied to the purchase of an absolute interest and not to the grant of a permanent lease. This view of the law was expressed in the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (1). It is, however, to be noticed that the judgment in the case of *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2) was delivered by their Lordships after an application for a review of Judgment [See *Iswar Shyam Chand Jiu* v. *Ram Kanai Ghose* (3)]. And in delivering their judgment their Lordships made the following remarks:—

"The only question remaining depends on the law of limitation. On this point attention has been called to the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (1) decided by this Board in July 1909. It is impossible to distinguish that case from the present. Whatever might have been the inclination of their opinion if the matter had been *res integra* it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Board delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami* v. *Shyama Charan Nandi* (1). They do so with the less hesitation because the language of the Article under discussion in that case and in this has been altered by subsequent legislation.

(1) (1909) 36 Cal. 1003=4 I. C. 449=36 I. A. 148 (P. C.).

(2) (1911) 38 Cal. 526=10 I. C. 683=38 I. A. 76 (P. C.).

(3) (1910) 14 C. W. N. 244*n*.

Another authority was also relied upon in the course of the argument. That authority was the decision by the Privy Council in the case of *Damodar Das* v. *Lakhan Das* (4). That decision did not, however, turn on Article 134 of the Schedule to the Act of 1877. There was nothing in that case to show that the property was vested in the *chela* as trustee for the idol. Their Lordships found agreeing with this Court that the property belonged to the idol and that the possession of the junior *chela* had become adverse to the idol.

So far as the evidence goes in this case, it appears that the property was vested in the *shebait* in trust for the idol. The original grant is not forthcoming but subsequent documents appear to have recognised it. The question of limitation must, therefore, be considered with reference to Article 134 of Schedule I of the Limitation Act (IX of 1908). The wording of that Article is as follows:—

"To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration."

It will be noticed that the Article in the present Act has been substantially altered from the Article as it appeared in the Act of 1877. Presumably the word "transferred" was deliberately inserted in place of the word "purchased," in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II of the Act of 1877.

The learned Subordinate Judge has found that the grant of a permanent lease was a "transfer." In that view I agree. He has, however, come to the conclusion that it was not a transfer for valuable consideration. In the opinion of the learned Judge a transfer for valuable consideration in a case such as the present could only take place when a fine or premium was paid for the grant of lease. The learned Judge, also found that there was no proof that the premium was paid for the grant of the *putni* in the present case. It may, however, be doubted whether evidence of the actual payment of the premium could, at this time, be produced. But whether that be so or not, I think that a grant of a permanent lease at a considerable annual rent is a

(4) (1910) 37 Cal. 885=7 I. C. 240=37 I. A. 147 (P. C.).

transfer for valuable consideration. As was remarked by the Exchequer Chamber in the case of *Currie* v. *Misa* (5), " a valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

In my opinion the grant of the permanent lease in the present case was a transfer for valuable consideration and the present suit is barred under Article 134 of the Schedule I to the Act of 1908, unless the plaintiff can bring his case under S. 30 of the Act.

The learned Vakil for the respondent in the present appeal, however, based his main argument on this branch of the case not on the ground stated in the Judgment of the learned Subordinate Judge, but on S. 30 of the Limitation Act, 1908. But that section does not, in my opinion, apply. S. 30 only applies when there is a period of limitation " prescribed " both by the Act of 1877 and the Act of 1908. The decisions of the Privy Council show that no period of limitation was " prescribed " for a suit of the present nature under the Act of 1877.

The present suit is, I think, barred by limitation.

Another point that raises a difficulty in the way of the respondent is the usufructuary mortgage in favour of the Raja of Pachete. The respondent on the 8th of August, 1909 granted to the Raja a usufructuary mortgage of (amongst other properties) the property in suit for a term that had not expired at the institution of the present suit. Whether that mortgage was binding on the idol we do not know, the Raja not being a party to this suit. The mortgage is, however, expressed to be made for legal necessity and is treated by the learned Judge in his judgment as being a valid transaction. On the 9th of September, 1909 notice to quit was served on the defendants. But on the 15th of November, 1910, that is after the institution of the present suit, the Raja received and granted a receipt for rent part of which accrued due after the institution of the suit. In the absence of the Raja we cannot determine whether the mortgage to the Raja was a valid transaction, but assuming, as the learned Judge did, that the mortgage was valid, then it was not open to the *shebait* to determine without the Raja's consent the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him. Moreover, the receipt of rent by the Raja, after the institution of the suit, would seem to show that at the date of the receipt the Raja considered the lease as in existence. Further, under the terms of the decree the defendants are liable to pay mesne profits as from the date of the expiry of the notice to quit, although they have paid rent to the Raja to a date subsequent to the institution of the present suit under an assignment of the rents to the Raja under the terms of a document executed by the *shebait*, which the learned Judge treats as a valid transaction in his judgment. Clearly the Raja ought to have been made a party to the present suit and if his usufructuary mortgage is a valid one, then the defendants who have paid rent to him to a date subsequent to the suit are not liable to ejectment.

I think we ought to reverse the decision of the learned Judge in the Court below and allow the present appeal. The plaintiff-respondent must pay to the appellants their costs both in this Court and the Court below.

The defendants Nos. 14 and 15, who are co-appellants with the defendants Nos. 9 and 13 in this appeal, have, it is represented, settled their disputes with the plaintiff. Their appeal is, therefore, allowed to be withdrawn.

Teunon, J.—I agree.

V.B./R.K.

Appeal allowed.

(5) (1875) 10 Ex. Cas. 153=1 App. Cas. 554.

A. I. R. 1916 Calcutta 730

MOOKERJEE AND NEWBOULD, JJ.

Dina Nath Nag and *others*—Defendants —Appellants.

v.

Sashi Mohan Dey Tarafdar—Plaintiff —Respondent.

Second Appeal No. 2724 of 1912, decided on 29th March, 1915, against the Decree of the Sub-Judge, Mymensingh, dated 9th July, 1912.

(a) Bengal Tenancy Act (8 of 1885), S. 182—Applicability—Homestead need not be in same village or be held under same landlord.

In order to make S. 182 of the Bengal Tenancy Act applicable, it is not essential that the homestead should be in the same village or be held under the same landlord as the holding of the *raiyat*. [P. 731, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), S. 182—"Homestead"—Meaning of.

The expression 'homestead' as used in the section denotes land on which a *raiyat* has his homestead, that is, land used by him for residential purposes. The section is not applicable where it is established that the land is not used by the *raiyat* as his homestead; it is not sufficient to show that the character of the land is such as would justify its use as a homestead. [P. 732, C. 1.]

(c) Bengal Tenancy Act (8 of 1885)—Scope of—Act applies to land used for agricultural purposes.

The provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes, and are not restricted to such lands alone as are actually under cultivation. [P. 732, C. 1.]

(d) Bengal Tenancy Act (8 of 1885)—Scope of—Land used for purposes of gathering and storing thereon crops raised on adjacent lands—Act held applicable.

Where the defendants were *raiyats* in respect of lands in the vicinity of the land in dispute which they had taken with a view to gather and store thereon the crops raised on the adjacent lands actually cultivated by them:

Held, that the provisions of the Bengal Tenancy Act applied, and the defendants were *raiyats* also in respect of the disputed lands. [P. 732, C. 2.]

Nilmadhub Bose and *Mukund Nath Roy*—for Appellants.

Ram Chunder Mozumdar and *Nares Chunder Sen Gupta*—for Respondent.

Judgment.—This is an appeal by the defendants in an action in ejectment. The plaintiff seeks to eject the defendants on the ground that they were tenants of the disputed land and that their tenancy has been terminated by service of notice to quit under the provisions of the Transfer of Property Act. The Courts below have decreed the suit. Upon appeal to this Court, the defendants have contended that they are *raiyats* and cannot be ejected except in conformity with the provisions of the Bengal Tenancy Act. This contention is based on a two-fold ground, namely, *first*, that the disputed land is the homestead of the defendants, governed by the provisions of S. 182 of the Bengal Tenancy Act; and *secondly*, that if the land is not their homestead, it is held by them as *raiyats* and for agricultural purposes. It may be premised here that the defendants hold as *raiyats* parcels of land in the neighbourhood; those parcels, however, lie in a different village and are held by them under a landlord other than the plaintiffs. The previous history of the land in dispute has not been very successfully investigated. We are told that it was used as a homestead by one Ram Kani Seal; but no information is available as to whether he was a *raiyat* or not. In 1904, he transferred the land to the defendants. Since then, the land has been used by the defendants, not as their homestead, but only to gather and store the crops raised by them in the neighbouring fields. The plaintiff-respondent asserts that the holding of Ram Kanai Seal was non-transferable and that the defendants did not acquire a valid title by their purchase; this may be assumed to be correct for the purpose of the present argument. The position consequently is that the defendants are tenants in respect of the disputed land, as after their purchase rent was accepted from them by one of two joint landlords: and the land in suit represents only a half share of the entire holding. What, then, is the status of the defendants?

The *first* branch of their contention is that this is homestead land governed by the provisions of S. 182 of the Bengal Tenancy Act. That section is in these terms:

"When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

With regard to this section it has been ruled by this Court in the cases of *Kripa Nath Chakrabutty* v. *Sheik Anu* (1), *Protap Chandra Das* v. *Biseswar Pramanick* (2), *Golam Mowla* v. *Abdool Sowar Mondul* (3) and *Harihar Chattopadhyaya* v. *Dinu Bera* (4) that in order to make S. 182 applicable; it is not essential that the homestead should be in the same village or be held under the same landlord as the holding of the *raiyat*. This position has not been controverted by the respondent and has been made the foundation of an argument by the appellants that even though the land is not used as a homestead by the *raiyat*, S. 182 applies on proof that the land is capable of use as a homestead. The argument in substance is that we should read "any

(1) (1906) 10 C. W. N. 944.
(2) (1905) 9 C. W. N. 416.
(3) (1911) 9 I. C. 922.
(4) (1911) 10 I. C. 139.

homestead" for the expression "his homestead" and any holding" for "his holding," to justify the conclusions adopted in the cases mentioned. In our opinion there is no foundation for this contention. To substitute for the expressions "his homestead" and "his holding" the phrases "any homestead" and "any holding" respectively would obviously be to undertake legislation beyond the competence of a Court of Justice. The cases on which reliance has been placed were decided in view of the fact that there is nothing in the language of S. 182 to justify its restriction to cases where the homestead and the holding are situated in one village and are held under one landlord. That this was the reasoning on which the principle in question was adopted is clear from the decision in *Harihar Chattopadhyaya* v. *Dinu Bera* (4). We are further not prepared to accede to the contention of the appellants that the expression "homestead" is used in S. 182 as a generic term descriptive of a particular kind of land; on the other hand, we think, it denotes land on which a *raiyat* has his homestead, that is, land used by him for residential purposes. In our opinion, it is plain that S. 182 is not applicable where it is established that the land is not used by the *raiyat* as his homestead; it is not sufficient to show that the character of the land is such as would justify its use as a homestead. The first branch of the contention of the appellants entirely fails.

The *second* branch of the contention of the appellants is that the land in suit is held by them as *raiyats*. It is plain that the provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes, and are not restricted to such lands alone as are actually under cultivation. This view is supported by a long series of decisions, amongst which may be mentioned the cases of *Fitzpatrick* v. *Wallace* (5), *Latifar Rahaman* v. *A. H. Forbes* (6) and *Hedayet Ali* v. *Kalanand Singh* (7). In the case last mentioned, the question arose, whether land leased for grazing purposes was governed by the provisions of the Bengal Tenancy Act. It was pointed out that the Bengal Tenancy Act would be applicable if it was found that the grazing was in relation to cultivation, which is the primary purpose for which a *raiyat* acquires the right to hold land. In the case before us, the defendants are *raiyats* in respect of lands in the vicinity of the land in suit, which they have taken with a view to gather and store thereon the crops raised on the adjacent lands actually cultivated by them. This gathering and storage of crops raised by them is clearly a purpose ancillary to cultivation. Where, as here, land has been let out for a purpose like this, it is impossible to hold that the provisions of the Bengal Tenancy Act do not apply; the inference is thus irresistible that the defendants are *raiyats* also in respect of the disputed land. On behalf of the respondents it has been strenuously contended, however, that there is nothing to indicate that the land was actually let out for this purpose. But we have the undeniable fact that ever since the defendants came into occupation of this land, they have used it for this purpose without protest by their landlord. The landlord is in fact in an inextricable difficulty. If it is his case that the land was let out as a homestead to *raiyats*, though no doubt they are *raiyats* in respect of other lands in a different village under other landlords, the provisions of S. 182 are applicable. If, on the other hand, the land was let out, as it apparently was, to *raiyats* for a purpose ancillary to cultivation, the grantees are *raiyats* in respect of the land. In either view, the defendants are *raiyats* and can be ejected only in accordance with the provisions of the Bengal Tenancy Act. The plaintiff has not shown that he is entitled to eject them under the Bengal Tenancy Act. His case, on the other hand, throughout has been that the tenancy of the defendants is governed by the provisions of the Transfer of Property Act, which, in the view we take, are inapplicable as is plain from S. 117.

The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.

V.B./R.K.

Appeal allowed; *Suit dismissed.*

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(5) (1869) 11 W. R. 231.
(6) (1910) 5 I. C. 783.
(7) (1913) 20 I. C. 332.

A. I. R. 1916 Calcutta 733 (1)

CHITTY AND BEACHCROFT, JJ.

Ujir Sheikh—Petitioner.

v.

Syed Ali Sheikh and *others*—Accused—Opposite Parties.

Criminal Revn. No. 419 of 1915, decided on 10th May, 1915.

Criminal P. C. (5 of 1898), Ss. 423 (*d*) and 522—Scope of S. 423—Appellate Court is competent to set aside order under S. 522.

Under S. 423 (*d*) of the Code of Criminal Procedure an Appellate Court has power to set aside an order under S. 522, Criminal Procedure Code, as the section authorises the Appellate Court in an appeal to make any incidental order.

Gregory, *Atulya Charan Bose* for *Dasarathi Sanyal* and *Umesh Chandra Ghosh*—for Petitioner.

Manmatha Nath Mukerjee—for Opposite Parties.

Judgment.—This was a rule calling upon the District Magistrate and the opposite party to show cause why the order setting aside the order under S. 522, Criminal Procedure Code, should not itself be set aside. It has been argued that the Appellate Court had no jurisdiction under the Code to set aside that order and, further, that on the merits the order ought not to have been set aside. So far as the question of jurisdiction is concerned, we think that the Appellate Court had power to set it aside under S. 423 (*d*), Criminal Procedure Code, which authorises the Appellate Court in an appeal to make any incidental order. So far as the merits are concerned, it appears that, on the findings of the Appellate Court, the order under S. 522, Criminal Procedure Code, ought not to have been allowed to stand, and that the Appellate Court was, therefore, right in setting it aside. This Rule must be discharged.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 733 (2)

MOOKERJEE AND RICHARDSON, JJ.

Nazimulla—Defendant—Appellant.

v.

Wazidulla and *others*—Plaintiffs—Respondents.

Second Appeal No. 2490 of 1913, decided on 2nd March, 1915, against the Decree of Sub-Judge, 2nd Court, Sylhet, dated 11th April, 1913.

Limitation Act (9 of 1908), S. 23—Cause of action arises from day to day in respect of obstruction to water course—It is continuing nuisance—It is similar to obstruction of way—Obstruction to other easement may be treated as continuing nuisance.

The obstructions which interfere with the flow of water are in the nature of continuing nuisances, as to which the cause of action is renewed *de die in diem* so long as the obstructions causing such interference are allowed to continue. 6 Cal. 394 (P. C.) ref. to and foll.

There is no distinction between an obstruction to a water-course and one to a way, and wrongful interference with a right of way constitutes a nuisance. *Lane* v. *Capsey*, (1891) 3 Ch. 411 and *Thope* v. *Brumfitt* (1893) 8 Ch. 650, ref. to. 1. C. W. N. 96, ref. to.

Obstructions to easements other than water-courses may be treated as continuing nuisances. *Gillon* v. *Boddington*, (1824) 1 Car. & P. 541 and *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.) 765, ref. to. [P. 734, C. 1.]

Gopal Chandra Das—for Appellant.

Birendra Chandra Das—for Respondents.

Judgment.—This is an appeal by the first defendant in a suit for establishment of a right of way. The plaintiffs came to Court on the allegation that they had used the disputed land as a path from time immemorial peaceably, openly and uninterruptedly; and this was the only means of access to their land. The Courts below have found that the right of way as alleged by the plaintiffs has been established, and have made a decree accordingly. The only ground urged by the appellant against this decision is that the question of limitation has been erroneously decided, as the Subordinate Judge has held that S. 23 of the Indian Limitation Act is applicable to the case and consequently no question of limitation arises. The obstruction is said by the plaintiffs to have been caused in 1908 and the suit was commenced on the 15th July, 1911. It has been urged that S. 23 has no application to the case and that the Courts below should have investigated whether the obstruction was caused within 12 years prior to the suit, so as to bring the case within Article 144. In our opinion there is no foundation for this contention.

It was pointed out by their Lordships of the Judicial Committee in *Rajrup*

Koer v. *Abul Hossein* (1), where the suit was instituted for the removal of obstructions to a water-course used by the plaintiff from time immemorial, that the obstructions which interfered with the flow of water were in the nature of continuing nuisances as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. In support of this conclusion reference was made by their Lordships to S. 24 of the Indian Limitation Act, 1871. The same view was applied subsequently in the case of *Achul Mahta* v. *Rajun Mahta* (2) and *Punjai Kuvarj* v. *Bai Kuvar* (3). But it has been argued on behalf of the appellant that the cases mentioned related to water-courses, and that although an obstruction to a water-course may rightly be described as a continuing nuisance, an obstruction to a way does not fall within that category. We are of opinion that the distinction suggested is not well founded and that wrongful interference with a right of way constitutes a nuisance [*Lane* v. *Capsey* (4) and *Thorpe* v. *Brumfitt* (5)]. The principle laid down by the Judicial Committee in *Rajrup Koer* v. *Abdul Hossein* (1) and applied in the case of *Punja Kuvarji* v. *Bai Kuvar* (3) was applied by Norris, J., to the case of obstruction of a way in *Saojan Bibi* v. *Shamed Ali* (6) and we agree with the view taken by that learned Judge. A reference to the cases of *Gillon* v. *Boddington* (7) and *Whitehouse* v. *Fellowes* (8) will show that obstructions to easements other than water-courses may be treated as continuing nuisances. We hold accordingly that the Subordinate Judge has correctly applied S. 23 to the circumstances of this case.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1881) 6 Cal. 394=7 C. L. R. 529=7 I. A. 240 (P. C.).
(2) (1881) 6 Cal. 812.
(3) (1881-82) 6 Bom. 20.
(4) (1891) 3 Ch. 411=61 L. J. Ch. 55.
(5) (1893) 8 Ch. 650.
(6) (1897) 1 C. W. N. 96.
(7) (1824) 1 Car. & P. 541=Ryan & M. 161.
(8) 10 C. B. (N. S.) 765=30 L. J. C. P. 305=4 L. T. 177.

A. I. R. 1916 Calcutta 734

RICHARDSON AND MULLICK, JJ.

Alejan Bibi and *others*—Plaintiffs—Appellants.

v.

Raham Ali and *others*—Defendants—Respondents.

Second Appeal No. 4257 of 1913, decided on 10th February, 1915, from the Decision of Sub-Judge, Chittagong, dated 5th September, 1913.

Bengal Tenancy Act (8 of 1885), Ss. 49 (*b*) and 85—Under-*raiyat*—Holding for term — Devolution of interest—Heirs can be ejected without notice.

There is nothing in the Bengal Tenancy Act which expressly takes away the right of the heirs of an under-*raiyat* to succeed to the remainder of the term granted by the *raiyat* within the powers conferred on the latter by S. 85, and apart from custom or express enactment there is no doubt that a lease for a term devolves upon the heirs of the original lessee. On the expiry of the term the heirs may be ejected without notice under S. 49 (*b*) of the Bengal Tenancy Act. 31 Cal. 757 and 11 C. W. N. 519, dist.

[P. 735, C. 1.]

Dhirendra Kastgir—for Appellants.

Abdul Jawad—for Respondents.

Richardson, J.—The defendants in this suit are the heirs of an under-*raiyat* to whom the plaintiffs, as *raiyats* of the holding in which the land in suit is situated, granted by a written and registered instrument a lease for a term of nine years. The under-*raiyat* died some years ago and it has been found that the defendants have since been in possession of the land leased to them and have been paying rent therefor to the plaintiffs. The term of nine years has now expired and the suit was brought by the plaintiffs for the purpose of ejecting the defendants from the land comprised in the sub-lease. In the first Court the plaintiffs obtained a decree, that decree was reversed by the learned Subordinate Judge in the Court of Appeal below and the suit was dismissed. The learned Subordinate Judge held that the sub-tenancy granted to the original under-*raiyat* came to an end with his death, that the payment by and acceptance of rent from his heirs, the defendants, created a new tenancy as between them and the plaintiffs and that the defendants cannot be ejected unless and until notice to quit has been served upon them in accordance with Clause (*b*) of S. 49 of the Bengal Tenancy Act.

The question before us in this second appeal, which is preferred by the plaintiffs, is whether the learned Subordinate Judge was right in the view which he took of the case and of the respective rights of the parties. For the appellants it has been urged that a *raiyat* is empowered by S. 85 of the Bengal Tenancy Act, if not expressly at any rate by necessary implication, to grant an under-*raiyat* by means of a written and registered instrument sub-lease for a term not exceeding nine years. It is further argued that there is nothing in the Act which has the effect of cutting down a sub-lease for such a term to a sub-lease for the term of the under-*raiyat's* life if he should die before the expiry of the nine years. This reasoning is in some respects analogous to the reasoning adopted by the Full Bench in deciding the case of the *Midnapur Zemindari Company, Ltd.* v. *Hrishikesh Ghosh* (1), where the question was whether the holding of a non-occupancy *raiyat* was or was not heritable. It may fairly be said that there is nothing in the Bengal Tenancy Act which expressly takes away the right of the heirs of an under-*raiyat* to succeed to the remainder of a term granted by the *raiyat* within the powers conferred on the latter by S. 85 and apart from custom or express enactment, there is no doubt that a lease for a term devolves upon the heirs of the original lessee. On behalf of the defendants, the respondents before us, our attention has been directed to the Full Bench case of *Arip Mandal* v. *Ram Ratan Mandal* (2) and also to the decision of Mr. Justice Mookerjee in *Jamini Sundari Dasi* v. *Rajendra Nath Chukrabutty* (3). Those cases, however, deal with the position which arises upon the death of an under-*raiyat* who holds under an annual holding or a tenancy from year to year. In such a case, no doubt the only right which the Full Bench recognises as belonging to the heirs of the under-*raiyat* upon his death is a right to remain in possession of the land until the end of the then agricultural year for the purpose, if the land has been sub-let, of realising the rent which might accrue during the year or, if not sub-let, for the purpose of tending and gathering in the crops. The decision of the Full Bench seems, therefore, to deny to the heirs of the under-*raiyat* under an annual holding any right of succession properly so called to the tenancy and so the decision was understood by Mr. Justice Mookerjee, who observes: "It follows, therefore, that the Full Bench held that the heirs of an under-*raiyat* under an annual holding do not acquire any interest in his holding by inheritance." That being so, it is contended for the defendants that there is no real difference between the case of a tenancy for a term of years and the case of a tenaney from year to year and that if a tenancy of the latter sort is not heritable, a tenancy for a term should also be held to be not heritable. In my opinion, weighing the arguments of both sides the balance inclines in favour of the view propounded on behalf of the plaintiffs. It seems to me that inasmuch as under the Act a *raiyat* is clearly at liberty to grant a sub-lease for a term not exceeding nine years, the lease so granted, in the absence of anything to the contrary in the Act, carries with it the ordinary incidents of a lease for a term of years. One of the incidents of such a lease is that if the lessee dies before the end of the term, his heirs are entitled to succeed him in the tenancy. I do not say that there is no force in the arguments pressed upon us on behalf of the defendants but as I have said, on the whole it seems to me that the view suggested on the other side should prevail.

I am, therefore, of opinion that this appeal should be allowed, the decree of the Subordinate Judge should be set aside and the decree of the Munsif should be restored.

The plaintiffs will be entitled to their costs throughout.

Mullick. J.—I agree.

V.B./R.K.

Appeal allowed.

(1) A. I. R. (1914) Cal. 757=41 Cal. 1108=25 I. C. 564.
(2) (1904) 31 Cal. 757.
(3) (1907) 11 C. W. N. 519.

A. I. R. 1916 Calcutta 735

MOOKERJEE AND BEACHCROFT, JJ.

Birendra Kishore Manikya Bahadur—Plaintiff—Appellant.

v.

Kalitara Debi and *others*—Defendants—Respondents.

Second Appeal No. 475 of 1911, decided on 13th July, 1915, against the Decree of Dist. Judge, Tipperah, dated 29th November, 1910.

Bengal Tenancy Act (8 of 1885), Ss. 102, 104 and 106—Words 'every settlement of rent or decision of dispute' by Revenue Officer in S. 9 of Act 3 of 1893 are not applicable to decisions of validity of *Lakheraj* title under S. 104—Revenue Officer's decision about rent free title before the amendment cannot operate as *res judicata* as he was incompetent to decide.

The words "every settlement of rent or decision of a dispute by a Revenue Officer" in S. 9 of Act 3 of 1898 (B. C.) are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a *lakheraj* title under S. 104 of the Bengal Tenancy Act, 1885. [P. 736, C. 2.]

Before the amendment of the Bengal Tenancy Act in 1898, a Settlement Officer was incompetent to decide the question of rent-free title, and, therefore, such a decision given before but embodied in the record published subsequently to the enforcement of the amending Act, will not operate as *res judicata* between the parties in a suit for assessment of rent of the same lands brought afterwards in a Civil Court. [P. 737, C. 1.]

Dwarka Nath Chuckerbutty and *Birendra Chandra Das*—for Appellant.

Bepin Chandra Bose—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for assessment of rent of land which, the defendants contend, they hold under a rent-free title. The Court of first instance found in favour of the plaintiff and decreed the suit. Upon appeal, the District Judge has reversed that decision, and has held, *first*, that the decision of the question by the Settlement Officer does not conclude the matter in controversy, and, *secondly*, that from the long and uninterrupted possession of the defendants without payment of rent to the plaintiff or his predecessor, the inference may legitimately be drawn that the original grant was rent free. On the present appeal, the validity of the conclusion of the District Judge upon the second aspect of the case has not been disputed; but it has been argued that the decision of the Settlement Officer, which was adverse to the defendants, operate as *res judicata*, and that it was not open to the District Judge to come to an independent determination on the merits.

From an examination of the record, it transpires that on the 17th April, 1897, the Settlement Officer decided, in the course of a proceeding under Chapter X of the Bengal Tenancy Act, that the present defendants had failed to establish before him their alleged rent-free title. On the basis of this decision of the dispute between the parties, the rent was subsequently settled and the record was finally published on the 1st December, 1898. The appellant now contends, with reference to sub-S. 1 of S. 9 of Act III of 1898 (B. C.), which came into force on the 2nd November, 1898, that the decision of the Revenue Officer, though prior in point of time, was embodied in a Record of Rights published afterwards and precludes an investigation of the matter by the Civil Court.

Sub-S. (1) of S. 9 is in these terms:

"Every settlement of rent or decision of a dispute by a Revenue Officer under S. 104 or S. 106 of the Bengal Tenancy Act, 1885, before the commencement of this Act, in respect of which no appeal has, before the commencement of this Act, been preferred to the Special Judge appointed under S. 108 of the Act, shall have the force and effect of a decree of a Civil Court in a suit between the parties and shall be binding."

The appellant argues that there was a decision of a dispute by a Revenue Officer under S. 106 of the Bengal Tenancy Act, 1885, and that such decision has the force and effect of a decree of a Civil Court in a suit between the parties and is final. This contention is based upon a superficial view of the provisions of sub-S. (1) of S. 9. It was ruled by this Court in the case of *Radha Kishore Manikya* v *Durganath Bhuttacharjee* (1) that the words "every settlement of rent or decision of a dispute by a Revenue Officer" in S. 9 are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a *lakheraj* title under S. 104 of the Bengal Tenancy Act, 1885. This conclusion coincides with the decision of *Donay Dass* v. *Keshub Pruhti* (2), where Mr. Justice Ghose observed that the Legislature could not possibly have intended to accord finality to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under S. 106. This view is, in our opinion, eminently reasonable. Reliance, however, has been placed upon the later decision in *Nabin Chandra Chakrabarti* v.

(1) (1905) 32 Cal. 162.
(2) (1904) 8 C. W. N. 741.

Maharaja Radha Kishore Manikya Bahadur (3) where the attention of the Court was not drawn to the cases of *Donay Dass* v. *Keshub Pruhti* (2) and *Radha Kishore Manikya* v. *Durganath Bhuttacharjee* (1). There is a dictum in this judgment to the effect that the doctrine of *res judicata* applies, irrespective of the question whether the decision of the Revenue Officer was or was not competent under S. 104 or 106. In support of this view reliance was placed upon the decision in *Nikunja Behari Chanda* v. *Radha Kishore* (4). On an examination of the judgment in that case, however, it transpires that the decision is not an authority for the proposition deduced therefrom. There it was held that the particular decision of the Revenue Officer was within his jurisdiction and if the decision was within his competence, it was plainly final between the parties under sub-S. (1) of S. 9 of Act III of 1898. We may further observe, with reference to the decision in *Nabin Chandra Chakrabarti* v. *Maharaja Radha Kishore Manikya Bahadur* (3), that although reliance was placed upon the doctrine of *res judicata*, the Court yet proceeded to determine the case on the merits and came to the conclusion that the claimants had failed to establish their alleged rent-free title on the basis of the *sanads* and the other documents produced by them We hold accordingly that the appellant can succeed, only if the decision of the Settlement Officer, dated the 17th April, 1897, was a decision of a dispute which he was competent to decide under S. 106, Bengal Tenancy Act, as it stood before its amendment in 1898.

It cannot, we think, be seriously maintained that the Settlement Officer was competent to decide a question of this character before the amendment of the Statute in 1898. This is plainly indicated by the fact that S. 102 has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide, when the land is claimed to be held rent-free, whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and, if so entitled, under what authority. The very circumstance that the Legislature has inserted this clause in S. 102 points to the conclusion that the matter provided for thereunder is not covered by the other clauses of S. 102. This, in fact, was the view taken by a Full Bench of this Court in the cases of *Secretary of State for India in Council* v. *Nitye Singh* (5), and is also in accord with the decision in *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (6). But it has been argued that the decision of the Full Bench should be limited to cases where the Settlement Officer is invited to decide whether an alleged rent-free grant constitutes a valid title, and in support of this our attention had been drawn to isolated passages in the judgment delivered by the Full Bench. But we prefer to accept the interpretation of the decision of the Full Bench as given by Mr. Justice Prinsep who delivered the leading judgment in that case; his view will be found in the case of *Radha Kishore Manikya* v. *Durganath Bhuttacharjee* (1), and was confirmed on appeal by the Bench of three Judges. Reference has also been made to the case of *Karmi Khan* v. *Brojo Nath Das* (7), but that decision, rightly interpreted, does not support the contention of the appellant. In fact, the question whether a *lakheraj* is valid or not, does not and cannot require consideration in a case of this description; the proceeding is, not by the Government for assessment of revenue on land alleged to be held revenue free, but is by the proprietor of an estate for assessment of rent on land claimed by the occupier to be held as rent-free.

It has finally been urged that if this view be taken, it would be open to any occupier of land to defeat the proceeding before the Settlement Officer by an unfounded assertion, that the land was held rent-free. There is no ground for this apprehension, for, as was pointed out by Mr. Justice Prinsep in *Nikunja Behari Chanda* v. *Radha Kisore* (4) it is open to the Settlement Officer to investigate whether rent has, as a matter of fact, been paid in respect of the disputed land; if it is proved that rent has been paid, the Settlement Officer is competent to assess fair and equitable rent on the land; if, on the other hand, it is proved that rent has never been paid in respect

(3) (1907) 11 C. W. N. 859.
(4) 30 I. C. 944.
(5) (1894) 21 Cal. 38.
(6) (1903) 30 Cal. 339.
(7) (1895) 22 Cal. 244.

of the land. he cannot assess rent thereon merely because he is of opinion that the alleged rent-free title has not been proved. This was the law under the Bengal Tenancy Act as it stood before its amendment in 1898. The law, however, was altered in 1898 and the controversy cannot be raised again. We hold accordingly that the decision of the Settlement Officer dated the 17th April, 1897 does not operate as *res judicata* and that it was open to the District Judge to come to a determination of the matter in dispute on the evidence before him. That determination, as we have said, is not, and cannot be successfully assailed on the merits, as it accords with a long line of cases in this Court : *Birendra Kishore Manikya* v. *Bhoirab Chandra Chakrabarti* (8).

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(8) A. I. R. (1915) Cal. 170=27 I. C. 12.

A. I. R. 1916 Calcutta 738

FLETCHER AND TEUNON, JJ.

Shashi Bhusan Hazrah—Defendant—Appellant.

v.

Esabar (Esrar) Ali Nazir and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 2310, 2651 to 2657 of 1911 and Appeal No. 646 of 1911, decided on 11th March, 1915, from the Decrees of Sub-Judge, First Court, Hooghly, dated 7th July, 1911.

(a) Bengal Tenancy Act (8 of 1885), Ss. 105, 106 and 109—Revenue Court's decision of fair rent under S. 109 is final and binding—No suit lies unless the matter, subject of an application under S. 105 or 106 is before Civil Court.

Under the provisions of S. 109 of the Bengal Tenancy Act, the decision of a Settlement Officer or rather a Revenue Court, with reference to what is the fair and equitable rent, is binding and conclusive and the tenants are not entitled to question that decision in any Civil Court, provided that the question in the Civil Court is concerning any matter which is or has clearly been the subject of an application made under Ss. 105 to 108 of the Bengal Tenancy Act. [P. 739, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 105, 106 and 109—Scope of S. 109 stated—S. 109 does not bar suit for declaration that lands are *Lakheraj* grants or held at fixed rents—Scope of S. 106 pointed out—Principle that option of Special Tribunal bars—Jurisdiction of ordinary Court is unsound.

The duty of a Revenue Court is limited to the inquiry as to what is the fair rent having regard to the entry that appears on the Record of Rights and, therefore, S. 109 of the Bengal Tenancy Act is no bar to a suit by a tenant for a declaration that the lands are either *lakheraj* of are held at fixed rates. S. 106 of the Bengal Tenancy Act does not exclude the right of a Civil Court. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special Tribunal, that necessarily excludes the jurisdiction of the ordinary Courts of the country. [P. 739, C. 1 & 2.]

(c) Jurisdiction—Civil and revenue—Mistake in choosing a forum cannot deprive a person of his rights in property.

A person, because he went to a Civil Court instead of going to a Revenue Court, is not liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. [P. 740, C. 1.]

Rash Behari Ghose, Sarat Chandra Roy Chowdhury, Jyotish Chandra Hazra and *Satya Charan Sinha*—for Appellant.

Mohendra Nath Roy, Nagendra Nath Ghose and *Haradhan Chatterjee*—for Respondents.

Fletcher, J.—These appeals are preferred by the defendant, who is the *darpatnidar* of a certain *mouzah*, called Nagarpore, of which his father obtained a *darpatni* settlement on the 13th April, 1899. The plaintiffs in these cases are the various tenants in the *mouzah*. The rights that the plaintiffs allege they have in the lands are either that their lands are *lakheraj*, or, in two cases, I think, that they are held at fixed rents. The only objection that has been raised before us is as to whether the Civil Court had jurisdiction to hear and determine these suits. Proceedings were commenced on the 27th July, 1901 by the father of the defendant to have a Record of Rights prepared and that being done, the record was finally published on the 9th July, 1903, and the lands of the plaintiffs in those suits were all recorded as *mal* lands. The defendant's father then applied under S. 105 of the Bengal Tenancy Act for assessment of fair and equitable rents of the lands. Objection was raised by the tenants, namely, that certain of the lands were *lakheraj* and the rest of the lands were held at fixed rents. The Settlement Officer held that certain of the lands were *lakheraj*, but that the other lands were

not held at fixed rents, but were liable to have fair rents assessed. The cases were then taken before the Special Judge and the learned Special Judge agreed with ths decision of the Settlement Officer. Then second appeals were preferred to this Court, and this Court was of opinion that the decision of the Settlement Officer was *ultra vires* in holding that the lands were *lakheraj* and that the duty of the Settlement Officer was to settle rents having regard to the entries that appeared in the Records of Rights. This Court upheld the decision in so far as it held that the other lands were not held at fixed rents. See *Sambhu Chandra Hazra* v. *Purna Chandra* (1). Then the cases went back to the Settlement Officer and he settled, in accordance with the decision of this Court, fair rents under the provisions of the Bengal Tenancy Act. The tenants then went to the Civil Court and they brought, amongst other suits, the suits that are now under appeal in which they asked for a declaration either that the lands were *lakheraj* or that they were held at fixed rents. It is now argued that the decisions of the Courts below are wrong, on the ground that the decision of the Settlement Officer or rather the Revenue Court with reference to what is the fair and equitable rent is binding and conclusive and that the tenants are not entitled to question that decision in any Civil Court. Of course, that is so under the provisions of S. 109 of the Bengal Tenancy Act, provided that the question in the Civil Court is concerning any matter which is or has already been the subject of an application made under Ss. 105 to 108 of the Bengal Tenancy Act. But it is obvious from the decision of this Court in the second appeals, to which I have referred, that this Court held that the Revenue Officer was not competent to go behind the Record of Rights and enquire what was the real nature of the interest of the tenants. This Court said that the duty of the Revenue Court was limited to the inquiry as to what was the fair rent having regard to the entry that appeared on the Record-of-Rights. It is quite obvious that, in that view, S. 109 of the Bengal Tenancy Act would not be a bar to the present suits.

Then an argument that seems to me to have no substance at all has been advanced and that is that, having regard to the terms of S. 106 of the Bengal Tenancy Act, as the tenants have taken no proceedings as contemplated by that section, therefore, they are deprived of the right of suit in the Civil Court. But the wording of the section clearly does not bear any such construction The words are that "a suit may be instituted." The word "may" cannot be construed as meaning that the jurisdiction of the Civil Court is excluded. Before the jurisdiction of the ordinary Courts of the country can be excluded by a special Court, namely, the Revenue Court, there must be the clear words in the Statute excluding such jurisdiction. It is quite true that Dr. Ghose has referred to us an unreported decision of this Court See *Sashi Bhusan Hazra* v. *Aswini Comar Samanta* (1-*a*) in which the view is taken that S. 106 does exclude the jurisdiction of the ordinary Civil Court. But that decision stands alone or rather, if it has got any support at all, it is supported by the decision in *Jogendra Nath* v. *Krishna Pramada* (2), that has received judicial consideration on more than one occasion and cannot be considered as lending a strong support. It is sufficient to say that my learned brother who is sitting with me has, in a well-considered judgment See *Shashi Bhusan Hazra* v. *Denamoyee Dasi*, (3), already dissented from this decision which Dr. Ghose relies upon. I do not see how, on the plain words of the S. (106), it can be said that the section excludes the right of the Civil Courts. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special tribunal, that necessarily excludes the jurisdiction of the ordinary Court of the country. I think that it does not so exclude and that the words of S. 106 are merely permissive, and in my opinion, the decisions in the two cases. See *Pandab Dowari Das* v. *Ananda Kishun Chakravarti* (4) and *Shashi Bhushan Hazra* v. *Denamoyee Dasi* (3) that have been cited to us by the learned Vakil for the respondents are more in accordance with not only principle, but the plain words of S. 106, than that

(1) (1907) 35 Cal. 176=12 C. W. N. 122.

(1-*a*) (1915) 28 I. C. 981.
(2) (1908) 35 Cal. 1013.
(3) A. I. R. (1914) Cal. 492=23 I. C. 615.
(4) (1910) 7 I. C. 102.

which Dr. Ghose has relied upon. That being so, it is manifest that there is nothing in the proceedings that have taken place before the Revenue Court or the omission of the plaintiffs in these suits to resort to the Revenue Court that would take away the rights that the plaintiffs allege they have in the lands as against *darpatnidar*. It seems to me to be an alarming proposition to put forward that a person, because he went to the Civil Court instead of going to the Revenue Court, is liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. I agree with the decision of my learned brother in the case that has been handed over to us by the learned Vakil for the respondents, and, I think, that the judgment arrived at by the learned Judge of the lower Appellate Court is correct. The appeals, therefore, fail and must be dismissed with costs.

Teunon, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 740

MOOKERJEE AND ROE, JJ.

Mohesh Chandra Guha—Petitioner.

v.

Rajani Kanta Dutt and *another*—Opposite Party.

Civil Rule No. 1138 of 1914, decided on 7th May, 1915, against the decision of Small Cause Court Judge, Barisal, dated 11th July, 1914.

Contract Act (9 of 1872), S. 2 (*d*)—Consideration—Release of debtor—Acceptance of another in his place—Release is good consideration.

Where the creditor releases his debtor and accepts a new debtor in his place, the release of the original debtor furnishes good consideration for the new contract. [P. 740 C. 2.]

Asitaranjan Chatterjee—for Petitioner.

Bepin Behari Ghose—for Opposite Party.

Judgment.—This Rule was granted under S. 25 of the Provincial Small Cause Courts Act, on the application of the plaintiff in the Court below. He sued to recover money due on a bond for Rs. 100 executed in his favour on the 28th July, 1910 by one Tilak Chandra Dutt and his two sons, Rajani Kanta Dutt and Mohesh Chandra Dutt. The bond recited that on the 28th May, 1904 the plaintiff advanced Rs. 50 to Tilak Chandra Dutt and Mohesh Chandra Dutt and took a bond on the basis whereof payments had been made from time to time, that a considerable sum was still due on account of principal and interest, and, that inasmuch as Mohesh Chandra Dutt was not present and could not renew the bond, Rajani Kanta Dutt joined his father Tilak Chandra Dutt in the execution of the second bond. The Small Cause Court Judge has dismissed the suit as against the two sons on the ground that in so far as they were concerned, the bond was executed without consideration and was not binding on them as it was not registered. We are now invited by the plaintiff to set aside the decree of dismissal in favour of the two sons.

It is indisputable that the suit has been rightly dismissed as against Mohesh Chandra Dutt, as the suit has been brought on the renewed bond and he was not a party thereto. On the other hand, if the suit were treated as brought for enforcement of the original obligation, the claim as against him would clearly be met by the plea of limitation. But in respect of the liability of Rajani Kanta Dutt, it is plain that the Subordinate Judge has taken an erroneous view. One of the witnesses for the plaintiff stated in cross-examination that no cash consideration was paid for the bond in suit. The Subordinate Judge has inferred from this that the bond was without consideration, and his observation that the bond was not binding because unregistered seems to indicate that he had the provisions of S. 25 of the Indian Contract Act in view, which, it cannot be disputed, have no bearing on the case. The Subordinate Judge is clearly wrong in his view that a bond cannot be operative unless supported by cash consideration: See Indian Contract Act, S. 2 (*d*). What happened was that the creditor required that the bond should be renewed by the original executants; one of them was absent and could not comply with his demand. The creditor agreed to release the absent debtor from liability, if his brother would make himself responsible in his place. Rajani accordingly executed the renewed bond. This, then, is a case where the creditor released his debtor and accepted a new debtor in his place. The release of the original debtor furnishes good consideration for the new contract: *Alliance Bank*

v. *Broom* (1), *Fullerton* v. *Provincial Bank of Ireland* (2) and *Glegg* v. *Bromley* (3). The view taken by the Subordinate Judge cannot consequently be supported. But it is necessary to remand the case for investigation of one question and one question only, namely, whether Rajani really executed the bond. He denied in his written statement that he did so, but this point has not been determined by the Subordinate Judge.

The result is that this Rule is discharged in so far as Mohesh Chandra Dutt is concerned; it is made absolute against Rajani Kanta Dutt and the case is remitted to the Subordinate Judge in order that he may re-try the case against him in view of the observations made in this judgment. There will be no order for costs in this Court.

V.B./R.K.

Rule partly discharged; Case remanded.

(1) (1864) 2 Drew. and Sm. 289.
(2) (1903) A. C. 309.
(3) (1912) 3 K. B. 474.

A. I. R. 1916 Calcutta 741

MOOKERJEE AND ROE, JJ.

Janaki Nath Hore and *another*—Defendants—Appellants.

v.

Prabhasini Dasi—Plaintiff—Respondent.

Second Appeal No. 2491 of 1913, decided on 18th May, 1915, against the Decree of Dist. Judge, Faridpur, dated 14th June, 1913.

(a) Civil Procedure Code (5 of 1908), O. 41, R. 11 and O. 47, R. 4—Notice of review should generally be given but it is not essential in review of order of dismissal under O. 41, R. 11—Opposite party in R. 4 means party interested in order sought to be reviewed.

As a general rule, no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. [P. 742, C. 1.]

But an application for review of an order of dismissal under R. 11, O. 41 of the Code of Civil Procedure, 1908, can be granted without the issue of any notice to the respondent. [P. 743, C. 1.]

The expression "opposite party" in the proviso to R. 4 of O. 47 may be taken to mean the party interested to support the order sought to be vacated or modified upon the application for review. [P. 742, C. 1 & 2.]

(b) Civil Procedure Code, (5 of 1908), O. 41, R. 11 and O. 47, R. 4—Court passing order under O. 41, R. 11 is alone entitled to review the order—Effect of review depends upon each individual case.

The propriety of an order granting a review of the order of dismissal of an appeal under R. 11 of O. 41 of the Code of Civil Procedure, 1908, can be considered only by the Bench granting the review, and it is that Bench alone which can either maintain or vacate the original order of dismissal. [P. 743, C. 1.]

Whether the entire case is or is not re-opened when a review has been granted, must depend upon the circumstances of each individual case. [P. 743, C. 2.]

(c) Civil Procedure Code (5 of 1908), S. 41, R. 12—Appeal admitted under R. 12 is not restricted to grounds of appeal raised.

When an appeal is admitted under R. 12, O. 41 of the Civil Procedure Code, 1908, the appeal cannot be restricted to one or more grounds specified in the memorandum of appeal. The whole appeal is before the Court when the case is taken up for final disposal. [P. 743, C. 2.]

(d) Bengal Tenancy Act (8 of 1885), Ss. 161 and 167—Rule of estoppel between lessor and lessee by grant of lease does not affect purchaser in rent decree against lessor—Purchaser under S. 161 takes free of all encumbrances—Sub-tenancies can be annulled under S. 167.

The principle that, when a person has granted a lease on the allegation that he had such interest as entitled him to create a valid lease in favour of the grantee, the doctrine of estoppel operates between the grantor and the grantee, does not apply to the case of a purchaser of a holding at a sale in execution of a decree for arrears of rent suing to eject the defendant as a trespasser. [P. 743, C. 2 & P. 744, C. 1.]

The rights of a stranger who has purchased at a sale held in execution of a decree under Chapter 14 of the Bengal Tenancy Act are regulated by the provisions of that Chapter, which authorise the purchaser to annul all encumbrances—including sub-tenancies—mentioned in S. 161 of the Act. He can take the requisite steps under S. 167 to annul a sub-tenancy. [P. 744, C. 2.]

Kishore Lal Sarkar, *Bepin Behari Ghose* and *Haris Chandra Roy*—for Appellants.

Hira Lal Sanyal, *Purenda Sunder Banerjee* and *Amarendra Nath Bose*—for Respondent.

Judgment.—This is an appeal by the defendants in a suit for possession of land upon declaration of title by purchase at an execution sale and for mesne profits. The Court of first instance dismissed the suit; upon appeal the District Judge has reversed that decision and has made a decree for ejectment in respect of the first seven parcels of land. On the present appeal the propriety of the decision of the District Judge has been assailed as erroneous in law. But before we deal with the questions which arise in the appeal, we have to examine two

preliminary objections taken on behalf of the plaintiff-respondent.

The appeal was lodged in this Court on the 31st July, 1913. On the 1st December, 1913, the appeal was summarily dismissed under R. 11, O. 41, of the Code by Carnduff and Richardson, JJ. On the 28th February, 1914, an application was made by the appellants for a review of this order. The application was heard *ex parte* on the 8th April, 1914. The result was that the previous order of dismissal was recalled and an order was made to the following effect:

"The appeal will be heard; let the record be sent for and issue the usual notices."

On behalf of the respondent, two objections have been urged against the validity of this order, namely, *first*, that it is inoperative because made in contravention of R. 4 of O. 47 of the Code, which requires that no application for review shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and, *secondly*, that if the order be assumed to have been properly made without notice, the appellants are restricted to the single ground upon which the application for review was based. In our opinion, there is no substance in either of these contentions. As regards the *first* objection, it need not be disputed, to use the language of Lord Macnaghten in the case of *Mahomed Zahuruddin* v. *Nuruddin* (1), that, as a general rule, no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. But the substantial question is, who is the "opposite party" upon whom notice of the application should have been served in this case. The expression "opposite party" is not defined in the Code, but it may be taken to mean the party interested to support the order sought to be vacated or modified upon the application for review. Now, what was the order in the present case which was sought to be recalled by the appellants and what was the order which they endeavoured to get substituted in lieu thereof. The order which they prayed might be recalled was to the effect that the appeal be summarily dismissed; and the order which they wished to have substituted in its place was that notice of appeal be served upon the respondent and that the appeal be heard on the merits after the record had been received. Can it be contended reasonably that the respondent was the "opposite party" within the meaning of the expression in the proviso to R. 4 of O. 47, that he was in fact interested to appear and support the order of summary dismissal, when the only order sought to be substituted therefor was that the appeal be heard in his presence? In our opinion, the question must be answered in the negative. If we acceded to the contention of the respondent, the result would be that he would be subjected to needless harassment from which the Legislature intended to protect him by the introduction of R. 11, O. 41 of the Code. If it is obligatory upon the Court to issue notice upon the respondent when an application is made to review an order of dismissal under R. 11 of O. 41, the respondent must appear in answer to the Rule to support the order of dismissal, without the record before the Court; and if the Rule is made absolute and the appeal directed to be heard in the presence of the respondent, he would have to appear a second time to support the decree under appeal. This result could never have been intended by the Legislature. The view we take is in accord with that adopted in *Joy Coomar Dutta Jha* v. *Esharee Nund Dutta Jha* (2), where it was ruled that an application for review of an order of dismissal under S. 25 of Act 23 of 1861, which corresponds to R. 11 of O. 41 of the present Code could be granted without the issue of any notice to the respondent. That procedure has been followed in numerous cases in this Court during the last 40 years, though we are informed that latterly in one or two solitary instances, amongst which may be mentioned *Abdul Hakim* v. *Hem Chandra Das* (3), the view has been taken that notice of the application for review should be issued upon the respondent. We are clearly of opinion that what has been the practice of the Court for a long series of years is in conformity with the law and that we should not depart from it. We may further point out that if the objection urged by the respondent were well-founded, we could not give effect to it; for as was pointed out in the case of

(1) (1894) 14 M. L. J. 7.

(2) (1872) 18 W. R. 475.

(3) (1915) 42 Cal. 433=30 I. C. 165.

Haldhar Jha v. *Syed Shah Mahammad Ashraf Alam* (4) where a similar objection was unsuccessfully taken, the point must be urged before the Division Bench which granted the review; it is that Bench alone which can consider the propriety of the order previously made and either maintain or vacate the original order of dismissal. The respondent has made a faint attempt to develop an analogy between an *exparte* order granting a review and an *ex parte* order directing that an appeal be registered though filed beyond the period of limitation or on a memorandum insufficiently stamped: on this basis, it has been argued that in the former, precisely as in the latter, class of cases the respondent is not bound by the order made in his absence and is competent to question its validity when the appeal is called on for final disposal in his presence. But, plainly, there is no real analogy between the two classes of cases. It cannot be maintained for a moment that the order in the present case was made without jurisdiction and we are not prepared to adopt the view indicated in *Abdul Hakim* v. *Hem Chandra Das* (3) that the order made without notice is a nullity. Even if the contention of the respondents that notice is essential is well founded, it shows at best that the order has been made irregularly or with material irregularity in the exercise of the jurisdiction possessed by the Judges who granted the review. That order, consequently, can neither be ignored nor vacated by us. But it is not necessary to deal with this aspect of the case in fuller detail, because in our opinion the order was properly made, though notice of the application for review was not served on the respondent.

As regards the *second* objection that the appeal should be restricted to the single ground which was made the basis of the application for review, we are of opinion that it is entirely unfounded. No doubt, it was ruled by this Court in *Bhubaneshwari Koer* v. *Ajodhya Singh* (5) that an application for review may be granted in part; and, as pointed out in *Sheikh Sadaruddin* v. *Sheikh Ekramuddin* (6), whether the entire case is or is not re-opened when a review has been granted, must depend upon the circumstances of each individual case. But it is plain that in this case the entire appeal is open, because, as was pointed out in *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (7), when an appeal is admitted under R. 12 of O. 41 of the Code, the appeal cannot be restricted to one or more grounds specified in the memorandum of appeal; the whole appeal is before the Court when the case is taken up for final disposal. We hold accordingly that all the grounds taken in the memorandum of appeal may be considered by us.

We now turn to the merits of the appeal. The case was argued in the Courts below on the assumption that the land in dispute constituted an occupancy holding of one Arun Kanta Chandra, who granted a permanent sub-lease on the 3rd December, 1899 to the first defendant. The case for the defendant is that at the time when this sub-lease was granted, he was already in occupation as a tenant and that the sub-lease did not create any new tenancy. This sub-lease contravened the provisions of S. 85 of the Bengal Tenancy Act, as it created a term exceeding nine years and would not have been admitted to registration if it had been stated in the document that the grantor was an occupancy *raiyat*. But the title of the defendant does not depend upon the sub-lease. He has been in possession from a period antecedent to the lease upon payment of rent to his grantor, and has thus acquired the status of at least an under *raiyat*. The question is, whether the plaintiff is entitled to eject him.

The plaintiff purchased the holding at a sale held in execution of a decree for arrears of rent on the 21st January, 1901 and instituted this suit on the 4th December, 1911 to eject the defendant as a trespasser. It is plain that there is no room here for the application of the principle recognised in *Manik Borai* v. *Bani Charan Mandal* (8) and *Arad Ali* v. *Rachimaddi* (9), namely, that when a person has granted a lease on the allegation that he has such interest as entitled him to create a valid lease in favour of the grantee, the doctrine of estoppel

(4) A. I. R. (1915) Cal. 68=25 I. C. 880.
(5) (1911) 11 I. C. 102.
(6) A. I. R. (1914) Cal. 146=20 I. C. 670.
(7) (1911) 11 I. C. 212.
(8) (1911) 10 I. C. 469.
(9) (1911) 10 I. C. 562.

operates between the grantor and grantee ; in other words, that it is not competent to the grantor to show that the recitals in the document as to his status are incorrect and that on the true state of facts, he had no authority to create the lease. Here the question does not arise between the grantor and the grantee, and the sub-lease is consequently liable to be attacked as void, on the principle explained in *Jarip Khan* v. *Dorfa Bewa* (10) and *Telam Pramanik* v. *Adu Shaikh* (11). The plaintiff is a purchaser at a sale held in execution of a decree for arrears of rent and we have to investigate his rights and privileges. In this connection, our attention has been invited to two classes of cases, where two distinct principles have been recognised. In the first class of cases, namely, in *Amirullah Mohamed* v. *Nazir Mahomed* (12), *Amirullah Mahomed* v. *Nazir Mahomed* (13) and *Lal Mahomed Sarkar* v. *Jagir Sheikh Mallik* (14) the doctrine was recognised that the landlord of an occupancy *raiyat*, who has purchased the interest of the *raiyat*, and is thus brought into direct contact with the under-*raiyat* inducted on the land by the occupancy *raiyat*, cannot, in view of the provisions of S. 22 of the Bengal Tenancy Act, seek the benefit of sub-S. (1) of S. 85, which provides that if a *raiyat* sub-lets otherwise than by a registered lease the sub-lease shall not be valid against the landlord, unless made with the landlord's consent. In the second class of cases, namely, *Peary Mohun Mookerjee* v. *Badul Chandra Bagdi* (15), *Gangadhar Mandal* v. *Rajendra Nath Ghosh* (16) and *Fakir Chandra Singha Roy* v. *Banamali Sain* (17), the principle is enunciated that when a landlord purchases the occupancy holding at a sale in execution of a decree for arrears of rent, it is not necessary for him to annul the interest of the under-*raiyat* as an encumbrance, because it is an interest which is not valid against him by virtue of sub-S. (1) of S. 85. The case before us is not covered by either of these two principles. We have not here to deal with the case of a landlord who has purchased by private alienation or at a sale held in execution of a decree for arrears of rent. We have to investigate the case of a stranger who has purchased at a sale held in execution of a decree under Chapter 14 of the Bengal Tenancy Act. His rights are clearly regulated by the provisions of that Chapter. S. 159 provides that where a holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as "protected interests," but with power to annul the interests defined as "encumbrances". S. 160 defines "protected interests." S. 161 defines the term "encumbrance" to mean a lien, sub-tenancy, easement or other right to interest created by the tenant on his tenure or holding or in limitation of his own interest therein and not being a protected interest as defined in S. 160. The sale in this case was held under Chapter 14, and, consequently, must be deemed to authorise the purchaser to annul all encumbrances mentioned in S. 161. But the plaintiff contends that as he is a purchaser at the instance of the landlord, he is the landlord within the meaning of S. 85 and that as against him the sub-tenancy of the defendents is not valid. To give effect to this contention of the respondent, it would be necessary to read into S. 85 words which do not find a place there. We should have to read and construe S. 85 as if it provided that sub-leases by the occupancy-*raiyat* shall not be valid against his landlord nor as against a person who has purchased at a sale in execution of a decree for arrears of rent held at the instance of the landlord. The obvious answer to the contention of the respondent accordingly is that these or similar words are not in S. 85. The substance of the argument is a choice between two conflicting positions. One possible view is that as the sub-tenancy is not valid against the landlord when he takes proceedings to enforce the decree for arrears of rent and brings the holding to sale, he does so on the assumption that the sub-tenancy does not exist ; that is, he acts in a manner contrary to the express language of S. 159. The other possible view is that the landlord acts in conformity with S. 159 and that the property is sold with liberty reserved to the purchaser to annul the

(10) (1912) 15 I. C 476.
(11) (1913) 18 I C. 791.
(12) (1904) 31 Cal. 932.
(13) (1907) 34 Cal. 104.
(14) (1909) 2 I. C. 654.
(15) (1901) 28 Cal. 205.
(16) (1913) 19 I. C. 652.
(17) (1913) 21 I. C. 104.

sub-tenancy. If the landlord himself happens to purchase, it becomes superfluous for him to proceed in the manner provided in S. 167 by service of notice upon the encumbrancer, because as soon as he is brought into direct contact with the sub-tenant, he is entitled to take up the position that the sub-tenancy as against him is not valid. On the other hand, if the property passes into the hands of a stranger, he takes the requisite steps under S. 167 to annul the sub-tenancy. This view does not involve any hardship upon the purchaser, nor does it tend to deprecate the value of the holding as was apprehended by the respondent. We may add that the question which now requires decision was left open for consideration in the case of *Fakir Chandra Singha Roy* v. *Banamali Sain* (17) and after full consideration of the arguments addressed to us, we are of opinion that it should be answered against the respondent.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below. The effect of our decision will be that the defendants will be tenants under the plaintiff in respect of the first seven parcels of land.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 745

MOOKERJEE AND RICHARDSON, JJ.

Ram Sumnun Prosad—Plaintiff—Appellant.

v.

Genda Lal Rai and *others*—Defendants—Respondents.

Second Appeal No. 1271 of 1911, decided on 23rd April, 1915, against the Decree of Dist. Judge, Bhagalpur, dated 16th March, 1911.

(a) Mortgage—Person deriving title subsequent to mortgage cannot impeach genuineness of it.

Those who have derived title subsequent to a mortgage cannot be permitted to impeach the genuineness of that transaction to the detriment of a *bona fide* purchaser, for value without notice from a purchaser in a Court sale. 16 I. C. 825; 22 I. C. 86 and *Gresham Life Assurance Society* v. *Crowther*, (1914) 2 Ch. 219, foll. [P. 746, C. 1.]

(b) Transfer of Property Act (4 of 1882), S. 43—S. 43 protects *bona fide* purchaser for value from ostensible owner.

A *bona fide* transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner. *Mohamed Mozuffer Hossein* v. *Kishore Mohun Roy*, 22 Cal 909 (P. C.); 9 M. I. A. 303 (P. C.); *Colonial Bank* v. *Cady*, (1891) 15 A. C. 267 and 63 L. T. 27, ref. to. [P. 746, C. 1.]

Jogesh Chandra De—for Appellant

Rash Behari Ghose, Ganesh Dutt Singh and *Baidyanath Narain Singh*—for Respondents.

Judgment.—This is an appeal by the plaintiff for declaration of title to land and for recovery of possession thereof. The property in dispute admittedly belonged to a family of Jhas, now represented by the defendants second party. In 1881 the Jhas mortgaged the property to Manoji Narain Singh, the predecessor-in-interest of the first party defendant. The mortgagee sued in due course, obtained a decree, and at the sale which followed thereon purchased the mortgaged property on the 27th July, 1891. The sale was confirmed on the 26th September, 1891. There was some delay in the issue of the certificate of sale, which was not granted till the 26th April, 1892. Symbolical possession was thereafter delivered to the purchaser on the 4th February, 1894. Meanwhile, on the 28th March, 1892, the purchaser included the property in a mortgage executed by him in favour of one Barhamdeo Prosad, now represented by the plaintiff. A decree was obtained on this mortgage on the 29th April, 1897, and at the execution sale which followed, the decree-holder became the purchaser on the 10th May, 1904. The sale was confirmed on the 19th December, 1904 and symbolical possession was thereafter delivered to the purchaser on the 18th January, 1905. The plaintiff was, however, unable to obtain actual possession, and consequently, instituted this suit on the 27th August, 1909. His claim was resisted by some of the defendants, who claimed to have acquired the right, title and interest of the Jhas by various transactions subsequent to the mortgage of 1881. Their defence was substantially two-fold namely, *first*, that the mortgage of 1881, which is the root of the title of the plaintiff was a fictitious transaction and, *secondly*, that the suit was barred by limitation. The Courts below have concurrently found in favour of the defendants

upon each of these points and have dismissed the suit. On the present appeal the decision of the District Judge on both the points has been questioned as contrary to law.

As regards the first ground of defence, it is plain that the defendants, who have derived title from the Jhas subsequent to the mortgage of 1881, cannot be permitted to impeach the genuineness of that transaction to the detriment of a *bona fide* purchaser for value without notice. It may be conceded that as between the mortgagors and the mortgagee of 1881, the former could show against the latter, so long as the rights of no third party intervened, the fictitious nature of the transaction: but they cannot be allowed to do so when an innocent stranger has in good faith acquired a title for value on the faith of the reality of the mortgage. This position is amply supported by the decisions in *Ram Charan Das* v. *Joy Ram Majhi* (1), *Radha Madhab Paikara* v. *Kalpataru Roy* (2) and *Akhil Prodhan* v. *Manmatha Nath Kar* (3). To the same effect is the decision in *Gresham Life Assurance Society* v. *Crowther* (4). The situation here is, in fact, stronger than even a case where the true owner has placed an ostensible transferee in a position to mislead a *bona fide* purchaser for value without notice of the secret title; the mortgage, the suit thereon, the execution sale, and the delivery of possession through Court, constitute an elaborate network of devices sufficient to induce the belief that the title of the Jhas has vested in Monoji Narain Singh. Consequently the rule applies by which a *bona fide* transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner. *Ram Coomar* v. *John and Maria Mcqueen* (5), *Mahomed Mozuffer Hossein* v. *Kishore Mohun Roy* (6), *Sarat Chunder Dey* v. *Gopal Chunder* (7), *Varden Seth Sam* v. *Luckpathy Royjee* (8), *Colonial Bank* v. *Cady* (9) and *Cairncross* v. *Lorimer* (10). We must, consequently, hold that the title of the plaintiff is not impeachable at the instance of the defendants as the representatives of the original proprietors.

As regards the second ground of defence, it is plain that Article 137 of the first Schedule of the Indian Limitation Act, 1908, governs the case. That Article provides that a suit by a purchaser at a sale in execution of a decree for possession of immovable property, when the judgment-debtor was out of possession at the date of the sale, must be instituted within twelve years from the date when the judgment-debtor is first entitled to possession. The Courts below have concurrently found that notwithstanding the delivery of symbolical possession to Monoji Narain Singh on the 4th February, 1894, the Jhas continued in possession, and they were in possession even when symbolical possession was delivered to the predecessor of the plaintiff on the 18th January, 1905. This latter delivery of possession was operative as against the then judgment-debtor, namely, Monoji Narain Singh, but was wholly ineffectual to affect the title or interrupt the actual possession of the Jhas. *Juggobundhu Mukerjee* v. *Ram Chander Bysack* (11) and *Joggobundhu Mitter* v. *Purnanund Gossami* (12). The plaintiff was consequently bound to sue within twelve years from the date when his judgment-debtor, Monoji Narain Singh, was first entitled to possession, *i.e.*, within twelve years from the 4th February, 1894 when symbolical possession was delivered to Monoji Narain Singh as against the Jhas. The plea of limitation would have been of no avail if the suit had been instituted on or before the 4th February, 1906. The inference follows that the suit, instituted as it was on the 27th August, 1909, is barred by limitation under Article 137. In this view it is needless to consider a question of considerable nicety which was argued at the Bar and which has led to considerable divergence of judicial opinions, namely, whether possession adverse to the mortgagor also operates to the prejudice of the mortgagee, and, if so, under what circumstances and subject to what qualifications.

(1) (1912) 16 I. C. 825.
(2) (1912) 16 I. C. 811.
(3) (1914) 22 I. C. 86.
(4) (1914) 2 Ch. 219.
(5) (1872) 18 W. R. 166.
(6) (1895) 22 Cal. 909=22 I. A. 129 (P. C.).
(7) (1893) 20 Cal. 296=19 I. A. 203 (P. C.).
(8) (1861-63) 9 M. I. A. 303=1 Suth. P. C. J. 480 (P. C.).
(9) (1891) 15 A. C. 267=63 L. T. 27.
(10) (1861) 3 Mcq. H. L. 827.
(11) (1880) 5 Cal. 584.
(12) (1889) 16 Cal. 530.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 747

FLETCHER AND TEUNON, JJ.

Har Prosad Dass—Plaintiff—Appellant.

v.

Bakshi Bindeswari Prosad Singh and *another*—Defendants—Respondents.

Appeal No. 437 of 1912, decided on 15th April, 1915, from the Original Decree of Sub-Judge, First Court, Shahabad, dated 9th September, 1912.

Limitation Act (9 of 1908), S. 19—Acknowledgment by *karta* of Joint Hindu family is valid—Other members bound by acknowledgment—Pronote filed with plaint missing from Court's records—Copy filed—Held, plaintiff's claim could not fail by reason of theft or inability to produce original document—Evidence Act (1872), S. 65.

S, the *karta* of a joint Hindu family, executed certain promissory notes. *S* died leaving a brother *H* and a minor son. *H* succeeded to the *kartaship* and renewed one of the hand-notes executed by *S*. In a suit on the notes the plaintiff alleged to have filed the notes with the plaint but they were missing from the Court's records. Copies of the notes were filed and admitted by the lower Courts. The debt was not proved to have been contracted for any immoral purpose:

Held, that the plaintiff's claim could not fail by reason of the theft or his inability to produce the original documents before the Courts: [P. 748, C. 2.]

Held, further, that the debt not being for immoral purposes *H* as the *karta* of the family was an agent duly authorized in this behalf so as to give an acknowledgment under S. 19 of the Limitation Act and that the son of *S* was bound by the acknowledgment. [P. 749, C. 1.]

Manmothnath Mukerjee, Sailendranath Palit for *Umakali Mukerjee, Satindra Nath Mukerjee* and *Sudhansa Sekhar Mukerjee*—for Appellant.

Mohendra Nath Roy and *Raghu Nath Singh*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Shahabad, dated the 9th September, 1912. The plaintiff sued to recover certain sums that were alleged to be due to him from the defendants. The first defendant, Bakshi Harihar Prosad Singh, had a brother, Bakshi Sheo Prosad Singh. In the year 1907 Sheo Prosad Singh died leaving the second defendant, his only son. In his life-time, Sheo Prosad had executed certain promissory notes and, on the 30th April, 1906, he executed a fresh hand-note for Rs. 6,000 in favour of the plaintiff in lieu of all the notes that had been executed by him down to that date. On the 22nd November, 1906, Sheo Prosad executed a further hand-note for the sum of Rs. 1,000. Sheo Prosad was the *karta* of this joint Hindu family and the defendant No. 2, his infant son, was a member of that family which was undivided at all times material for the purposes of the present case. On the death of Sheo Prosad, the first defendant succeeded to the office of the *karta* and he executed five promissory notes in favour of the plaintiff, two being dated the 5th April 1908 and the 12th November, 1908 respectively, each of them being for Rs. 1,000, another one dated the 26th December, 1908 for Rs. 300 and the two remaining ones being dated the 28th April, 1909 and the 15th May, 1909, the first one being for Rs. 1,400 and the last one being for Rs. 1,000. Harihar Prosad Singh, the first defendant, also on the 30th April, 1909, renewed the hand-note for Rs. 6,000 which had been given by Sheo Prosad Singh by giving a note for Rs. 7,720-2-9. On the original note, there was endorsed "executed another hand-note in its stead of the value of Rs. 7,720-2-9 up to date," and it was signed by the defendant No. 1. Default having been made in paying the amount covered by these notes as well as the note for Rs. 1,000 executed by Sheo Prosad on the 22nd November, 1906, the plaintiff brought the present suit. The learned Judge of the Court below has given a decree to the plaintiff against the defendant No. 1 alone for the whole amount sued for, except the Rs. 1,000 covered by the hand-note dated the 22nd November, 1906. He has dismissed the suit as against the defendant No. 2. The plaintiff has appealed against that decision.

It will be convenient to deal with the five notes that were given by the defendant No. 1 himself after the death of Sheo Prosad in the first place, and then to deal with the renewed note for Rs. 7,720-2-9 that was given by the defendant No. 1 in renewal of the note for Rs. 6,000 executed by Sheo Prosad. No argument was advanced before us as regards the amount

covered by the note dated the 22nd November, 1906 executed by Sheo Prosad Singh, the claim as regards that being evidently barred by limitation.

The learned Judge has made this finding with reference to the five notes that were given by the defendant No. 1 himself :

"There is nothing to show that the moneys were borrowed for family purposes or for the benefit of the minor. On the other hand, there is evidence adduced by the defendant No. 2 to show that the defendant No. 1 has been leading an extravagant and dissipated life, which renders it highly probable that he borrowed the moneys for his own personal use."

The evidence on which the learned Judge came to that conclusion is ample to warrant the conclusion that he came to. The evidence is not very much one way or the other, but it seems to me that, on these five notes, the evidence is not sufficient to establish the liability of the infant, that is the defendant No. 2, with respect to the moneys so advanced. I think, with regard to the amounts due on those five notes, we ought to affirm the decision of the learned Subordinate Judge.

The case on the note for Rs. 7,720-2-9 is not so easy. The first point that was objected to was that the learned Judge of the Court below admitted a copy of this note in evidence and also copies of the notes in respect of which it was a renewal, on the ground that the original documents had been stolen from the Court records. It is said that the whole of that story about the documents having been stolen is a false story. There does not seem to be any reason why the plaintiff who appears to be a man of substance should have set up a bogus story as to these documents having been stolen, so that he could give false copies in evidence. The learned Judge remarks that "it is not altogether improbable that the hand-notes alleged to have been filed with the plaint were stolen about the same time. However this may have been, it cannot be doubted that the hand-notes, or at least, those detailed in paragraph 5 of the plaint were really executed and that the debts have not been repaid." The objection of the respondents to this appeal is that the learned Judge of the Court below admitted secondary evidence of these notes without coming to a definite finding that the document had been stolen or lost. I think the learned Judge, when he remarked that it was not altogether improbable that the hand-notes were stolen, meant to come to the conclusion that whether those documents had been actually stolen or not, at any rate they had been mislaid or had not been found at that time and further, that there was no doubt that the documents had been in existence and that the copies filed were the true copies of those documents. I think the learned Judge was clearly right in holding that the plaintiff's claim should not fail by reason of the theft or his inability to produce the original documents before the Court.

Then the next point is—"*Is the defendant No. 2 liable for this amount?*" It cannot be denied that the defendant No. 2 was liable to repay the six thousand rupees which was secured by the promissory note of the 30th April, 1906. The maker of that promissory note was the father of the defendant No. 2 and, unless it was for an immoral consideration, the defendant No. 2 was liable to pay his father's debt. So far from this debt being given for an immoral consideration, the evidence shows that the moneys were borrowed with reference to a hosiery business that Sheo Prasad was carrying on for the benefit of the joint family. There is no doubt that the defendant No. 2 was liable to pay the amount secured by that note. There are, therefore, only two questions with reference to this matter. *First* of all "Had Harihar Prosad, that is, the defendant No. 1, power to give an acknowledgment of the debt secured by the note for Rs. 6,000 so as to prevent it from being barred by limitation?" and, *secondly*, "If he had, whether the acknowledgment in this case is sufficient to answer the purpose of the Statute?" There has been a good deal of conflict of judicial authorities on the question as to whether the persons acting for those under disability are entitled to give an acknowledgment or not. The balance of judicial authorities appears to me to have held that they are able to do so, provided that the debt is not barred by limitation on the date when the acknowledgment is given. That was decided in the Full Bench case of *Chinnaya* v. *Gurunatham Chetti* (1) of the Madras High Court. That case was followed and

(1) (1882) 5 Mad. 169.

approved of in the case of *Bhasker Tatya Shet* v. *Vijalal Nathu* (2). Whatever conflict there was in the various decisions, it was set at rest by the 21st section of the Indian Limitation Act of 1908, which provides that "the agent duly authorized, as is mentioned in Ss. 19 and 20 of the Act shall in the case of a person under disability include his lawful guardian, committee or manager." The decisions that the learned Vakil for the respondents relied upon, namely, in the cases of *Wajibun* v. *Kadir Buksh* (3) and *Chhato Ram* v. *Bilto Ali* (4), can no longer be considered to be good law. These decisions are inconsistent with the statutory provision that now appears in S. 21. I think that there is no doubt that the defendant No. 2 being a person liable to pay this debt contracted by his father the defendant No. 1, as the *karta* of the family, was an agent duly authorised in this behalf so as to give an acknowledgment under S. 19 and thus to give a new period of limitation with regard to the amount remaining due on the promissory note for Rs. 6,000. If that is so, the only other question is "Is the acknowledgment in this case sufficient to bind the defendant No. 2?" The learned Vakil for the defendant No. 2, respondent, has tried to limit the acknowledgment to the promissory note for Rs. 7,720-2-9. He says that that does not show any connection between the original hand-note for Rs. 6,000 and this renewed note and that, therefore, as there is no connection between the two documents, it. cannot be taken to be an acknowledgment of the liability that existed on the defendant No. 2 to pay the amount which his father was liable to pay on the note for Rs. 6,000. As a matter of fact, that is not strictly so, because the hand-note for Rs. 7,720-2-9 is expressed to be given in lieu of the hand-note dated the 30th April, 1906. That certainly established a connection between that hand-note and the hand-note for Rs. 6,000. But, in addition to that, there is the endorsement upon the hand-note for Rs. 6,000 itself in these terms:— "Executed another hand-note in its stead of the value of Rs. 7,720-2-9 up to date." It is quite clear that it was an acknowledgment in respect of the amount due on the former hand-note. It is said that the defendant No. 1 did not express to have made the acknowledgment as the *karta* of joint family. There is not much authority on that point, but in the case that I have referred to, namely, the Full Bench case reported as *Chinnaya* v. *Gurunatham Chetty* (1), the acknowledgment did not express that it was made as binding the family and notwithstanding that the Full Bench considered that the acknowledgment bound the family, on the ground that the *karta* having power to borrow money for proper purposes had power to give a proper acknowledgment of the existing debt. During the course of the argument it was somewhat faintly suggested that the infant was not liable on this note at all on the ground that he was not a party to the present note. The claim in this suit is not limited to suing on the promissory note itself. There is an obligation to pay outside the note and that obligation bound the other members of the joint family, notwithstanding that they could not be sued upon the note. As a matter of fact presumably the second defendant is bound to pay his father's debt if not contracted for immoral purposes, whether it is a debt on a promissory note or in any other form. In this case, the obligation to repay the money remains on the defendant No. 2. That liability has been, to my mind, properly acknowledged by an agent duly authorized to make the acknowledgment under S. 19 of the Limitation Act and the second defendant is, therefore, liable to pay to the plaintiff out of his share of the family estate the amount so due upon that promissory note. I think therefore that we ought to set aside the judgment and decree passed by the learned Subordinate Judge in so far as it relates to the liability of the defendant No. 2 under the promissory note for Rs. 7,720-2-9 and in lieu thereof direct that the defendant No. 2 is liable along with the defendant No. 1 to pay that amount together with interest thereon at the contractual rate down to the institution of the suit out of his share of the joint family property. In other respects the decree of the lower Court will stand. As both parties have partially succeeded in this Court, we make no order as to the costs of this Court. Similarly we think we ought to direct that the plaintiff and the defendant No. 2 should bear their

(2) (1893) 17 Bom. 512.
(3) (1886) 13 Cal. 292.
(4) (1899) 26 Cal. 53.

own costs in the lower Court, the plaintiff having succeeded against the defendant No. 2 on one claim and having failed on the other. The order passed by the lower Court for costs as against the defendant No. 1 will stand.

Teunon, J.—I agree.

V.B./R.K.

Decree modified.

A. I. R. 1916 Calcutta 750

JENKINS, C. J. AND N. R. CHATTERJEA, J.

Durga Mohun Gangopadhya and *others* —Plaintiffs—Appellants.

v.

Sukumar Das and *others*—Defendants —Respondents.

Letters Patent Appeal No. 125 of 1913, decided on 4th May, 1915, against the decision of Roy, J., dated 8th August, 1913.

Bengal Tenancy Act (8 of 1885), S. 40—Per *Jenkins, C. J.*—In suit for rent commuted Civil Court can question Revenue Court's competency —Per *N. R. Chatterjea, J.*—Exercise of jurisdiction by Revenue Courts pre-supposes *raiyats* to be occupancy and rent payable in kind.

Per *Jenkins, C. J.*—The Civil Courts can consider the competence of the Revenue Courts in commutation proceedings, where a suit is brought for recovery of arrears of rent as determined by these proceedings. [P. 750, C. 2.]

Per *N. R. Chatterjea, J.*—The exercise of jurisdiction by a Revenue Court pre-supposes that the *raiyat* is an occupancy *raiyat* and the rent is payable in kind as indicated in S. 40 of the Bengal Tenancy Act.

[P. 750, C. 2 & P. 751, C. 1.]

Gunada Charan Sen—for Appellants.

Surendra Chandra Sen—for Respondents.

Jenkins, C. J. This is a suit for rent; and the plea advanced by the defendants is that there has been a commutation under S. 40 of the Bengal Tenancy Act. As regards the years 1315 and 1316, if that plea is good it furnishes an answer. But the plaintiffs take exception to the commutation proceedings or at any rate to their finality; for he says under S. 40 there can be no commutation unless the tenant is an occupancy *raiyat* and unless he pays for the holding rent in kind, or on the estimated value of a portion of the crop or at rates varying with the crop, or partly in one of those ways and partly in another, or partly in any of those ways and partly in cash. The plaintiffs say that this question must be decided in this suit and that it is open to the Civil Court to question the jurisdiction of the Revenue Authority.

The judgments of the Munsif as also of the Subordinate Judge and of Mr. Justice Ray are all against the plaintiffs. The judgment of the Munsif is to the effect that the tenant was an occupancy *raiyat* and that the rent was payable in kind, so that the learned Judge affirmed the competence of the Revenue Court's proceedings. The other two Courts, however, did not follow this procedure but treated the matter as concluded by the decision of the Revenue Court and on that ground have upheld the defendants' plea.

I do not wish to say that there is nothing to be said in support of that view. But whether it be right or whether it be wrong, I consider we are bound by a decision of an Appellate Bench of this Court in *Kali Krishna* v. *Ram Chandra* (1) which directly decides the point in discussion before us, and determines that Civil Courts can consider the competence of the Revenue Courts in commutation proceedings where a suit is brought for recovery of arrears of rent as determined by these proceedings. I, therefore, accept that decision as binding on me. In view of that decision it is manifest that the judgment of Mr. Justice Hari Nath Ray cannot stand, nor can that of the lower Appellate Court. We must, therefore, in deference to the decision I have cited, vary the judgment of Mr. Justice Ray so far as it relates to the rent for the years 1315 and 1316 and also set aside the decree of the Subordinate Judge as regards these two years and send back the case in order that it may be determined whether the commutation proceedings were competent. The case must, therefore, go back to the lower Appellate Court for the determination on the record as it stands, and the costs of the litigation hitherto incurred will be dealt with in the lower Appellate Court and the Judge will in this connection have regard to the extent to which the plaintiffs' claim is conceded.

N. R. Chatterjea, J.—I agree with the view taken in *Kali Krishna* v. *Ram Chandra* (1). I think the exercise of jurisdiction by a Revenue Court pre-supposes that the *raiyat* is an occupancy

(1) (1915) 29 I. C. 896.

raiyat and the rent is payable in kind, as indicated in S. 40 of the Bengal Tenancy Act.

V. B./R. K.

Appeal partly allowed ; Case remanded.

A. I. R. 1916 Calcutta 751

MOOKERJEE AND BEACHCROFT, JJ.

Brojendra Kishore Roy Chowdhury and *others* —Plaintiffs—Appellants.

v.

Bharat Chandra Roy and *others*—Defendants—Respondents.

Second Appeals Nos. 1748 and 2023 of 1912, decided on 2nd August, 1915, against the Decrees of Dist-Judge, Sylhet, dated 19th April, 1912.

(a) Limitation Act (5 of 1908), S. 23 and Sch. 1, Arts. 120 and 142—Property attached under S. 146, Criminal P. C.—Suit for possession and declaration of title—Continuing wrong—Limitation.

The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants. Proceedings were instituted under S. 145 of the Criminal Procedure Code and the Magistrate being unable to satisfy himself as to which of the parties was in possession of the subject of dispute, attached it under S. 146 of the Criminal Procedure Code on the 25th April, 1902. In 1909 two suits were instituted by two sets of plaintiffs for declaration of their title and for recovery of possession. The plaintiffs were found to have been in possession, when, on the 25th April, 1902, the property was attached by order of the Magistrate :

Held, that the suits, though framed as suits for possession, could not be treated as such and were not governed by Art. 142 of the Limitation Act. [P. 753, C. 1.]

Held, further that the suits were for declaration of title under S. 42 of the Specific Relief Act and there was continuing wrong independent of contract within the meaning of S. 23 of the Limitation Act and that consequently a fresh period of Limitation under Art 120 of the Limitation Act began to run at every moment of the time the wrong continued, and the suits were, therefore, not barred by time.

[P. 753, C. 2 & P. 754, C. 1.]

(b) Words and phrases—Dispossession—Meaning of.

Semble.—Dispossession implies the coming in of a person and the depriving out of another from possession. [P. 752, C. 2.]

(c) Words and phrases—Discontinuance of possession—Meaning of.

Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another.

[P. 752, C. 2.]

(d) Limitation Act (9 of 1908), S. 142—Property attached under S. 146, Criminal P. C.—Attachment does not amount to either dispossession or discontinuance of possession—Criminal P. C. (1898), S. 146.

If the seisin or legal possession is, during the attachment of a property under S. 146 of the Criminal Procedure Code, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession within the meaning of Article 142 of the Limitation Act.

[P. 752, C. 2.]

(e) Civil P. C. (5 of 1908), O. 2, R. 2—Cause of action—Continuing injury—Fresh cause of action *de die in diem.*

If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem.*

[P. 754, C. 1 & 2.]

(f) Specific Relief Act (1 of 1877), S. 42—Property attached by Magistrate under S. 146, Criminal P. C.—Suit against Magistrate not maintainable—Criminal P. C. (1898), S. 146.

No action can be brought against a Magistrate for recovery of possession of a property attached by him under S. 146, Criminal Procedure Code. [P. 752, C. 2.]

Dwarka Nath Chakrabarty, Ramani Mohan Chatterjee Tara Kishore Chaudhuri and *Broja Lal Chakrabarty*—for Appellants.

Gopal Chandra Das—for Respondents.

Judgment.—The events antecedent to the litigations, which have culminated in the present appeals, are no longer in controversy and may be briefly recited. The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants, and a breach of the peace became imminent. Proceedings were consequently instituted under S. 145 of the Criminal Procedure Code ; but as the Magistrate was unable to satisfy himself as to which of the parties was in possession of the subject of dispute, he attached it under S. 146 of the Criminal Procedure Code, until a competent Court should determine the rights of the parties thereto or the person entitled to possession thereof. This order was made on the 25th April, 1902. On the 3rd July and 11th October, 1909 these suits were instituted by the two sets of plaintiffs who claim respectively an eight-annas and a five-annas share of the property, for declaration of their title and for recovery of possession. The Courts below have concurrently found that the plaintiffs have fully proved their title, and that the defendants have no case on the merits. The Courts below have also

found that the plaintiffs were in possession when on the 25th April, 1902, the property was attached by order of the Magistrate. But while the trial Court held that the claims were not barred by limitation, as the plaintiffs were in possession within twelve years of the suit, the lower Appellate Court has concluded on the authority of the decision in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1) that the suits are barred by limitation, as they have been instituted more than six years after the order of the Magistrate. The result of this divergence of opinion has been that the District Judge has reversed the decrees of the Subordinate Judge and has dismissed the suits, although he has found that the plaintiffs have established their title. The plaintiffs have now appealed to this Court and have impugned the correctness of the view adopted by the District Judge. The question, consequently, arises, what is the period of limitation, if any, applicable to a suit for determination of the rights of the parties to an order under S. 146 of the Criminal Procedure Code, where it is found that the party who is the rightful owner was in possession when the property was attached by the Magistrate. Three alternative views have been placed before us for consideration, *viz.*, *first*, that the suit is in essence for recovery of possession of immovable property, and must under Article 142 of the Schedule to the Indian Limitation Act be instituted within twelve years from the date of the order of the Magistrate; *secondly*, that the suit is in substance for declaration of title to immovable property, and must, under Article 120, be instituted within six years from the date of the order of the Magistrate when the right to sue accrues; and *thirdly*, that the suit is for declaration of title to land, but that there is no bar of limitation applicable, as under S. 23 a fresh period of limitation begins to run at every moment of the time during which the attachment continues. If the first or the third view is adopted, these suits are not barred by limitation, while the suits must be deemed barred if the second alternative is accepted.

As regards the *first* possible point of view, it is clear that no action can be brought against the Magistrate for recovery of possession. In the words of Lord Morris in *Khagendra Narain Chowdhry* v. *Matangini Debi* (2), the Magistrate is in the position of a stake-holder, or, as was said in *Ramaswamy Aiyar* v. *Muthusamy Aiyar* (3), when the property is attached, it passes into legal custody, and during the continuance of the attachment, such custody must be held to be for the benefit of the true owner: *Beni Prasad* v. *Shahzada Ojha* (4) and *Kara Singh* v. *Bakar Ali Khan* (5). It is further plain that there is no cause of action against the Magistrate, as he has acted in the exercise of his statutory powers. The suit must, consequently, be brought against the rival claimant, but obviously the suit cannot be framed as one for recovery of possession of the disputed land from him, as he is admittedly not in possession. The plaintiff may have been deprived of possession, but he cannot aptly be said to have been dispossessed, or, to have discontinued possession within the meaning of Article 142 of the Indian Limitation Act. Dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another. These elementary principles are deducible from the decision of the Judicial Committee in *Trustees and Agency Company* v. *Short* (6) and *Secretary of State* v. *Krishnamoni Gupta* (7). To the same effect is the observation of Baron Parke in *Smith* v. *Lloyd* (8), that to make the Statute of Limitation applicable, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected. It follows that if the seisin or legal possession is, during the attachment, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession. We must accordingly hold, as was done in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1) that Article 142 has no application to a suit of

(1) (1903) 26 Mad. 410.

(2) (1890) 17 Cal. 814=17 I. A. 62 (P. C.).
(3) (1907) 30 Mad. 12.
(4) (1905) 32 Cal. 856.
(5) (1883) 5 All. 1=9 I. A. 99 (P. C.).
(6) (1879) 13 App. Cas. 793.
(7) (1902) 29 Cal. 518=29 I. A. 104 (P. C.).
(8) (1854) 9 Exch. 562.

this description, and we are unable to accept the contrary opinion on this point as formulated in *Goswami Ranchor Lalji* v. *Sri Girdhariji* (9). We are not unmindful that in *Khagendra Narain* v. *Chowdhry Ratangini Debi* (2), the suit was framed as one for recovery of possession and that the Judicial Committee ordered that each of the parties "be decreed to be put into possession" of an equal moiety of the disputed property. It is clear, however, that the question now under consideration was not raised before the Judicial Committee, for the obvious reason that the suit there was in time, whether the six years' or the twelve years' rule was applied; the record shows that the order of attachment was made on the 10th December, 1877 and the suit was commenced on the 14th December, 1880. It may also be observed that the language of the order by the Judicial Committee is consistent with the view that the parties were to be put into possession by the Magistrate. It may be added that the decision in *Nasir Ali Sheikh* v. *Adeluddi Shana* (10), to which reference was made in the course of argument, is clearly distinguishable. There the Magistrate had, after the attachment, placed a stranger in possession, contrary to the provisions of S. 146, Criminal Procedure Code; a suit against such stranger for recovery of posession is clearly governed by Art. 142 or Art. 144. We need not refer in detail to the case of *Chujmull* v. *Khyratee* (11), *Goswami Ranchor Lalji* v. *Girdharji* (9), *Akilandmmal* v. *Periasami Pillai* (12), *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1), and *Deo Narain Chowdhury* v. *Webb* (13), in so far as they merely recognise the doctrine that Art. 47 of the Indian Limitation Act is restricted to cases where an order for possession has been made in favour of one of the parties and has no application where the land has been attached under S. 146. We hold accordingly that the suits before us, though framed as suits for possession, cannot be treated as such and are not governed by Art. 142 of the Indian Limitation Act.

As regards the *second* and *third* possible points of view, it is clear, from what has already been stated, that the suit must be treated as suits for declaration of title under S. 42 of the Specific Relief Act. What then is the period of limitation, if any, applicable to these suits? We have been pressed, on the one hand, to adopt the view propounded in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1), that Art. 120 is applicable and that the suit is required to be instituted within six years from the date of the order of attachment when the right to sue accrues. We have been pressed, on the other hand, to hold that this is a case of continuing wrong under S. 23 and that the right to sue accrues from moment to moment. The first alternative, though adopted by the Madras High Court, leads to an obvious anomaly. If the suit is not instituted within six years from the date of the order of attachment, neither of the claimants can obtain a declaration of title; yet the title continues unaffected in the true owner, for under S. 28 his right is extinguished only at the determination of the period limited for the institution of a suit for possession. The Magistrate thus continues as a stakeholder for an indefinite period, as there is no statutory provision for forfeiture after the lapse of a prescribed term. According to the Madras High Court, however, the true owner, although not in a position to seek a declaration of title for purposes of recovery of the property, can obtain a declaration of title to the profits in the hands of the Magistrate; in other words the Magistrate is constituted his manager in perpetuity. The Madras High Court further seems to hold that, although a declaration of title cannot be embodied in the decree, because the prayer for declaration is barred by lapse of time, yet the finding in the judgment on the issue of title, will have the force of *res judicata* and will practically operate as a determination of the question of right for purposes of S. 146, Criminal Procedure Code. With all respect, this bears the appearance of a distinction without a difference. To adopt the language of Lord Ellenborough in *Luxmore* v. *Robson* (14) "the common sense, the practice, and the general convenience of mankind require that a construction different from that in the case cited should be adopted." In our opinion, the true view of the

(9) (1898) 20 All. 120.
(10) (1912) 16 I. C. 620.
(11) (1868) 3 Agra H. C. R. 65.
(12) (1876-78) 1 Mad. 309.
(13) (1901) 28 Cal. 86.
(14) 1 B. & Addl. 584.

matter is that S. 23 of the Indian Limitation Act governs the case. To maintain this position, it is not essential to accept the broad proposition formulated in *Chukkun Lal Roy* v. *Lolit Mohan Roy* (15) [which was reversed on appeal on another point by the Judicial Committee in *Lalit Mohun Singh Roy* v. *Chukkun Lall Roy* (16)] that a suit for declaration of title to immovable property cannot be held to be barred so long as the plaintiff has a subsisting right to such property; nor is it necessary to depart in any way from the rule recognised in *Mohabharat Shaha* v. *Abdul Hamid Khan* (17), that a suit for declaration of title to immovable property is governed by Article 120. On the other hand, as was explained in the case last mentioned, and as had been previously indicated in the cases of *Brinda* v. *Kaunsilla* (18), *Ananda Razu* v. *Viyanna* (19), and *Jugalkishore* v. *Lakshmandas Raghunathdas* (20), Article 120 and S. 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation, for instance, in suits for partition of joint property.

The answer to the question, when does the right to sue accrue, must depend on the circumstances of the particular case, and very refined distinctions have, indeed, been sometimes drawn, as may be seen from *Yamuna Bai Rani Sahiba* v. *Solayya Kavundan* (21) and *Pamu Sanyasi* v. *Zemindar of Jeypur* (22). In the case before us, the view may reasonably be maintained that there is a continuing wrong independent of contract and that consequently a fresh period of limitation under Article 120 begins to run at every moment of the time the wrong continues. It is needless for our present purpose to attempt an exhaustive definition of the expression "continuing wrong." But it may generally be stated that if the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*. To put the matter in another way, where the wrongful act produces a state of affairs every moment's continuance of which is a new tort, a fresh action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury. Tested from this point of view, what is the position here? The defendants attempted to interfere with the possession of the plaintiffs, and a breach of the peace became imminent. The Magistrate intervened, as it was incumbent upon him to do, and attached the property. The result was that the plaintiffs were deprived of the enjoyment of their property. This state of things has continued, though it could have been terminated if the defendants had intimated to the Magistrate that they abandoned all claim to the property and would not cause a breach of the peace by an endeavour to obtain possession by force. We think, in these circumstances, that the case may aptly be treated as one of continuing wrong within the meaning of S. 23 of the Indian Limitation Act. From this point of view, no question of limitation arises.

The result is that these appeals are allowed, the decrees of the District Judge set aside, and the suits decreed with costs in all the Courts. The title of the plaintiffs in each case to the share claimed will be declared, and it will be further declared that they are entitled to have the property released from attachment and to be placed in possession by the Magistrate.

V.B./R.K.

Appeals allowed.

(15) (1893) 20 Cal. 906.
(16) (1897) 24 Cal. 834=24 I. A. 76 (P.C.).
(17) (1905) 1 C. L. J. 73.
(18) (1891) 13 All. 126.
(19) (1892) 15 Mad. 492.
(20) (1899) 23 Bom. 659.
(21) (1901) 24 Mad. 339.
(22) (1902) 25 Mad. 540.

A. I. R. 1916 Calcutta 754

WALMSLEY, J.

Biswessor Sen and *another*—Plaintiffs—Appellants.

v.

Imamuddi Chowdhuri and *others*—Defendants—Respondents.

Second Appeal No. 660 of 1914, decided on 18th March, 1915, against the Decree of Sub-Judge, 1st Court, Backergunj, dated 16th December, 1913.

Limitation—Applicability—Law of limitation in force on day of institution applies.

The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary.
[P. 755, C. 1.]

Bepin Behari Ghose—for Appellants.

Judgment.—The plaintiff brought a suit to recover *khas* possession of some land. The Court of first instance held that the suit was not barred by limitation. The learned Subordinate Judge, however, held that it was barred by limitation. The matter turns upon the question whether the law applicable to the case is the present Limitation Act or the Act of 1877. The argument of the lower Appellate Court is that according to the old Limitation Act, the defendants' possession became adverse to the plaintiff from the date of the sale and that, therefore, when the suit was instituted more than twelve years had already expired. So that the defendant's title by adverse possession was complete. The plaintiff contends that he is entitled to the benefit of the new Act and he quotes in support of his view the case of *Lala Soni Ram* v. *Kanhaiya Lal* (1). In that case it was said by their Lordships of the Privy Council that "the High Court rightly held that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary." Adopting that principle it appears that the plaintiff is right in contending that he is entitled to the benefit of Article 138 as it now stands and that he has twelve years from the date from which it was confirmed instead of the date on which the sale actually took place. I, therefore, set aside the decision of the learned Subordinate Judge holding that the suit was barred by limitation, and remand the appeal to be heard by that Court in regard to the other contentions.

As nobody appears on behalf of the respondents the plaintiff will bear his own costs in this Court, whatever the result may be.

V./B.R.K.

Appeal allowed.

(1) (1915) 35 All. 227 = 19 I. C. 291 = 40 I. A. 74 (P.C.).

A I. R. 1916 Calcutta 755

WALMSLEY AND NEWBOULD, JJ.

Raghunath Jha — Defendant—Appellant.

v.

Birjnandon Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 2248 of 1912, decided on 9th June, 1915, against the Decree of Dist. Judge, Darbhanga, dated 25th May, 1912.

Civil P. C. (5 of 1908), O. 21, R. 97—Order under R. 97 without enquiry not being legal suit for possession more than one year after is not barred—Limitation Act (1908), Art. 11.

Where a resistance is offered in an execution proceeding, an order passed without any inquiry at all is not an order under S. 335 of the Civil Procedure Code, 1882, and a suit for the possession of the property brought one year after the order, is not barred by Article 11, Schedule II to the Limitation Act, 1877. [P. 756, C. 2.]

Rash Behari Ghose, *Sarosh Charan Mitter* and *Chandra Sekhar Persad Singh*—for Appellant.

Dowarka Nath Chakravartty and *Manmohan Bose*—for Respondents.

Walmsley, J.—The plaintiff obtained six decrees on hand-notes against defendant No. 1, Ramji Lal Das, and his father and in execution caused the property in suit and other property to be put to sale, and himself purchased it on 11th April, 1906. Meanwhile, he says, Ramji Lal fabricated three bonds, among them a mortgage-bond purporting to have been executed on 25th February, 1893, in favour of Raghunath Jha, defendant No. 2. The latter obtained an *ex parte* decree against Ramji Lal on the basis of this mortgage-bond in Suit No. 26 of 1906 and in execution bought the property now in suit. In February 1907 the plaintiff asked the Court to put him in possession of the property in suit, but resistance was offered by Raghunath Jha. The Munsif disposed of the matter by an order dated 18th February, 1907. The plaintiff instituted the present suit on 8th August, 1910, and the reliefs for which he asked were, so far as this appeal is concerned, for declaration that the mortgage-bond of 25th February, 1893, the proceedings in Suit No. 26 of 1906 on that bond and the proceedings in execution of the decree were fraudulent and inoperative against him (the plaintiff) and that he (the plaintiff) is

entitled to possession of the land in suit. Defendant No. 2 contested the suit and it is he who has preferred this appeal.

On the merits, the Courts below have decided in favour of the plaintiff, and the only contention in appeal is that the suit is barred by limitation. It is said that the Munsif's order of 18th February, 1907, was an order under S. 335, Civil Procedure Code of 1882, and that the suit is barred by Article 11 of the Limitation Act of 1877, because it was not brought within one year of that order.

It is obvious that this contention must prevail if the order mentioned was an order under S. 335, Civil Procedure Code.

It appears that on 15th February, 1907, the plaintiff as auction-purchaser applied to the Court to be put in possession of the purchased property, and the Munsif's order of the next day was that the *nazir* should go and give him possession but should return if there was any opposition. On 18th February, the Munsif recorded this order:

"this petition is vehemently objected to. The best course left for the applicant is to bring a suit. Case is dismissed."

In this order, the "applicant" must be the plaintiff, then auction-purchaser, and the "petition" and the "case" are his petition to be put in possession.

By S. 335, Civil Procedure Code, it is provided that "the Court on the complaint of the purchaser shall enquire into the matter of the resistance * * * * * * * and pass such order thereon as it thinks fit." We are asked to presume that the Court made an enquiry, although no record of such an enquiry exists, and that the order dismissing the decree-holder's petition was in consequence such an order as is contemplated by S. 335, Civil Procedure Code. Our attention has been drawn especially to the case of *Sardhari Lal* v. *Ambika Pershad* (1), where their Lordships of the Privy Council remarked that

"the Code does not prescribe the extent to which the investigation should go."

That case may be distinguished from the present one, *firstly*, by the fact that there was an order allowing certain objection to an attachment made by the decree-holder, and *secondly*, by the fact that the nature of the enquiry made by the Court was not known, and their Lordships assumed that there was some sort of enquiry. These are substantial points of difference, and because of these differences, I do not think that the principle laid down by the Privy Council governs the present case.

On the other hand, we have been referred to two Calcutta cases, where the circumstances are very similar to those of the present case. The first is that of *Rash Behary Bysack* v. *Budden Chunder Singh* (2). If the Munsif's compressed order of 18th February, were expanded, it would be, *mutatis mutandis*, very much the same as the order recorded by the Munsif in that case, and it was held that there had been no judicial enquiry as required by the section and consequently no proper order. The second case is much more recent and it refers to the Privy Council judgment; it is the case of *Sarat Chandra Bisu* v. *Tarini Prasad Pal* (3), where Maclean, C. J., held that if there was no enquiry at all, there was no order within the meaning of S. 335, Civil Procedure Code.

In my opinion, it is clear that there was no enquiry at all in the present case on which an order could be based, and that the order passed was not an order under S. 335, Civil Procedure Code. Consequently I hold that the suit was not barred by limitation. The appeal is dismissed with costs.

Newbould, J.—I agree.

V.B/R.K.

Appeal dismissed.

(1) (1888) 15 Cal. 521=15 I. A. 123 (P. C.).

(2) (1883) 12 C. L. R. 550.

(3) (1907) 34 Cal. 491.

A. I. R. 1916 Calcutta 756

JENKINS, C. J. AND CHATTERJEA, J.

Kedar Nath Banerjee and *others*—Defendants Appellants.

v.

Haridas Ghose—Plaintiff and others—Defendants—Respondents.

Second Appeal No. 1160 of 1913, decided on 1st June, 1915, against the Decree of Sub-Judge, Second Court, Burdwan, dated 23rd December, 1912.

Hindu Law— Succession—*Dayabhaga*—Great-grandfather's son's daughter's son is preferential heir than maternal uncle.

In a contest between the great-grandfather's son's daughter's son and the maternal uncle regarding succession under the *Dayabhaga* School

of Hindu Law, the great-grandfather's son's daughter's son is the preferential heir. 13 W. R. 49 (F. B.) and A. I. R. (1914) Cal. 217, foll.
[P. 757, C. 1 & 2.]

Bishendra Nath Sarkar—for Appellants.

Nagendra Nath Ghose—for Respondents.

Jenkins, C. J.—The point in contest in this litigation is whether in a *Dayabhaga* family, the great-grandfather's son's daughter's son or the maternal uncle is to be preferred. The proposition only has to be stated to make one realise what an amount of learning and industry the problem might demand. We have had the advantage of having the position of the maternal uncle advocated before us by one who is worthily following in the steps of his distinguished father and we can say; much as we regret the absence of Babu Golap, we do not feel we have suffered anything in view of the argument that has been addressed to us.

Undoubtedly there are, as Babu Rishendra Nath Sarkar has brought clearly to our notice, a number of considerations that might be brought into play were the matter untouched by authority. But a Full Bench of this Court, as far back as *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1), came to a conclusion as to the principle of succession in a *Dayabhaga* family which really governs this case. It has been treated as governing cases of a similar description by other distinguished Judges, whom I name in this particular connection merely because they are Judges who would be particularly familiar with and interested in the question. The learned Judges are Mr. Justice Guru Das Banerji, Mr. Justice Mookerjee and Mr. Justice N. R. Chatterjea. And they one and all have felt that it is not for this Court, at any rate, to question the propriety of that Full Bench decision. In the case of *Kailash Chandra Adikhary* v. *Karuna Natha Chowdhury* (2) the contesting parties were in the precise position, curiously enough, of those who are now litigating before us, that is to say, the contest there was as here: between the great-grandfather's son's daughter's son and the maternal uncle. There it was decided in favour of the great-grandfather's son's daughter's son. And I see no ground on which we can refuse to follow that ruling. The learned Vakil in the course of his argument before us has done his best to depreciate the value of the maxim *stare decisis*. But that is an argument that must be addressed to a higher authority and not to this Court.

There was another argument advanced before us, namely, that the possession of Tulsi was such that her existence offers a complete bar against the suit. But that was a point not taken in the lower Courts, nor in the original grounds of appeal here. It was a very late development. But obviously the basis of that argument involves an investigation into facts on which it is beyond our competence to embark. We cannot, therefore, give effect to it.

As to the first point our decision, in obedience to the authorities, is that the plaintiff who claims under the great-grandfather's son's daughter's son is entitled to succeed. This is in accordance with the view of the learned Subordinate Judge and the Munsif.

The result is that the appeal must be dismissed with costs.

N. R. Chatterjea, J.—I agree that the principle of succession governing this case must be taken to have been settled by the Full Bench decision in *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1). The particular point raised in this case was decided in the case reported as *Kailash Chandra Adhikary* v. *Karuna Nath Chowdhury* (2) and I see no reason to alter the opinion which I expressed in that case.

V.B./R.K.

Appeal dismissed.

(1) (1870) 13 W. R. 49=5 B. L. R. 15 (F. B.)
(2) A. I. R. (1914) Cal. 217=19 I. C. 677.

A. I. R. 1916 Calcutta 757

CHAUDHURI, J.

Ram Chunder Banka—Plaintiff.

v.

Rawatmull—Defendant.

Ordinary Original Civ. Juris. Suit No. 1145 of 1914, decided on 2nd August, 1915.

(a) Waiver—Meaning of.

Waiver is consent to dispense with or forego something to which a person is entitled.
[P. 759, C. 2.]

(b) Waiver—Consent not to sue on failure to pay instalment amounts to waiver.

Where it was proved that demand was made in three successive years in respect of three

instalments due upon an instalment bond, but the plaintiff consented not to sue for the whole amount, as he was entitled to do under the bond, for default on the first two occasions but refused to consent on the third:

Held, that this amounted to a waiver of the payment of the two earlier instalments.

[P. 759, C. 2.]

(c) Limitation Act (9 of 1908), Sch. I, Art. 75—Instalment bond—Waiver of—Limitation.

When the instalment bond was executed on the 6th November, 1908 and provided payment of Rs. 10,000 by annual instalments of Rs. 400, commencing from the 30th of September, 1909, and further that in case of default the whole amount payable on the bond was to fall due, and the plaintiff waived the payment of the first two instalments as aforesaid and filed a suit for the recovery of the whole amount on the 12th November, 1914:

Held, that his suit was not barred by limitation and it was decreed for Rs. 9,200.

[P. 760, C. 1.]

B. C. Mitter, *B. L. Mitter* and *H. C. Mazumdar*—for Plaintiff.

Rasul—for Defendant.

Judgment.—This is a suit on an unregistered instalment bond executed by the defendant on the 6th November, 1908. It is for a sum of Rs. 10,000 payable in annual instalments of Rs. 400, commencing from the 30th September, 1909 (not 1899 as appears by mistake in the bond), it being agreed between the parties that in case of default of payment of the instalments, there was to be "immediate payment of the sum of Rs. 10,000, or the unpaid part thereof or the unpaid instalment with interest from the date of default." After reciting the agreement aforesaid, the third clause of the bond runs thus: "In case the said yearly payments of principal shall from any cause whatever not be paid upon the day hereinbefore mentioned for such payment, the said Rawatmull, his heirs, executors, administrators or assigns shall forthwith pay to Golab Roy, Bhuramull and Ghanesham Dass, their heirs, executors, administrators or assigns the whole balance then remaining unpaid of the said sum of Rs. 10,000 or at the option of the said Golab Roy, Bhuramull and Ghanesham Dass, their heirs, executors, administrators or assigns the unpaid instalment with interest thereof at the rate of nine annas per cent. per annum."

The plaintiff states in the third paragraph of the plaint that

"the defendant failed and neglected to pay any of the said instalments. The plaintiff firm did not claim with the knowledge and consent of the defendant the whole of the said sum of Rs. 10,000 on failure to pay the first and second instalments in respect thereof, and they submit that they are entitled to recover the said sum of Rs. 10,000 with interest thereon at the rate aforesaid on the failure on the part of the defendant to pay the third instalment in respect thereof under this bond."

The defendant in his written statement denies the agreement, and says that he signed the bond:

"under mental and bodily distress and under the coercion or influence of the plaintiff firm without understanding its purport or contends."

In answer to the third paragraph of the plaint, the defendant denies that he consented:

"that the plaintiff firm should not claim the whole of the sum of Rs. 10,000 on his failure to pay the first and second instalments."

He alleges that no demand was ever made from him and submits that under the circumstances, the plaintiff's claim should be held barred by the Statute of Limitations. The only issue raised by him at the hearing was as regards limitation, the suit being filed on 12th November, 1913 after the reopening of the Court after the long vacation. It was argued on his behalf that under Article 75 Schedule I of the Limitation Act, the period of three years ran from the date of the first default, *namely*, the 30th September, 1909. It was argued that this was not a case of waiver at all as no payment of any overdue instalment had been alleged, and that according to the ruling of this Court in *Hurri Pershad Chowdhry* v. *Nasib Singh* (1) and *Jadab Chandra Bakshi* v. *Bhairab Chandra Chukkerbutty* (2), amongst others there could be no waiver so as to affect limitation save by payment and acceptance of an overdue instalment. A large number of other cases was referred to. It is only necessary to refer to some of them. *Mon Mohun Roy* v. *Durga Churn Gooee* (3) sums up the current of decisions up to that date. Wilson, J., in discussing the case of *Cheni Bash Shaha* v. *Kadum Mandul* (4) held

"it was unnecessary and unprofitable to enquire how he might decide a question of the kind if it were a new question, as it was a question which had arisen many times in the course of a number of years; that it was all important in a matter of this kind that the current of decisions should be uniform and consistent and should be strictly adhered to."

Then he discussed various cases and held that under Article 179 of the old

(1) (1894) 21 Cal. 542.
(2) (1904) 31 Cal. 297.
(3) (1888) 15 Cal. 502.
(4) (1880) 5 Cal. 97.

Limitation Act, limitation ran from the time when default in payment of the first instalment was made, in consequence of which, the whole amount became due basing his decision on the Full Bench ruling in *Hurronath Roy* v. *Maheroollah Mollah* (5). The learned Judge further said

"there has, however, been engrafted upon that general rule an exception in certain cases. That exception I understand to be this, that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment, has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then, the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred."

The next case I shall deal with is that of *Girindra Mohun Roy Chowdhury* v. *Bocha Das* (6) which discusses all the earlier cases including the case above referred to. The learned Judges sum up the discussion in these words: "The preponderance of the authorities supported by the decision of the Full Bench quoted above, *Hurronath Roy* v. *Maheroollah Mollah* (5), is to the effect, that in the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment, limitation would begin to run from the date of the non-payment of that instalment, unless there has been a waiver by the decree-holder by the acceptance of the overdue instalment. In view of the conflicting rulings on the subject of waiver, we feel bound to follow the decision of the Full Bench in *Hurronath Roy* v. *Maheroollah Mollah* (5)...We hold that mere abstinence on the part of the plaintiff in this case from bringing a suit for the recovery of the whole amount due on the failure of the payment of the first two instalments, did not amount to waiver." That sums up the state of the law on the subject so far as our Court is concerned. In *Hurri Pershad Chowdhry* v. *Nasib Singh* (1) and in *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (2) the learned Judges have, however, held that

"there cannot be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment."

This seems to me to unduly restrict the meaning of the term "waiver." It is an expression of wide application and significance, therefore, difficult to define: It is quite clear, however, upon the authorities that mere abstinence from suing is not waiver; but that there may not be any other means of waiving, except by acceptance of an overdue instalment, I am not prepared to accept until there is such uniformity in the decisions on that point as to compel adherence. In dealing with the question of the waiver of a notice under a covenant in a mortgage-deed in *Selwyn* v. *Garfit* (7), Bowen, L. J., defined waiver in this way:

"What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice."

This may be paraphrased thus. Waiver is consent to dispense with or forego something to which a person is entitled. It seems to me that such consent may be by express agreement between the parties, or implied from the receipt of an overdue instalment. See also *Kankuchand Shiv Chand* v. *Rustomji Hormusji* (8). In *Abinash Chandra Bose* v. *Bama Bewa* (9), Chitty and Carnduff, JJ., did not

"concur in the opinion which had been expressed in one or two of the cases cited before them."

Referring to *Hurri Pershad Chowdhry* v. *Nasib Singh* (1) and *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (2),

"that waiver can be effected only by acceptance of subsequent instalments. Waiver of such condition may be effected in a variety of ways and may be inferred from various circumstances. It must, however, always depend on some definite act or forbearance on the plaintiff's part."

I respectfully agree with that opinion. Here the plaintiff has examined three witnesses as to what happened when demand was made from the defendant on three occasions. The plaintiff firm consented to waive their benefit under the instalment bond, namely, consented not to sue for the whole sum on default on the part of the defendant of the first two instalments. They did so in two successive years, but that on the third occasion, the firm refused to consent any further. The defendant has sworn to the contrary, but I am unable to accept his evidence. Waiver of this character ought no doubt to be proved by satisfactory evidence. I hold that there is such satisfactory evidence in this case, but

(5) (1867) 7 W. R. 21 (F. B.).
(6) (1909) 36 Cal. 394=1 I. C. 49.
(7) (1888) 38 Ch. D. 273.
(8) (1896) 20 Bom. 109.
(9) (1909) 4 I. C. 17.

having regard to the fact that the payment of the first two instalments was waived, I give a decree in favour of the defendant for the sum of Rs. 9,200 with interest at 9 per cent. from 1st October, 1911 to date of suit and with costs on scale No. II.

Messrs. *Manuel, Agarwalla* and *Dey*—Attorneys for the Plaintiff.

Mr. *B. L. Mukerjee*—Attorney for the Defendant.

V.B./R.K.

Suit partly decreed.

A. I. R. 1916 Calcutta 760

JENKINS, C. J. AND CHATTERJEA, J.

Anath Nath Mitra - Defendant—Appellant.

v.

The Midnapur Zemindary Co., Ltd. - Plaintiff—Respondent.

Second Appeal No. 200 of 1912, decided on 7th June, 1915, against the Decree of Dist. Judge, Midnapur, dated 6th November, 1911.

(a) Landlord and tenant—Rent—Enhancement—Specifying a certain sum is not conclusive against enhancement of rent—Enhancement is normal condition—In absence of document conduct of parties has to be considered in determining terms—Rent is enhancible unless otherwise found.

Variableness of rent is the normal condition and even the naming of a sum is not conclusive against this; and, therefore, each case of enhancibility of rent is to be judged by its own peculiar circumstances. [P. 760, C. 2.]

Where there is no document, the conduct of the parties, especially where it extends over a long period of time, may justify an inference as to the terms on which land is held; but where there is a document defining the right of the parties, its terms must in the first instance be investigated. [P. 760, C. 2.]

Where no sufficient ground is found for excluding the normal condition of variableness, the rent is enhancible. [P. 760, C. 2.]

(b) Deed—Construction—Words should be construed in light of circumstances existing.

In construing a document to ascertain its meaning, the Court must have regard to every fact, a knowledge of which may conduce to the right application of the words used. 19 W. R 141 (P.C.) and 9 Cal. 505, ref. to. [P. 761, C. 1.]

Karunamoy Bose—for Appellant.

Rash Behari Ghose, Joges Chandra Roy and *Sitaram Banerjee*—for Respondent.

Judgment.—The appellant is a defendant in a suit for the recovery of enhanced rent. It has been conclusively determined that he is a tenure-holder and not a *raiyat* and the only question that remains for decision is, whether the rent he pays is liable to enhancement. The Subordinate Judge of the first Court at Midnapur held that the rent was enhancible and dismissed the suit. This decree has been reversed by the District Judge.

From the decree of District Judge the present appeal has been preferred. Among the points urged in opposition to the appeal is the contention that the conclusion of the District Judge is on a question of fact and so it cannot be questioned in an appeal from appellate decree.

To appreciate this argument it is necessary to observe what the conditions are which bear on the question of enhancibility of rent. Variableness is the normal condition and even the naming of a sum is not conclusive against this.

Each case, however, has to be judged by its own peculiar circumstances. If there is no document, the conduct of the parties, especially where it extends over a long period of time, may justify an inference as to the terms on which land is held.

But where there is a document defining the right of the parties, its terms must, in the first instance, be investigated.

Here the rights of the parties must be determined by the terms of the documents, and this is a matter of construction which is open to this Court on second appeal.

There are several documents and the first is dated as far back as 1824. It is expressed to be granted to Gopi Nath Mittra, "a tenant, for clearing jungle." The *jama* is at the rate of 5 annas 7 *gundas* per *bigha* and the land leased and the total rent was said to be Rs. 66-14-0. The lease, however, provided for remissions, which had the effect of making the rent progressive until in 1237 (1830) it was payable at full rate, Rs. 66-14-0. This, it was agreed, should be paid year by year as the rent of the 200 *bighas*. And then the document proceeds as follows:

"You shall continue to enjoy the jungle land with great felicity on bringing the same under cultivation, and causing the same to be held in *jote* by other persons, according to the former boundaries thereof. If you bring or cause to be brought under cultivation any land in excess

of this quantity of land, then you shall separately pay rent of the land that may be found to be excess by measurement, at the rate of 5 annas 7 *gundas* per *bigha* as stated in this *patta*. This *patta* is granted to you in respect of the land, with the exception of the *hasil* and *paikan* lands included in former *jama* but lying within the aforesaid boundaries. You shall not get any remission (in rent) on account of drought, inundation, destruction of crops by worms, jungle or waste lands."

This then is the first document we have to construe and in ascertaining its meaning the Court must have regard to every fact a knowledge of which may conduce to the right application of the words used.

Though it may be that the construction placed on no document is an authority for the construction of another, yet we have the sanction of the Privy Council that it is relevant to the construction of the lease now under consideration that it was granted with a view to the reclamation of jungle land that for the first few years the amount of rent payable was progressive, and that then a fixed rate was named. [*Soorasoonderee Debia* v. *Golam Ali* (1).] This decision has been accepted as furnishing a test in later cases, and among them it will suffice to mention *Huro Prasad Roy Chowdhury* v. *Chundee Churn Boyragee* (2).

In view of the salient facts of this case I hold that on the true construction of the lease of 1824 the rent payable by the tenant is not enhancible in the manner claimed. Of the five remaining leases four appear to be in the nature of grafts on that with which I have dealt, and each to be a recognition the additional land has come within its scope as was contemplated from the first. To each of these the same considerations apply and I hold that the rent in each case is not enhancible.

But to the 6th and last lease none of the considerations which have influenced the construction I have placed on the five earlier ones apply, and I can find no sufficient ground for excluding the normal condition of variableness. In the case of the last lease, therefore, the rent is enhancible.

We accordingly set aside the decree of the lower Appellate Court with costs throughout to be paid by the respondent. The case will go back to the lower Appellate Court for the rent of the 6th lease only to be fixed in accordance with these remarks and for a decree.

V.B./R.K.

Decree set aside; Case remanded.

(1) (1873) 19 W. R. 141=15 B. L. R. 125*n*. (P. C.).

(2) (1883) 9 Cal. 505.

A. I. R. 1916 Calcutta 761

WOODROFFE AND NEWBOULD, JJ.

Maharam Ali—Defendant—Appellant.

v.

Ayesa Khatun—Plaintiff—Respondent.

Second Appeal No. 992 of 1914, decided on 15th July, 1915, against the Decree of Sub-Judge, Tipperah, dated 15th January, 1914.

Mahomedan Law—Divorce—A *abinnamah* executed by husband authorising wife to divorce on ground of second marriage—Contract held not void.

A Muhammadan husband executed a *kabinnamah* in favour of his wife authorizing her to divorce herself from the husband in the event of his marrying a second wife. He, however, married a second wife and imputed unchastity to his first wife and refused to maintain her. Thereupon a document of *talaknamah* was executed by the wife in accordance with the provisions to that effect in her *kabinnamah*:

Held, that the contract was not void and the effect of the second marriage was to give the wife a power to divorce her husband.

[P. 762, C. 1.]

Sasadar Roy—for Appellant.

Upendra Kant Roy—for Respondent.

Judgment.—This is a suit to recover maintenance against a Muhammadan husband. The claim is in respect of the period of *iddat* after divorce. A document of *talaknamah* was executed by the wife in accordance with the provisions to that effect in her *kabinnamah*. Both the Courts have come to a conclusion that the wife is entitled to maintenance and that the divorce which she purported to effect, was a good and valid one. On appeal, it has been contended that there is no cause of action either in fact or in law. The facts are that the wife claimed under the terms of the *kabinnamah* to divorce herself from the husband under the powers which had been given her in the event of his marrying a second wife, and further she alleges that she has the right to divorce herself because he has imputed unchastity to her and refused to maintain her. These are findings of fact with which we cannot interfere in second appeal. It must be taken that such facts do exist. But it is said that in law, it was not possible

for the parties to enter into the terms which they did. We are referred to the provisions of S. 26 of the Indian Contract Act, upon which it is argued that the agreement not to marry a second wife was void. As I pointed out in the course of the argument we are not concerned, in the circumstances of the case, with the question whether or not the defendant could be restrained from marrying a second wife. The question before us is this, if he does marry a second wife, what is the effect under the terms of the *kabinnamah*? The effect of the second marriage is to give the wife a power to divorce her husband. That the husband can delegate to her, power to divorce on certain conditions, is not contested before us and as regards the condition against remarriage which is assailed, we have been referred to the decisions in *Badarannissa Bibi* v. *Mafiattala* (1), which was before, and *Ayatunnessa Beebee* v. *Karam Ali* (2), which was after the Contract Act. An expression of opinion in Mr. Ameer Ali's work on Muhammadan Law was also referred to.

Under these circumstances, we are not prepared to say that the parties could not enter into the contract into which they did enter. Lastly, it is contended that the divorce was bad, because it was not communicated to the defendant by the plaintiff. In the first place, it is by no means clear that in a case of this kind where *talaknamah* is registered, anything more than this is necessary. The case of *Sarabai* v. *Rabiabai* (3) has been cited before us. It is not reasonable to suppose that a registered document of this kind could have been executed in a mofussil village without the defendant knowing that it had been done. But apart from this, it is sufficient to dispose of this part of the case on the ground that the question was not raised in either of the two lower Courts. Had it been raised, the question whether or not there was a sufficient communication or whether the defendant had otherwise knowledge of the divorce pronounced by his wife, could have been entered into. The point not having been raised in the lower Courts cannot, in our opinion, be urged here now.

(1) 7 B. L. R. 442=15 W. R. 555.
(2) (1909) 36 Cal. 23=1 I.C. 513.
(3) (1906) 30 Bom. 537.

The result, therefore, is that we affirm the decision of the Court below and dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 762

SHARFUDDIN AND COXE, JJ.

Hanuman Persad Thakur—Plaintiff—Appellant.

v.

Jadunandan Thakur and *another*—Defendants—Respondents.

First Appeal No. 248 of 1911, decided on 10th March, 1915, against the Decree of Addl. Sub-Judge, Muzafferpore, dated 31st May, 1910.

(a) Transfer of Property Act (4 of 1882), S. 54—Enquiry about title of vendor—Vendee cannot be expected to enquire whether vendor is *benami* for a woman.

It is bad law to hold that though a purchaser is not bound to inquire whether his vendor is the *benamidar* for another man, he is bound to ascertain whether or not he is the *benamidar* of a woman. [P. 763, C. 1.]

(b) Civil P. C (5 of 1908), S. 66—Scope of—It aims at execution sales—Intention is to stop *benami* auction-purchaser.

S. 66 of the Civil Procedure Code is clearly aimed at *benami* purchases at execution-sales. [P. 763, C. 2.]

The clear intention of S. 66 of the Code is to stop *benami* purchases by making it impossible for the real owner to question the *benmidar's* title. 23 All. 175, appr. and foll. [P. 763, C. 2.]

(c) Civil P. C. (5 of 1908), S. 66—Real purchaser cannot sue on basis of possession.

A real purchaser cannot base a suit against his *benamidar* on the fact of possession. 23 Cal. 699, not foll. and appr. [P. 764, C. 1.]

Casperz and *Gonesh Dutt Singh*—for Appellant.

Umakali Mukerjee, *Laxmi Narain Singh* and *Baidyanath Narain Singh*—for Respondents.

Coxe, J.—This appeal arises out of a suit for recovery of possession of certain land that was sold in execution of a decree against one Harnandan Thakur in May 1900. It was purchased ostensibly by the defendant, Jadu Nandan Thakur. The plaintiff is the heir of one Rajbati, the sister of Jadunandan, and his case is that Jadunandan purchased the property with Rajbati's money and on her behalf, and that she remained in possession till her death in January 1906, since when the defendants are in possession. The 2nd defendant is said to have purchased

a portion of the property from Jadunandan in June 1904, in full knowledge that Jadunandan was merely a *farzidar*. The defence is that Jadunandan bought the property himself.

The Subordinate Judge has dismissed the suit, holding that it is barred by S. 66 of the Code, and also that Jadunandan was the real purchaser. The plaintiff appeals.

Against Shia Thakur, the 2nd defendant, the plaintiff has, in my opinion, no case whatever. There is no evidence worth a moment's consideration that Shia had any reason to think that Jadunandan was not the real purchaser. Bhaya Singh, an important witness for the plaintiff, admits that Shia Thakur has been in possession since his purchase, which was 1½ years before Rajbati's death. Learned Counsel contended that Rajbati, being a *pardanashin*, could not be estopped from pleading that the ostensible owner was not the true owner, unless it was shown that everything had been explained to her. This seems to me an untenable contention. To accept it would be equivalent to holding that, though a purchaser is not bound to inquire whether his vendor is the *benamidar* for another man, he is bound to ascertain whether or not he is the *benamidar* of a woman. This is evidently unreasonable.

As regards Jadunandan I feel no hesitation in holding that the suit is barred by S. 66 of the Code and, therefore, need not examine the question whether Jadunandan was or was not the real purchaser. But I may say that I incline to the belief that the Subordinate Judge's view of the facts is correct. Learned Counsel has subjected the defendant's case to powerful criticism, but clearly the whole burden of proof rests on the plaintiff. It is argued that there is a discrepancy between the defendant's pleading and his proof. In the first he asserts that he bought the property himself, whereas in his evidence he says that he obtained the money from his brother with whom he lives in commensality. This does not seem to me of very much importance, especially when it is remembered that the defendant's case is that the sale certificate is conclusive. It is contended also that as Jadunandan was Rajbati's *mukhtear*, the burden of proving the good faith of all transactions between them rests on him. But it is open to doubt whether the power-of-attorney authorised Jadunandan to purchase property for Rajbati or to manage her estates, and in any case we have not to decide what was the character of a transaction between them; but whether there was any transaction between them or not. No real explanation has been given why Rajbati should want to buy his property which is many miles away from her home. It can hardly have been with a view to enrich the estate, because that had to descend to the plaintiff with whom she had quarrelled. The reason assigned in the evidence, namely, that she wanted to restore it to the judgment-debtor who was her kinsman, would have appealed with equal strength to her brother, Jadunandan.

As I have said, however, the suit is, in my opinion, barred by S. 66 of the Code, which lays down that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. Now here the defendant certainly claims under a certified purchase and the suit is based on the ground that the purchase was made on behalf of the plaintiff's predecessor-in-interest. Learned Counsel contends that the plaintiff also sues on the ground that Rajbati remained in possession till her death and relies on the decision in *Sasti Churn Nundi* v. *Anopurna* (1), which certainly is in his favour.

If the decision quoted is correct, it makes a very serious inroad on the section, and indeed I do not think it would be going too far to say that, if it is accepted, the section is for all practical intents and purposes repealed. The section is clearly aimed at *benami* purchases at execution sales. We have no need of a specific provision of law that a suit against a real purchaser, based on a false allegation that he is a *benamidar*, must fail. The clear intention of the section is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title. It is sometimes said that the Legislature cannot have intended to enable fraud to be practised. But I

(1) (1896) 23 Cal. 699.

cannot attach any other meaning to the section than this, that it aims at discouraging *benamis* by rendering the real purchaser helpless if he is cheated by his *benamidars*.

Now if the view taken in the case cited above is correct, namely, that the real purchaser can base a suit against his *benamidar* on the fact of possession, it is evident that the section at once loses all its effect. The purchase being *ex hypothesi* a *benami* purchase, the real purchaser would naturally get possession in every case, so that the only cases in which the section would be of any practical use would be those rare instances in which the parties quarrel immediately, even before possession is delivered. It can never have been the intention of the Legislature to enact the section for this limited purpose.

I agree with the decision in *Bishan Dial* v. *Ghazi-ud-Din* (2). It is not necessary, however, to refer the decision in *Sasti Churn Nundi* v. *Anopurna* (1) to a Full Bench, because the present case can be distinguished, as the trial Judge has pointed out, though it must be conceded that the distinction is somewhat unreal. Reading paragraph 7 of the plaint it cannot be disputed that this suit was brought "on the ground that the purchase was made on behalf of some one through whom the plaintiff claims."

The appeal fails and must be dismissed with costs. Defendant No. 2 is entitled to separate costs.

Sharfuddin, J. – I agree.

In the memorandum of appeal, we are informed that the value of the appeal has been put down as Rs.2,249-8-6, which is a mistake for Rs. 6,005.

V.B./R.K.

Appeal dismissed.

(2) (1901) 23 All. 175.

A. I. R. 1916 Calcutta 764

JENKINS, C. J. AND N. R. CHATTERJEA AND MULLICK, JJ.

Abdul Rahman Chowdhuri—Plaintiff—Appellant.

v.

Ahmadar Rahman and *others* - Defendants—Respondents.

Second Appeal No. 2462 of 1910, decided on 10th August, 1915, from the decision of Dist. Judge, Chittagong, dated 29th April, 1910.

Bengal Tenancy Act (8 of 1885), S. 161—Interest of unregistered purchaser of *putni* tenure is not an incumbrance.

"Per *Jenkins, C.J. and N. R. Chatterjea, J.*, (*Mullick, J.*, dissenting).—An interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act.

[P. 767, C. 2, P. 769, C. 1 & P. 771, C. 1.]

Probodh Kumar Das and *Khitish Chandra Chakerverty* – for Appellant.

Dhirendra Lal Kastgir and *Biraj Mohun Mojumdar*—for Respondents.

N. R. Chatterjea, J.—The plaintiff-appellant purchased a *putni taluk* at a sale held in execution of a decree for arrears of rent, and sued to recover possession of the lands in suit which were included in the *taluk*, from the defendants who were in possession thereof by purchase from the former *putnidar*. The Courts below dismissed the suit on the ground that the purchases made by the defendants of portions of the *putni* were "incumbrances" within the meaning of S. 161, Bengal Tenancy Act, which had not been annulled according to the provisions of S. 167 of that Act. The plaintiff has appealed to this Court.

Before dealing with the above question, I will notice a point raised on behalf of the respondents, *viz.*, that the landlord was bound to recognise the transfers of portions of a permanent tenure, and the transferees not having been made parties to the rent suit, the sale held in execution of the decree for rent passed only the interest of the person who was a party to the decree. But the tenure in the present case is *putni* tenure, and under the Putni Regulation, transfers of fractional portions of a *putni taluk* are not binding upon the *zemindar*, although the transferee acquires a valid title to the portion purchased. This is clear from Ss. 5 and 6 of the Regulation, and if any authority were needed, I may refer to the decision of the Judicial Committee in *Watson & Co.* v. *Collector of Zillah Rajshahye* (1). The cases relied upon on behalf of the respondent do not support his contention. In *Sourendra Mohan Tagore* v. *Surnomoyi* (2), it was held that although the transferee of a fractional share of a *putni* cannot enforce registration of his name

(1) (1869-70) 13 M. I. A. 160=12 W. R. 43=2 Suth. 269=2 Sar. 500 (P. C.).

(2) (1899) 26 Cal. 102.

on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void, and he is liable for rent severally and jointly with the registered tenant, if the landlord chooses to recognise him as one of the joint-holders of the *putni* and he is also liable for the entire rent of the *putni* estate. The other case, *Aosub Ali Pramanik* v. *Biseshuri* (3), also is to the same effect. These cases are no authorities for the proposition that the transfer of a share in *putni*, without the express consent of the *zemindar* is binding upon him. They only lay down that the transferee is liable jointly with the registered *putnidar* if the landlord chooses to recognise him as one of the joint holders of the *putni*. In the present case, the *zemindar* did not recognise the transferees and he was not bound to do so. This contention must, therefore, be overruled.

The *zemindar* sued the registered *putnidar* for rent, and in execution of the decree for rent brought the tenure to sale, and the plaintiff purchased it with power to annul all incumbrances. The defendants were unregistered transferees of the *putni*, and the question is whether their interests were incumbrances within the meaning of S. 161 of the Bengal Tenancy Act.

Now the defendants being transferees of portions of the *putni*, their position was that of co-sharers of the former *putnidar* though not recognised by the landlord. The sale held in execution of the decree for arrears of rent against the recorded *putnidar* passed the tenure itself, and not merely the right, title and interest of the recorded *putnidar*. The recorded *putnidar* represented the ownership of the *putni*, and so far as the *putni* interest itself was concerned, the sale passed the interest of the transferees of the portions of the *putni* as much as it did that of the recorded *putnidar*.

S. 161 of the Bengal Tenancy Act lays down that for the purposes of Chapter 14 of that Act, the term "incumbrance" used with reference to a tenancy "means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding, or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section (S. 160)." Now the right or interest created by the sale of a portion of the tenure itself is not a right or interest created by the tenant on the tenure, nor, do I think, is it a right or interest "in limitation of his own interest therein". The words "his own interest therein" in the case of a tenure mean the interest of a tenure-holder; and the right or interest created must be in limitation of such interest, and not a transfer of the tenure-holder's interest itself. By the sale of a portion of the tenure, the interest of the tenant in the tenure itself to the extent of the portion sold is transferred, and not an interest created in limitation of his own interest in the tenure. It is said that when a tenant transfers a part of his tenure, he does so in limitation of his interest, meaning thereby his entire interest, in it. But the words "in limitation of his own interest therein" would seem to indicate that it is not limitation in respect of the quantity or extent of interest which is contemplated and which could have been sufficiently expressed by saying "his interest therein," but has reference to limitation in respect of the particular interest held by the tenant.

The purchaser of a portion of the tenure professes to purchase and does purchase the ownership of the tenure itself to the extent of the portion purchased, and becomes a co-sharer of the original tenant. He is as much bound by the decree for rent as his vendor. He can maintain a suit for his share of the surplus proceeds of the sale held in execution of a decree for rent against the recorded tenant [see *Matangini Chaudhurani* v. *Sreenath Dass* (4)]. It is true a mortgagee can also do so, but a mortgagee can do so only as an incumbrancer and to the extent of his lien, whereas the purchaser of a portion of the tenure has right as a tenure-holder to the surplus sale-proceeds representing the portion purchased by him, because the sale is of the tenure including the portion purchased by him.

I think, therefore, that the words "in limitation of his own interest therein" do not refer to a sale of the tenure-holder's interest. As pointed out in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (5), the right created by a sale of a portion of the

(3) (1908) 8 C. L. J. 554.

(4) (1903) 7 C. W. N. 552.
(5) (1910) 5 I. C. 116.

tenure itself is to that extent not in "limitation," but in "extinction," of the rights of the tenure-holder. If the sale of a portion of a tenure is an incumbrance, the sale of the whole tenure would also be an incumbrance, and the purchaser at a sale for arrears of rent would get nothing unless he takes step within a year from the date of the sale to annul the interest of the private purchaser under S. 167, Bengal Tenancy Act. I do not think such a result was contemplated by the section.

I may in this connection refer to certain observations of Mookerjee, J., in *Bhawani Koer* v. *Mathura Prasad* (6), where one of the questions to be considered was, whether the interest of a person who has acquired by purchase the rights of the owner constitutes an "incumbrance" within the meaning of S. 54 of Act XI of 1859. The learned Judge observed:

"It was not disputed, and in my opinion, it could not be reasonably disputed, that if a person acquires the interest of the original owner of the estate before the default is made, his interest cannot be said to be an incumbrance and passes by the sale to the purchaser, because what is sold is in essence his share in the estate,"

and again—

"a purchaser of the interest of the proprietor, after default and before the revenue sale, is quite as much bound by the revenue sale as the proprietor himself, because in substance, he occupies the position of the proprietor."

The observations were no doubt made in connection with the provisions of S. 54 of the Revenue Sale Law, which does not contain a definition of the word "incumbrance" and I have referred to them only to show that the purchaser of the interest of the proprietor stands in the same position as the proprietor himself in relation to the sale.

We were referred to several cases, but none of them holds that a purchase of the tenure-holder's interest is an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act. In the case of *Chundra Sakai* v. *Kali Prosonno Chuckerbutty* (7), it was held by Norris and Gordon, JJ., that an exchange of land is an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act. Gordon, J., in delivering the judgment of the Court observed—"It seems to us that the exchange by which this land was acquired by the defendants was in limitation, if not in fact in destruction, of the original tenant's right in the holding."

The case of an exchange may perhaps be distinguished from that of a sale, although the two stand on the same footing generally so far as the rights of the parties are concerned. A person who takes the land of a tenure by exchange, does not take it as a part of the tenure nor as a tenant. The tenant does not create an interest in the tenure itself as in the case of a sale, and in that view, it may possibly be said that he creates an interest in "limitation" of his own interest in the tenure.

But if there is no distinction between an "exchange" and a "sale" so far as the present question is concerned, the view that an "exchange" is in "limitation" of the tenant's interest is opposed to that taken in *Tamizuddin* v. *Khoda Nawaz Khan* (5), and if in exchange is in "destruction" of the tenant's right it cannot be an "incumbrance" within the meaning of S. 161 of the Bengal Tenancy Act. I have doubts about the correctness of the decision in the case of *Chundra Sakai* v. *Kali Prosonno Chuckerbutty* (7) referred to above, and in any case, I think, it ought not to be extended further. In *Jogeshwar Mazumdar* v. *Abed Mahomed* (8), there is an observation that a

"lease just as much as a sale, gift or mortgage must come within the word 'incumbrance'."

In that case the learned Judges had only to deal with the question whether a "lease" is in "incumbrance" within the meaning of S. 11, Clause (3) of the Putni Regulation. It is true that under that Regulation, sales and gifts as well as mortgages and leases are treated as "incumbrances." But the word "incumbrance" appears to have been used in that Regulation in a different sense, as it includes a sale of the entire *putni* itself. Besides, the purchaser, under S. 15 of that Regulation, is entitled on applying to the Civil Court to obtain possession against the assignees of the defaulting *putnidar* at the time of delivery of possession.

The mode of enforcement of rights of the purchaser of a *putni taluq* as against assignees of the defaulting *putnidar* under the Putni Regulation is different from

(6) (1908) 7 C. L. J. 1.
(7) (1896) 23 Cal. 254.
(8) (1904) 3 C. W. N. 13.

that of a purchaser under the Bengal Tenancy Act, and the question we have to consider in the present case is, whether the interest of the purchaser of a portion of a tenure is an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act, which if not set aside under S. 167 of the Act stands good against the purchaser.

The other cases referred to in argument are *Tamizuddin Khan* v. *Khoda Nawaz Khan* (5) and *Asgar Ali* v. *Gouri Mohan Roy* (9). Both the cases dealt with the meaning of the word "incumbrance" in S. 86 of the Bengal Tenancy Act. In the first, it was held that the sale of a portion of a non-transferable occupancy holding is not an incumbrance within the meaning of S. 86, sub-S. (6) and (7) of the Bengal Tenancy Act and the case of *Jogeshwar Mazumdar* v. *Abed Mahomed* (8) was distinguished. In the second, which was decided by Mookerjee, J., and one of the members of the present Bench, it was held that the surrender by the tenant of his holding to his landlord in that case after he had transferred a portion of his holding was collusive, and that so long as the tenancy of the original tenant subsisted, the landlord was not entitled to eject the transferee. Another question was raised in the case, *viz.*, whether the purchaser of a portion of a holding is not protected under sub-S. 6 of S. 86 of the Bengal Tenancy Act, but in the view that was taken of the rights of the parties with reference to the first question, the Court held that it was not necessary to decide whether the case of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (5), upon which reliance was placed on behalf of the respondent, furnished a correct exposition of the law. The Court, however, observed that at least four points required consideration with reference to the decision in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (5). The last two points referred to by the Court have no bearing upon the construction of S. 161 of the Bengal Tenancy Act. With regard to the first two points, it was observed—"in the *first* place, the learned Judges adopted for the purposes of the interpretation of S. 86, which finds a place in Chapter IX of the Bengal Tenancy Act, the definition of the term 'incumbrance' given for the purposes of Chapter XIV alone. In the *second* place, the decision of this Court in the case of *Chundra Sakai* v. *Kali Prosonno Chuckerbutty* (7) shows that an exchange is an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act, and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale. Now, the Court in that case expressly said that it was not necessary to determine whether the case of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (5) was correctly decided, and reserved its opinion upon the question involved in the said case. But the observation on the first point indicates, if anything, that in the view of the Court, the term "incumbrance" as used in S. 161 is not the same as in S. 86, and the observation on the second point, *viz.*, that "there does not appear to be any real distinction between an exchange and a sale" was made in relation to the question before the Court, *i.e.*, in connection with S. 86 of the Bengal Tenancy Act. The Court in that case had nothing to do with the construction of the term "incumbrance" in S. 161 of the Bengal Tenancy Act, and these cases under S. 86, therefore, do not apply to the present case.

It is pointed out that adverse possession for the statutory period has been held to be an "incumbrance." In the case of adverse possession, however, although the tenant by allowing the adverse possessor to acquire a right may be said to create an interest in limitation of his interest in the tenure, no right is created in favour of such a person as a tenant as in the case of a sale, and the latter does not hold the portion in respect of which he acquires a statutory title, as a tenant or as part of the tenure. The purchaser of a portion of the tenure, on the other hand, acquires a right to a portion of the tenure itself, and holds such portion as a tenant and as a part of the tenure, and his position, therefore, differs materially from that of a person who has acquired a statutory title against the tenant.

I am of opinion that the interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act, and that the purchaser at a sale held in execution of a rent-decree against the recorded

(9) (1913) 21 I. C. 58.

putnidar is not required to annul such an interest under the provisions of S. 167 of the Bengal Tenancy Act.

In my opinion, therefore, the decree of the lower Courts should be set aside and the suit decreed.

Mullick, J.—The defendant is the purchaser of a share in a *putni taluk* from the registered tenant and the question is, whether his interest is an incumbrance on the tenure within the meaning of S. 161, Bengal Tenancy Act. If the interest is not an incumbrance, then the auction-purchaser who is the *zemindar* is entitled to take possession without annulling the defendant's interest. In the present case, admittedly the procedure for annulment of incumbrances has not been taken within the statutory period of one year from the date of the sale or from the date on which the purchaser had notice of the incumbrance, and the decree-holder's suit for *khas* possession must fail unless he can show that the interest in question is not an incumbrance.

Now an incumbrance as defined in S. 161 being any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and not being a protected interest as defined in the last foregoing section, it seems to me clear that the interest of a purchaser of a share of a tenure from one of the registered tenants must fall within this definition, and if the meaning of the Statute is plain, it is not our province to speculate as to the intentions of its framers. A tenant by selling a portion of his tenure creates a right or interest on his tenure as well as an interest in limitation of his own interest in the tenure. The extinction of his interest in that portion of the tenure which is transferred, does not affect the matter. The sole question is whether the definition applies.

This would appear to have been the view taken by this Court in *Chundra Sakai* v. *Kali Prosonno* (7). In that case, the plaintiff was the auction-purchaser of a *raiyati* holding at a rent-sale brought about by the *putnidar* and sued to eject the defendants from three plots of land in the holding, which the defendants claimed to have obtained from the recorded tenant in exchange for some other lands outside the holding. It was held that the interest of the defendants was an incumbrance within the meaning of S. 161. The learned Judges observed in that case that the defendants had an incumbrance upon the holding and the exchange by which the land was acquired by the defendants was in limitation, if not in destruction, of the original tenant's right in the holding.

Although other Statutes do not always furnish a safe guide, yet in the present case it would be useful to examine the previous law upon the subject of annulment of incumbrances in respect of tenancies. The first Statute which gave the auction-purchaser of a tenure sold for arrears of rent, the power to avoid incumbrances was Regulation VIII of 1819. The term "incumbrance" is not defined in that Regulation, but it is clear from the text that it covers transfers by sale, mortgage or gift. A complete extinction of the tenant's interest is, therefore, under the Regulation not inconsistent with the creation of an incumbrance. But Regulation VIII of 1819 only applied to a limited class of saleable tenures and although S. 105, Act X of 1859, rendered all other saleable tenures also liable to sale for arrears of rent, there was no procedure for bringing the latter to sale free of incumbrances. This difficulty was removed by Act VIII (B. C.) of 1865. In that Act also, there is no definition of the term "incumbrance" but the reported cases show that a sale by the registered tenant of a portion of his tenancy had the effect of creating an incumbrance, the transferee being regarded as the holder of a rent-free tenure: *Shib Doss Banerjee* v. *Bamun Doss Mukerjee* (10) following *Sreenath Chuckerbutty* v. *Sreemunto Lushkur* (11). Finally Act VIII of 1885, while leaving Regulation VIII of 1819 untouched, repealed Act X of 1859 and provided a procedure for bringing all saleable tenures to sale for arrears of rent. It reproduced in effect the provisions of Act, VIII (B. C.) of 1865 in regard to incumbrances and added a definition of the term "incumbrance."

Therefore, upon the analogy of the rulings under Act VIII (B. C.) of 1865, and in the absence of anything in the present Act which compels us to adopt a

(10) (1871) 15 W.R. 360.
(11) (1868) 10 W.R. 467.

contrary interpretation, I think it would be reasonable to hold that a purchaser from a registered tenant is in the position of a rent-free sub-tenant and is still an incumbrancer within the meaning of S. 161 of the present Act.

In *Jogeshwar Mazumdar* v. *Abed Mahomed* (8), the point for consideration before the Court was whether a tenancy granted by a *putnidar* was an incumbrance within the meaning of the Putni Regulation, but in giving judgment Rampini, J., observed that a lease just as much as a sale, gift or mortgage must come within the meaning of the word "incumbance." It is true, the correctness of that decision was doubted by Caspersz and Doss, JJ., in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (5), where they held that the sale of a portion of a non-transferable holding was not an incumbrance within the meaning of S. 86, Bengal Tenancy Act. But with regard to this case, it is to be observed in the *first* place, that Ss. 85 and 86 of the Bengal Tenancy Act (Act VIII of 1885) contain no definition of the term "incumbrance" and in the *second* place, that the Court was to some extent at least influenced by the consideration that the transfer having taken place without the consent of the superior landlord the transferor had not created any valid incumbrance.

On the other hand, in so far as the decision was authority for the proposition that a sale of a portion of a non-transferable occupancy holding was not an incumbrance, it was expressly dissented from in *Asgar Ali* v. *Gouri Mohan Roy* (9) by a Division Bench of this Court of which I was a member. In that case we relied *inter alia* on *Chundra Sakai* v. *Kali Prosonno* (7) and were of opinion that if an exchange created an incumbrance within the meaning of S. 161, Bengal Tenancy Act, there was no reason why a similar result should not follow from a sale, and applying this line of reasoning to S. 86 also, we held that an interest in a portion of a non-transferable occupancy holding acquired by purchase, was an incumbrance.

My learned brother has in the present case based his decision to some extent upon certain decisions relating to the Revenue Sales Act (Act XI of 1859). For the purposes of S. 54 of that Act, it has been held that the interest of a purchaser from the defaulting proprietor before default, is not an incumbrance: *Bhawani Koer* v. *Mathura Prosad* (6) and *Annoda Prosad Ghose* v. *Rajendra Kumar Ghose* (12). It has also been held that a person acquiring by adverse possession the interest of the defaulter before default is not an incumbrancer. These decisions, however, were founded upon a consideration of the policy of the Revenue Sales Act and it was felt that in the absence of any definition of the term "incumbrance" it would not be right to apply the term to the interest of a purchaser from the defaulter; for in that case, the auction-purchaser would get nothing at all, a state of affairs which would completely defeat the object of the framers which was the security of the revenue. No such considerations of policy arise in reference to sales held under Act VIII of 1865 and still less to those under Act VIII of 1885, which gives by definition a specific meaning to the term. Indeed on general principles, I cannot see how an interest acquired by purchase can be distinguished from one acquired by exchange or adverse possession.

It appears to be settled that for the purposes whether of the Putni Regulation or Act VIII of 1865, or of the Assam Land Revenue Regulation, a person who acquires by adverse possession some part of the right of the registered tenant, is an incumbrancer. I see no reason for doubting that he would also be an incumbrancer within the meaning of S. 161 of Act VIII of 1885, notwithstanding the fact that the acquisition of his interest means the complete destruction of the tenant's interest in the portion so acquired.

On principle, therefore, the complete extinction of the tenant's interest in a part of the tenancy does not seem to be inconsistent with the terms of S. 161.

But in the case before us, there is a further ground for holding the interest of the transferee to be an incumbrance. That ground is that the purchaser having acquired a fractional share and not being entitled to claim registration under the Putni Regulation, the extinction of the purchaser's interest *qua* the landlord is not complete. There has, therefore, been no complete extinction of the tenant's interest.

(12) (1902) 29 Cal. 223.

The result is that I summarise the grounds upon which I base my judgment as follows :—

1. The definition in S. 161, Bengal Tenancy Act, covers the sale of a portion.

2. The reported decisions seem to support the view I have taken, with the exception of the cases under Act XI of 1859 which do not apply and *Tamizuddin Khan* v. *Khoda Nawaz Khan* (5) which has been dissented from.

3. No question of policy stands in the way.

I would, therefore, dismiss the appeal with costs.

As we differ in opinion on a point of law, *viz.*, whether the interest of an unregistered purchaser of a portion of a *putni* tenure is an "incumbrance" within the meaning of S. 161 of the Bengal Tenancy Act, the case is laid before the Chief Justice, so that the point may be referred to one or more Judges under S. 98 of the Civil Procedure Code.

The case came up for final disposal before Sir Lawrence Jenkins, C. J.

Jenkins, C. J.—The point of law referred under S. 98 of the Code of Civil Procedure is whether the interest of an unregistered purchaser of a portion of a *putni* tenure is an "incumbrance" within the meaning of S. 161 of the Bengal Tenancy Act. In its practical aspect, the question is whether a purchaser of a tenure under a rent-decree must annul the interest of an unregistered purchaser in order to get a clean title, and whether on his failure so to do, the title of the unregistered purchaser prevails against him. It is not suggested that it was a defect in the rent-decree that the unregistered and unknown purchaser was not a party to the suit; the registered tenant represented the ownership of the whole tenure and as the sale was not of the defendant's interest but of the whole tenure, that tenure passed to the purchaser on the sale in execution of the rent-decree. The only limitation on the purchaser's acquisition was that he took subject to the interests (if any) defined in Chapter XIV of the Bengal Tenancy Act as "protected interests," but with power to annul the interests defined in that chapter as "incumbrances." There were no protected interests, but it is contended that the interest of the unregistered purchaser is an "incumbrance," and that as the necessary steps to annul it were not taken, it still subsists. In support of this view reliance is placed on the meaning ascribed to the terms "incumbrance" by S. 161.

The section runs as follows :—

"For the purposes of this Chapter (*a*) the term 'incumbrance,' used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section."

The language used, it is maintained, extends the meaning of the term incumbrance beyond its ordinary signification so as to include any disposition of the tenancy, even an absolute assignment on sale of the entirety, and it is conceded that all that can be urged in favour of an assignment of a part must equally extend to an assignment of the whole; the two stand or fall together.

It is difficult to understand why the inferior interests of a lien, sub-tenancy and easement alone should have been mentioned, if the intention was that the superior interest involved in an assignment was to be included in the general words. It runs counter to the first principles of construction. An incumbrance would not ordinarily mean or include an absolute assignment, nor would it be a right or interest created on the tenure. Can it be said to be in limitation of the tenant's interest? I think not; these words appear to me to refer not to the area but to the quality of the tenant's interest. This view preserves the essential characteristics of a lien, sub-tenancy or easement, for the idea inherent in these leading words is that of a graft on a subject-matter which is not destroyed but still continues, though in a modified form. The more general words that follow are at least as susceptible of a meaning which would give effect to that idea as the wider but less appropriate one for which the respondents contend.

It is urged, however, that there are decisions which compel me to hold an absolute sale as an incumbrance and special stress is laid on the case of *Chundra Sakai* v. *Kali Prosonno Chuckerbutty* (7) where it was held that an exchange of land is an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act.

The Court there was dealing with an exchange followed by a long possession,

and the subject-matter was a holding, not tenure. The *ratio decidendi* is to be found in these words:

"The exchange by which this land was acquired by the defendant was in limitation, if not in fact in destruction of the original tenant's right in the holding."

A distinction was thus recognised between limitation and destruction and presumably it was considered an exchange was a limitation, for S. 161 does not extend to that which is in destruction of the tenant's right. Whether this be a true view of the effect of an exchange, may have to be reconsidered in the future, it does not arise now. I am concerned only with an absolute sale and that, in my opinion, is not in limitation but in destruction of the interest to which it relates. On the question referred, therefore, I hold that the interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act.

Therefore, according to the opinion of the majority of the Judges who have heard the appeal, the decree of the lower Appellate Court is reversed and a decree for possession passed in the plaintiff's favour.

The case must go back to the Court of first instance for a decree as to mesne profits in accordance with O. 20, R. 12. The respondent will pay the appellant's costs of this appeal and reference.

V.B./R.K.

Decree reversed; Case sent back.

A. I. R. 1916 Calcutta 771 (1)

JENKINS, C.J. AND N. R. CHATTERJEA, J.

Mohesh Chandra Mukherjee and *others* —Defendants—Appellants.

v.

Omesh Chandra Ghosal and *others*—Plaintiffs—Respondents.

Second Appeal No. 2958 of 1913, decided on 24th May, 1915, against the Decree of Offg. Dist. Judge, Birbhum, dated 27th June, 1913.

Civil P. C. (5 of 1908), O. 34, R 1—Effect of not making a person interested in redemption a party—He can sue for possession on condition of his paying the debt due.

Where, in a suit for recovery of possession by the plaintiffs, it appeared that they, being interested in the equity of redemption in the property, were omitted from the previous suit whereby the defendants enforced their mortgage:

Held, that the defendants were not entitled to so omit the plaintiffs but that the plaintiffs could not get a decree for possession without any provision as to payment of what may be due under the mortgage to the defendants.

Ram Chandra Mozumdar and *Chandra Sekhar Banerjee*—for Appellants.

Dwarka Nath Mitter and *Jitendra Lal Banerjee* and *Bhudar Haldar*—for Respondents.

Judgment.—This is a suit for recovery of possession by the plaintiffs, who allege with truth that being interested in the equity of redemption in the property they were omitted from the suit whereby the appellants-defendants Nos. 1 to 6 enforced their mortgage. Defendants Nos. 1 to 6 have given us an explanation how they came to omit the plaintiffs. Indeed they go so far as to contend that they were entitled to omit them. We are unable to accept that argument. But, on the other hand, we think that the decree which grants the plaintiffs possession without any provision as to payment of what may be due under the mortgage to the defendants Nos. 1 to 6 cannot be supported. We, therefore, set aside the decree of the lower Appellate Court and send back the case to the Court of first instance in order that it may be there determined what having regard to all the circumstances in the case, is a proper sum to be paid by the plaintiffs for the purpose of redeeming their share in the property in suit.

We think that the costs of the two appeals, that is, in the lower Appellate Court and in this Court must be borne by the plaintiffs, but the costs of the suit already incurred and the costs yet to be incurred are left to the discretion of the Judge by whom the case will be heard.

V.B./R.K.

Decree set aside: Case remanded.

A. I. R. 1916 Calcutta 771 (2)

MOOKERJEE AND N. R. CHATTERJEA, JJ.

Bouwang Raja Challaphroo Chowdhury —Defendant—Appellant.

v.

Banga Behary Sen—Plaintiff—Respondent.

Second Appeal No. 3929 of 1913, decided on 17th August, 1915, from the

Decree of Dist. Judge, Chittagong, dated 30th June, 1913.

(a) Contract—Document need not be signed by both parties—Suit on bond—Document executed by party and accepted by another—Agreement completed.

A contract in writing in India does not necessarily imply that the document must be signed by both the parties thereto. [P. 773, C. 1.]

Therefore, a bond executed by a party and delivered to the other party and accepted by him completes the agreement between the parties and in law this amounts to a contract in writing. [P. 773, C. 1.]

(b) Limitation Act (9 of 1908), Art. 116—Applicability—Bond not signed by both parties.

Art. 116 of Schedule I to the Limitation Act, 1908, applies to cases of bonds not signed by both the parties. [P. 773, C. 1.]

(c) Interest—High rate—Court entitled to grant relief.

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. The fact that the rate of interest is excessive is sufficient by itself to justify the inference that the rate is penal and unenforceable. [P. 773, C. 2.]

(d) Contract—Right to enforce—Contract unenforceable—Party not entitled to set up other reasonable terms—Discretion of Court—Illustrated.

Once a contract between the parties is deemed unenforceable, the plaintiff is entirely in the hands of the Court, he is not entitled to substitute for the original contract another contract which may appear to him to be reasonable. [P. 774, C. 1.]

Where the plaintiff was by contract entitled to interest on his loan at the rate of 5858 per cent. a year and sued to recover interest at the rate of 40 per cent. a year.

Held, that no Court of Justice will enforce such a contract and in the opinion of the Court the plaintiff was entitled to 12 per cent. per annum simple interest by way of damages for the detention of the money. [P. 774, C. 1.]

Probodh Chunder Roy—for Appellant.

Kshitis Chunder Sen and *Pares Chunder Sen*—for Respondent.

Judgment.—This is an appeal by the defendant in a suit for recovery of money. On the 16th January, 1895, the defendant borrowed from the plaintiff Rs. 400 on interest at 4 per cent. per mensem, with six monthly rests; the money was made re-payable at the end of a year. These terms were incorporated in a bond executed by the defendant, and subsequently registered and delivered to the plaintiff. On the 25th December, 1901, the defendant paid the plaintiff Rs. 20 on account of interest, and on the 22nd December, 1904, he made a similar payment of Rs. 30. These payments were duly endorsed on the back of the bond and the entries were signed by the defendant. On the 15th December, 1910, the plaintiff instituted this suit for recovery of his dues on the bond. The schedule to the plaint set out an elaborate statement of accounts which showed that on the date of the commencement of the suit, a sum of Rs. 3,75,345-8-0 was payable by the defendant to the plaintiff. In the third paragraph of the plaint, however, the plaintiff stated that he could not possibly realise this large sum from the properties of the defendant and he consequently confined his claim to the modest sum of Rs. 3,000. The defendant pleaded in answer to the suit, *first*, that the claim was barred by limitation; and *secondly*, that the rate of interest was unconscionable and should not be enforced by a Court of Justice. The Courts below have overruled these contentions and have decreed the suit for the amount claimed. On the present appeal, the decree of the District Judge has been assailed on two grounds: namely *first*, that the claim is barred by limitation; and *secondly*, that interest is not recoverable to the extent claimed by the plaintiff.

As regards the *first* ground, the appellant has argued that Article 116 of the Schedule to the Indian Limitation Act is of no assistance to the plaintiff. That Article provides that a suit for compensation for the breach of a contract in writing registered must be instituted within six years from the date when the period of limitation would begin to run in a suit brought on a similar contract not registered. The argument of the appellant is that there is no contract in writing registered, because the bond whereon the suit is instituted was not signed by the plaintiff as well as by the defendant. In support of this contention reliance has been placed upon the decisions in *Apaji Bapuji* v. *Nilkantha Annaji* (1) and *Ramasami Chetti* v. *Sokhanda Chetti* (2). The first of these decisions, we observe, was not followed by this Court in *Panchanan Das Majumdar* v. *Kunja Behari Malo* (3). The second case, we observe, enunciates a rule contrary to what has been subsequently adopted by the Madras High

(1) (1901) 3 Bom. L. R. 667.
(2) (1891) 1 M. L. J. 737.
(3) (1908) 35 Cal. 683=1 I. C. 438.

Court in *Ambalavana Pandaram* v. *Vaguran* (4), *Kotappa* v. *Vallur Zemindar* (5), *Zemindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (6) and *Kotappa* v. *Vallur Zemindar* (5). We are not prepared to accept the contention of the appellant, for as was pointed out by Sir Francis Maclean, C. J., in *Panchanan Das Majumdar* v. *Kunja Behari Malo* (3), if we were to adopt this view we would have to read into Article 116 words not to be found there. There is in this case unquestionably a registered document, does, then, that document constitute a contract in writing? No doubt a contract implies two parties; but a contract in writing in this country does not necessarily imply that the document must be signed by both the parties thereto. In the case before us, the bond was executed by the defendant and delivered to the plaintiff. Acceptance by the plaintiff completed the agreement between the parties, and there was consequently, in law a contract in writing which was subsequently registered. We may add that there are expressions in the judgment in *Apaji Bapuji* v. *Nilkantha Annaji* (1) which indicate that the principle adopted there would not have been applied to the case before us. Sir Lawrence Jenkins, C. J., stated with reference to the document then before him that it was important to know that the document was not signed at its foot by the defendants who were sought to be made liable on the basis thereof, nor by any one on their behalf, and he added with reference to the decision in *Ambalavana Pandaram* v. *Vaguran* (4), that the case was distinguishable, because there the contract was signed at the foot by the party sought to be charged in the suit. We need not, consequently, express an opinion upon the question, whether the decision in *Apaji Bapuji* v. *Nilkantha Annaji* (1) may be defended on its special circumstances, because it is manifest that the principle there recognized does not govern the case before us. We hold accordingly that Article 116 is applicable to cases of the description now before us, and this view has been followed by implication in a long series of decisions of this Court, such as *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (7) and *Ethel Georgina Kerr* v. *Clara B. Ruxton* (8).

As regards the *second* ground, the appellant has argued that the provision for interest contained in the bond is in the nature of a penalty and is not enforceable in a Court of Justice. In support of this view reliance has been placed upon the decisions in *Abdul Majid* v. *Ksherode Chandra Pal* (9) and *Khagaram Das* v. *Ram Sankar Das* (10). In the case last mentioned, it was pointed out upon a review of the earlier authorities on the subject that the more modern decisions recognised the rule that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. It was further explained that the fact that the rate of interest was excessive, might be sufficient by itself to justify the inference that the rate was penal and unenforceable. In support of this view, reliance may be placed on *Webster* v. *Bosanquet* (11) and *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo Castaneda* (12). Reference may also be made to the observations of Lord Loreburn, Lord Macnaghten and Lord James in *Samuel* v. *Newbold* (13). Lord Loreburn said:—

"We are asked to say that an excessive rate of interest could not be of itself evidence, that the transaction was harsh and unconscionable. I do not accept that view Excess of interest or charges may of itself be such evidence and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty."

Lord Macnaghten was still more emphatic:

"The rate of interest may be so monstrous as to show of itself that the transaction is harsh and unconscionable. There may be, as Lord Thurlow said in the case of *Gwynne* v. *Heaton* (14), an inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense without producing and exclamation at the inequality of it."

Lord James added:

"Excessive interest of itself is sufficient to render a contract harsh, and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle the debtor to relief. What amounts to excessive interest is to be

(4) (1896) 19 Mad. 52.
(5) (1902) 25 Mad. 50.
(6) (1902) 25 Mad. 587.
(7) (1881) 6 Cal. 94.
(8) (1906) 4 C. L. J. 510.
(9) (1915) 42 Cal. 690=29 I. C. 843.
(10) (1915) 42 Cal. 652=27 I. C. 815.
(11) (1912) A. C. 394=106 L. T. 357.
(12) (1905) A. C. 6=91 L. T. 666.
(13) (1906) A. C. 461=95 L. T. 209.
(14) (1778) 1 Bro. C. C. 1.

determined by the Tribunal in each case, the question of risk being a material matter for consideration. When excessive interest is apparently established, any facts that tend to show that such excess does not render the contract harsh and unconscionable, should be proved in evidence by the lender. The burden is on him."

In the case before us, the result of the contract is that the plaintiff has become entitled to interest on his loan at the rate of 5858 per cent. a year; no Court of Justice will enforce such a contract. The respondent argues, however, that the modest sum he now claims gives him interest at the rate of 40 per cent. a year. But this contention entirely overlooks the fundamental fact that once the contract between the parties is deemed unenforceable, the plaintiff is entirely in the hands of the Court: he is not entitled to substitute for the original contract another contract which may appear to him to be reasonable. The Court has now to consider what sum should be decreed to the plaintiff by way of damages for the detention of his money. We are of opinion that the plaintiff should not have more than 12 per cent. per annum simple interest on the sum advanced by him.

The result is that this appeal is allowed, and the decree of the District Judge varied. A decree will be made in favour of the plaintiff for Rs. 400 with interest thereon at the rate of 12 per cent. per annum from the date of the loan to the date of the institution of this suit, that is, from the 16th January, 1895 to the 15th December, 1910. Allowance will be made in the accounts for the two sums admitted to have been paid towards interest. The sum thus determined will carry interest at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. Each party will pay his own costs in all the Courts.

V.B./R.K.

Appeal allowed; Decree varied.

A. I. R. 1916 Calcutta 774

MOOKERJEE AND ROE, JJ.

Nilkanta Roy Chowdhury and *others*—Defendants—Appellants.

v.

Lalit Mohan Banerjee and *another*—Plaintiffs—Respondents.

Second Appeal No. 98 of 1913, decided on 19th May, 1915, against the Decree of Sub-Judge, Faridpur, dated 26th September, 1912.

(a) Specific Relief Act (1 of 1877), S. 22—In suit for specific performance, performance of different contract cannot be decreed.

Where a plaintiff has alleged a contract of which he seeks specific performance but fails to establish it, the Court will not make a decree for specific performance of a different contract. *Hawkins* v. *Maltby*, (1867) 3 Ch. App. 188, *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1 and *Mortimer* v. *Orchard*, 2 Ves. 243, ref. to. [P. 775, C. 1.]

(b) Contract Act (9 of 1872), S. 65—Contract repudiated and unenforceable—Damages for loss and for breach before repudiation may be claimed.

Where there is a contract of which specific performance would not be decreed by the Court of Equity the plaintiff is entitled, owing to the wrongful repudiation of that contract by the defendant, to treat the contract itself as at an end and to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have been committed before repudiation. *Dominion Coal Company* v. *Dominion Iron and Steel Company*, (1909) App. Cas. 293. [P. 775, C. 1.]

(c) Damages—Breach of Contract—Damages for breach of contract which is not subject matter of suit cannot be granted just as different contract would not be enforced on failure to approve contract on which suit is based.

To make a decree for damages for the breach of a contract which is not the subject-matter of the litigation, would be to assume that there has been a breach of that contract which has never been attempted to be specifically enforced.

The principle upon which the Court refuses specific performance of a contract not the subject-matter of the suit, is equally applicable to the claim for damages for breach of the contract. [P. 775, C. 2.]

Brojolal Chakravarti—for Appellants.

Upendra Lal Roy—for Respondents.

Judgment.—This is an appeal by the defendants in a suit framed, in the alternative, for specific performance of a contract to grant a lease of land specified in the schedule to the plaint, or for the award of damages for wrongful breach of that contract. The Courts below have concurrently found against the plaintiffs that there was no contract to grant a lease of the land specified in the plaint; and in this view, they have dismissed the claim for specific performance. But while the primary Court dismissed the claim for damages as well, the Subordinate Judge has awarded the plaintiffs damages to the extent of Rs. 500. On the present appeal the controversy has centred round the question, whether it was

competent to the Subordinate Judge to award damages. In our opinion there is no room for serious argument that the decree of the Subordinate Judge cannot be supported.

It is well settled that when a plaintiff has alleged a contract of which he seeks specific performance and fails to establish it, the Court will not make a decree for specific performance of a different contract. If any authority is needed for this elementary proposition, reference may be made to the judgment of Lord Chelmsford in the case of *Hawkins* v. *Maltby* (1) where the bill for specific performance was dismissed, as one contract was alleged and another was proved. [See also *Lindsay* v. *Lynch* (2) and *Mortimer* v. *Orchard* (3).] This view has not been assailed on behalf of the respondents. But they have argued that this doctrine is not applicable in respect of the claim for damages for breach of contract; this contention, however, is manifestly unfounded. On what footing a decree for damages is made in a suit for specific performance of contract was explained by Lord Atkinson in the case of *Dominion Coal Company* v. *Dominion Iron and Steel Company* (4). Where there is a contract of which specific performance would not be decreed by a Court of Equity, the plaintiffs are entitled, owing to the wrongful repudiation of that contract by the defendants, to treat the contract itself as at an end and to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have been committed before repudiation. The expression of the same idea may be attempted in somewhat different terms: from every contract, there immediately and directly results an obligation on each of the contracting parties towards the other of them to perform such of the terms of the contract as he has undertaken to perform; and if the person on whom this obligation rests fail to discharge it, there results to the other party a right, at his election, either to insist on the actual performance of the contract or to obtain satisfaction for the non-performance of it [*Mackay* v. *Dick* (5)]. Consequently, damages can be decreed for breach of a contract which might, but for exceptional circumstances, have been specifically enforced. In the case before us, the suit has not been instituted on the real contract; specific performance has accordingly been rightly refused. How, then, can damages be decreed for breach of the real contract, which has not been investigated by the Court and for the breach whereof the suit has not been instituted? For ought we know, the defendant may still be willing to perform the real contract, only if the plaintiffs were disposed to accept performance thereof. To make a decree for damages for the breach of a contract which is not the subject-matter of the litigation, would be to assume that there has been a breach of that contract which has never been attempted to be specifically enforced. The principle upon which the Court refuses specific performance of a contract not the subject-matter of the suit, is equally applicable to the claim for damages for breach of that contract.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed with costs in all the Courts.

V.B./R.K.

Appeal allowed.

(1) (1867) 3 Ch. App. 188=37 L. J. Ch. 58.
(2) 2 Sch. & Lef. 1=9 R. R. 54
(3) 2 Ves. 243=30 E. R. 615.
(4) (1909) App. Cas. 293=78 L. J. P. C. 115=100 L. T. 245=25 T. L. R. 309.
(5) (1881) 6 App. Cas. 251=29 W. R. 541.

A. I. R. 1916 Calcutta 775

MOOKERJEE AND ROE, JJ.

Suresh Chandra Palit and *another*—Plaintiffs—Appellants.

v.

Lalit Mohan Dutta Chaudhuri and *others*—Defendants—Respondents.

First Appeal No. 191 of 1913, decided on 30th August, 1915, from the Decree of Sub-Judge, Sylhet, dated 17th February, 1913.

(a) Words and phrases—"*Malik*"—"*Nirbuyadha*"—Meaning of.

The use of the term "*malik*" may not by itself necessarily create un absolute interest, but the term when qualified by the word "*nirbuyadha*" indicates absolute ownership. [P. 777, C. 1 & 2.]

(b) Hindu Law—Will—Construction—Will by husband in favour of wife—Absolute interest—Provision for gift over of what might remain undisposed of is void and inoperative in law.

A Hindu testator appointed his wife as his executrix. A clause in the will vested in her

whatever might remain, after the payment of debts and expenses, absolutely and with complete power of alienation. Other clauses provided for the adoption of sons and in case of there being no adopted son or no son or wife of the adopted son at the time of the death of the widow, the heir, according to the Hindu *Shastras* who should be alive at the time, should get the properties which should remain after disposal by the widow by way of gift or sale:

Held, that the testator gave an absolute interest in his estate to his widow with full powers of alienation; that the gift over of what might remain undisposed of by her was void and inoperative in law. [P. 781, C. 2.]

(c) Will—Construction—Absolute interest.

Semble.—If an estate is given in terms which confer an absolute estate to a named donee, and, then, further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down and the further interests fail. [P. 778, C. 2.]

(d) Will—Construction — Provision for gift over is void.

A gift over, if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate or dies before selling his interest, is void both as regards realty and personality. [P. 780, C. 2.]

(e) Will—Construction—Gift over—Void for certainty.

When an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though couched in the most direct and precise words, is void for uncertainty. [P. 778, C. 2.]

(f) Deed—Construction—Words to be used in their grammatical and ordinary sense.

An instrument must receive a construction according to the plain meaning of the words and sentences therein contained; that is, the words are to be first read in their grammatical and ordinary sense, unless the context shows otherwise. [P. 781, C. 1.]

(g) Deed—Construction—Language clear and unequivocal—Construction cannot be altered to escape the harsh consequences of rules of law.

Where the language is clear and unequivocal, the construction cannot be altered or wrested to something different from the plain meaning for the purpose of escaping from what may seem to be the harsh consequences of rules of law. [P 781, C 2.]

Rishindra Nath Sarkar—for Appellant.

Tarakishore Chaudhuri and *Gobinda Chunder Dey Roy*—for Respondents.

Judgment.—The subject-matter of the litigation, which has culminated in this appeal, originally formed the estate of one Sarat Chandra Datta Chaudhuri, who made a testamentary disposition on the 2nd April, 1899, and died on the 7th November, 1901. He left a childless widow, Girija Sundari Chaudhri, who died on the 21st November, 1908. After the death of the widow, a dispute arose as to the devolution of the estate of her husband which had vested in her. The sons of the sister of the widow contended that the estate had vested in her absolutely and on her death, had devolved upon them as her heirs. The son of the sister of the testator contended, on the other hand, that the widow took nothing beyond a life-interest and that upon her death, the estate had devolved upon him as the reversionary heir to the estate of her husband. The result was that on the 11th September, 1911, the sons of the sister of the widow instituted this suit against the son of the sister of the testator for construction of his will and for recovery of possession of his estate on declaration of title thereto. Three other persons, with whom we are not now concerned, were also joined as defendants. The Subordinate Judge dismissed the suit, on the ground that the widow took only a life-interest and that upon her death, the estate vested in the first defendant as reversionary heir. The plaintiffs have now appealed to this Court and have contended, *first*, that the widow took an absolute estate under the will of her husband, and, *secondly*, that the gift over of what might remain undisposed of by her, was repugnant and void.

The rights of the litigants depend upon a true construction of the will of the testator and the determination of the legal effect of the disposition made by him. The material clauses of the will, after the usual prefatory words, are as follows:—

2. "If, at the time of my death, no son is born of my loins or no son exists, and I die childless, then in respect of my aforesaid movable and immovable properties which shall be rightfully owned by me, at the time of my death, by virtue of purchase, gift, inheritance or by any other right, I appoint my wife, Srimati Girija Sundari Chowdhury, to be the *achhi* or executrix after my death.

3. Immediately arter my death my executrix *i.e. achhi*, shall defray the expenses, etc., of my cremation ceremony with the income of my property and shall pay my just debts, etc., if there be any, and shall meet other necessary expenses. If the expenses cannot be met with the income of the aforesaid properties, the said *achhi*, *i. e.*, executrix, if necessary, shall be competent to sell some portion of my aforesaid properties.

4. After the performance of what should be done, according to the purport of the foregoing paragraph, my widow, Srimati Girija Sundari Chowdhury, shall obtain whatever movable and immovable properties shall be left by me and she shall be the absolute owner, with the rights of gift, sale and all other kinds of transfer.

5. If no son is born of my loins, or there be no son, my widow, Srimati Girija Sundari Chowdhury, if she wishes, shall be competent to adopt a son; if she wishes, she shall be competent to adopt three sons in succession, but she shall not be competent to adopt another son during the life-time of one, or if such son does not forsake his adoptive mother, or if any of them dies leaving a male child, then during the life-time of such male child.

6. If I adopt a son, during my life-time or after my death, my widow adopts a son, in that case, after her, *i. e.*, my widow's death, the said adopted son shall get such properties as shall remain after sale or gift by my widow; and he shall be the absolute owner, with the rights of gift, sale and all other kinds of transfer; but the said adopted son shall not be competent to go away to the house of his natural father and mother, that is, he shall dwell in my own house or in a separate house erected by him in our own village. If he does not do so, he shall be fully deprived of the said properties. During the life-time of my widow, the said adopted son shall not have any right over the aforesaid properties.

7. If the said adopted son shall have no son or if he dies before a son is born to him, his widow shall be in enjoyment and possession of the said properties, provided my widow or her husband as not conferred on her any special right in respect of the said properties. But if she does not live in my own house, or in the house erected by her husband or that erected by her in my own village, she shall be deprived of the right of enjoyment and possession of the said properties.

8. If, at the time of death of my widow, there be no adopted son or if no son or wife of the adopted son be alive, then, my heir, according to the Hindu *Shastras*, who shall be alive at the time, shall get the properties which shall remain after disposal by my wife by way of gift or sale of the same."

The second clause appoints the widow as executrix. The third clause authorises her to meet the expenses and pay the debts by sale, if necessary, of a portion of the estate. The fourth clause rests in her, whatever might remain after the payment of debts and expenses, absolutely and with complete power of alienation. It cannot be disputed that the effect of this clause, taken by itself, is to constitute the widow the absolute proprietor of the estate. Her status is described, not merely as that of *malik*, but as that of *nirbuyadha malik*. The use of the term *malik* may not by itself necessarily create an absolute interest, as explained in the cases of *Surajmani* v. *Rabi Nath* (1), *Punchoo Money* v. *Troylucko Mohiney* (2), *Shib Lakshan Bhakat* v. *Srimati Tarangini* (3) and *Padam Lal* v. *Tek Singh* (4). But, in the case before us, the term *malik* is qualified by the word *nirbuyadha* which as is clear from the Sanskrit lexicons of Wilson Bohtlingk and Roth and Monier Williams signifies 'completed' or 'finished.' In fact, the well known expression *nirbuyadha malik* is the strongest and most unequivocal phrase employed in the vernacular to indicate absolute ownership. In addition to this, we have two important facts; *first*, that as pointed out in *Kollany Kooer* v. *Luchmee Pershad* (5), *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (6) and *Rajnarain Bhaduri* v. *Katyayani Dabee* (7), affirming *Rajnarain Bhadury* v. *Ashutosh Chuckkerbutty* (8), the effect of the word *malik* is to confer on the donee a heritable and alienable estate; and *secondly*, that the fourth clause itself expressly confers on the widow full power of alienation of all kinds. As explained in *Toolsi Dass Kurmokar* v. *Madan Gopal Dey* (9), *Amarendra Nath Bose* v. *Shuradhany Dasi* (10), *Seth Mulchand Badharsha* v. *Bai Mancha* (11) and *Jogeswar Narain* v. *Ram Chandra Dutt* (12), when a power of absolute disposition is conferred on the donee, the provision indicates that the testator intended to create an absolute interest in favour of the donee. No doubt, there may be cases where, as in *Hara Kumari Dasi* v. *Mohim Chandra Sarkar* (13) and possibly in *Saroda Sundari* v. *Kristo Jiban Pal* (14), all the provisions of a will taken together may indicate that the widow took only a life-interest coupled with a power of appointment to alienate by gift or sale the property passing by the will; but this doctrine cannot be applied if there is, in so many words a clear and absolute gift to the widow, as in the case before us. We thus start with the fundamental position that by the fourth clause the widow took an absolute interest in the estate devised. Is there, then, any provision in the will which restricts the clear and unambiguous effect of this clause. The Subordinate Judge, in support of his view, relied upon the clauses

(1) (1908) 30 All. 84=35 I. A. 17 (P. C.).
(2) (1884) 10 Cal 342.
(3) (1908) 8 C. L. J. 20.
(4) (1907) 29 All. 217.
(5) (1875) 24 W. R. 395.
(6) (1897) 24 Cal. 834=24 I. A. 76 (P. C.).
(7) (1900) 27 Cal. 649.
(8) (1900) 27 Cal. 44.
(9) (1901) 28 Cal. 499.
(10) (1910) 5 I. C. 73.
(11) (1883) 7 Bom. 491.
(12) (1896) 23 Cal. 670=23 I. A. 37 (P. C.).
(13) (1908) 7 C. L. J. 540.
(14) (1901) 5 C. W. N. 300.

which authorise the widow to adopt and prescribe the devolution of the estate in the event of such adoption. In our opinion, these provisions do not qualify the effect of the fourth clause. In fact, even the later clauses explicitly provide that the widow would have absolute interest notwithstanding the adoption, that the adopted son would not have any right over the estate during her life-time and that after her death, he should get only such properties as might remain after sale or gift by the widow, so that it is conceivable that the widow might alienate the entire estate and leave nothing for the adopted son to take. The case is thus very different from that before the House of Lords in *Comiskey* v. *Bowring-Hanbury* (15), where, although an absolute gift was made to the widow, there was clear indication that the estate was to be kept intact by her for transmission to the nieces of the testator, in whose favour, there was an executory gift to take effect on her death. The Subordinate Judge also relied upon the decision of the Judicial Committee in *Mahomed Shamsool Huda* v. *Shewukram* (16) in support of the view that in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, namely, that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family, and also that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. This is indisputable and has been re-affirmed by the Judicial Committee in *Radha Prasad Mullick* v. *Ranimani Dassee* (17), but where, as here, the terms are perfectly clear, we cannot assume, contrary to the plain meaning thereof, that the testator intended to create estates of a particular description and then bend and twist the language in favour of the assumption so made. In our opinion, there is nothing in any of the later clauses of the will which cuts down the absolute estate created in favour of the widow in the fourth clause in the most unequivocal terms conceivable. It is possible that the testator has, in the later clauses of the will, made provisions repugnant to what is contained in the fourth clause, but that cannot affect the meaning of what is contained therein. As was observed by the Judicial Committee in *Tripurari Pal* v. *Jagat Tarini Dasi* (18), where an absolute interest is given, the Court will not cut it down by subsequent words, unless they clearly have an effect to restrict it. To the same effect is the principle repeatedly recognised by the House of Lords as a settled rule of construction, namely, that if there is a clear gift, it is not to be cut down by anything subsequent in the will, which does not, with reasonable certainty, indicate the intention of the testator to cut it down: *Thornhill* v. *Hall* (19), *Featherston* v. *Featherston* (20), *Abbott* v. *Middleton* (21), *Randfield* v. *Randfield* (22), and *In re Freeman, Hope* v. *Freeman* (23). Thus, if an estate is given in terms which confer an absolute estate to a named donee, and, then, further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down, and the further interests fail: *Hoare* v. *Byng* (24) and *Hyndman* v. *Hyndman* (25).

The question next arises, is the gift over contained in the eighth clause valid and operative in law? The appellants have contended that as an absolute interest was conferred on the widow, the gift over was void for repugnancy. This argument is supported by the well-settled rule of English Law that a gift over, if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate or dies before selling his interest, is void both as regards reality and personality. This is clear from a long line of authorities: *Lightburne* v. *Gill* 26), *Ross* v. *Ross* (27), *Green* v. *Harvey* (28), *Yalden, In re* (29), *In re Mortlock's Trust* (30), *Bowes* v. *Goslett* (31),

(15) (1905) A. C. 84=92 L. T. 241.
(16) (1874) 22 W. R. 409=2 I. A. 7 (P.C.).
(17) (1908) 35 Cal. 896=35 I. A. 118 (P.C.)

(18) (1913) 40 Cal. 274=17 I. C. 696=40 I.A. 37 (P. C.).
(19) (1834) 2 Cl. & F. 22.
(20) (1835) 3 Cl. & F. 67.
(21) (1858) 7 H L. C. 68.
(22) (1860) 8 H. L. C. 225.
(23) (1910) 1 Ch. 681.
(24) (1844) 10 Cl. & F. 508.
(25) (1895) 11 Ir. R. 179.
(26) (1764) 3 Brown P. C. 250.
(27) (1819) 1 J. & W. 154.
(28) (1842) 1 Hare 428=11 L. J. Ch. 290.
(29) (1851) 1 DeG. M. & G. 53.
(30) (1856) 3 K. & J. 456.
(31) (1857) 27 L. J. Ch. 249.

Henderson v. *Cross* (32), *Gulliver* v. *Vaux* (33), *Holmes* v. *Godson* (34), *Barton* v. *Barton* (35), *Perry* v *Merritt* (36), *Wilcock's Settlement, In re* (37), *Percy, In re* (38), *In re Dixon, Dixon* v. *Charlesworth* (39), *Jones, In re, Richards* v. *Jones* (40), *Comiskey* v. *Bowring Hanbury* (15), *Bull* v. *Kingston* (41), *Cuthbert* v. *Purrier* (42), *Bourn* v. *Gibbs* (43), *Phillips* v *Eastwood* (44), *Watkins* v. *Williams* (45), *Weale* v. *Ollive* (46); *Shaw* v. *Ford* (47), *In re Jenkins's Trusts* (48), *Stretton* v. *Fitz Gerald* (49), *Parnell* v. *Boyd* (50) and *In re Walker, Lloyd* v. *Tweedy* (51).

The decisions in *Upwell* v. *Halsey* (52) and *Doe.* d. *Stevenson* v. *Glover* (53) to the contrary effect cannot be treated as good law; the first of these cases was treated as overruled by Loughborough, L.C., in *Malim* v. *Keighley* (54) and by Sugden, L. C., in *Phillips* v. *Eastwood* (44), the second case was decided in ignorance of the decision in *Gulliver* v. *Vaux* (33), which, though decided in the Common Pleas in 1746, was brought to light in 1856, after a century's repose; it was with reference to this case that Holmes, J., observed in *Parnell* v. *Boyd* (50): "'T will be recorded for a precedent. And many an error, by the same example, will rush into the State." The rule thus steadily applied in England and Ireland is, however, different from that recognised by the Law of Scotland, for, as pointed out by the House of Lords in *Barstow* v. *Black* (55), the position of an absolute unlimited owner subject to a conditional gift over, though unknown to the law of England, is well known to the Scotch Law.

The rule of English Law has been adopted almost universally in the Courts of the United States, and is thus formulated by Chancellor Kent in his Commentaries (Vol. IV, 270):

"if there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to *A* in fee, and if he dies possessed of the property without lawful issue, the remainder over or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same, in all such cases, the remainder over is void as a remainder, because of the proceeding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will:"

Jackson v. *Bull* (56), *Jackson* v. *Robins* (57), *Ide* v. *Ide* (58) and *Attorney-General* v. *Hall* (59). The rule formulated by Kent has been twice approved by the Supreme Court of the United States, *Smith* v. *Bell* (60) and *Howard* v. *Carusi* (61).

The rule enunciated above has been recently adopted by the Judicial Committee of the Privy Council without discussion in *Tripurari Pal* v. *Jagat Tarini Dasi* (18). There the testator directed, with regard to a *debuttar* estate, which he had dedicated and religious ceremonies which he had established during his life-time, that his son, Mukunda Murari, would be the *shebait*. He appointed the mother of the boy to be *shebait* as guardian during his minority. He next proceeded to provide that, if during his life-time or after his death the said Mukunda Murari died, his widow would be *shebait*, and after her death her two daughters would be *shebaits*. After the death of the testator, the widow, during the minority of the boy acted as *shebait* and conducted the worship. Mukunda, on attainment of his majority, took possession and acted as *shebait*; he died in 1900, leaving a minor son and widow. His mother then resumed possession under the gift over in her favour. The infant son of Mukunda, through his mother, sued the widow and daughters of the testator for a declaration that he had the sole right to the *debuttar* estate of his grand-father as the heir of his father, in whom it had previously

(32) (1861) 29 Beav. 216.
(33) (1746) 8 De G. M. & G. 167*n*.
(34) (1856) 8 DeG. M. & G. 152.
(35) (1857) 3 K. & J. 512.
(36) (1874) 18 Eq. 152.
(37) (1876) 1 Ch. D. 229.
(38) (1883) 24 Ch. D. 616.
(39) (1903) 2 Ch. 458.
(40) (1898) 1 Ch. 438.
(41) (1816) 1 Mer. 314.
(42) (1822) Jac. 415.
(43) (1831) 1 Rus. & My. 614.
(44) (1835) L. & G. Temp. Sugden 270.
(45) (1851) 3 Mac & G. 622.
(46) (1863) 32 Beav. 421.
(47) (1877) 7 Ch. D. 669.
(48) (1889) 23 L.R. Ir. 162.
(49) (1889) 23 L.R. Ir. 310.
(50) (1896) 2 Ir. R. 571.
(51) (1898) 1 Ir. R. 5.
(52) (1720) 1 P. Wms. 651.
(53) (1845) 1 C.B. 448.
(54) (1795) 2 Ves. 529.
(55) (1868) 1 Sc. & Div. 392.

(56) (1813) 10 Johnson 19.
(57) (1819) 16 Johnson 537.
(58) (1809) 5 Mass. 500.
(59) (1731) Fitz. 314.
(60) (1832) 6 Peter 68.
(61) (1883) 109 U. S. 725.

vested absolutely on his attaining majority. The Subordinate Judge decreed the suit. This Court on appeal reversed that decision and held that the *shebaitship* devolved, upon the death of Mukunda, upon his mother, and that upon the death of the latter, it devolved on her daughters. The plaintiff appealed to the Privy Council and contended before the Judicial Committee that his father, Murari took an absolute estate in the *shebaitship*, which on his death devolved on the plaintiff by right of inheritance; the contention was that the gift over was contrary to law, and reference was made to S. 111 of the Indian Succession Act and the decision of the Judicial Committee in *Norendra Nath Sirkar* v. *Kamalbasini Dasi* (62). The Judicial Committee accepted this contention and held that, as there was an absolute gift to Mukunda on his attaining his majority, the plaintiff was entitled to succeed. This fits in exactly with the rule enunciated by Sir Arthur Hobhouse in *Mussoorie Bank* v. *Raynor* (63), and *Mussoorie Bank Limited* v. *Raynor* (64) namely, that when an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though couched in the most direct and precise words, is void for uncertainty, according to a very well-known and well-established class of cases. Much stress has been laid in this Court on the decision of the Judicial Committee in *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (65). That case is, in our opinion, clearly distinguishable and its precise effect was stated by Lord Hobhouse in *Kristoromoni Dasi* v. *Narendro Krishna Bahadur* (66); "*there was no gift over in that case: Bhooban Mohini Debia* v. *Hurrish Chunder Chowdhry* (65). The donor made a gift to his sister, Kasiswari, in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known and often used by Hindu donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, 'no other heir shall be entitled.' This was held to mean that if Kasiswari died leaving no issue then living, her interest was to cease. In effect, the construction was that if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life-interest. In the latter case, nothing had passed from the donor but the life-interest, and when that was spent, he or his heir would lawfully re-enter." This principle clearly does not avail the respondents, nor can they derive any assistance from the rule laid down in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (67), and *Sreemutty Soorjumoney Dossee* v. *Denobundo Mullick* (68) as to the defeasance of a prior absolute interest by a subsequent event. That rule has no application where, as here, there is an absolute gift of property to a person, followed by a gift over in the event of his dying intestate or not disposing of it. There is, in our opinion, no substantial answer to the contention that where a devisee takes an absolute interest, a gift over, on his failure to dispose of the property or of whatever part of the property he does not dispose of, is void.

An ingenious attempt has been made to criticise the rule enunciated and recognised in the law of England, and we are not unmindful that the rule has been the subject of unfavourable comment by text writers [see, for instance, Gray on Restraints on the Alienation of Property, Ss. 57—74*g*]. For all the practical purposes, however, it is fruitless to seek the logical justification of a principle which has been recognised or approved twice by the House of Lords [*Lightburne* v. *Gill* (26) and *Comiskey* v. *Bowring Hanbury* (15)], twice by the Judicial Committee [*Tripurari Pal* v. *Jagat Tarini Dasi* (18) and *Mussoorie Bank* v. *Raynor* (63)] and twice by the Supreme Court of the United States [*Smith* v. *Bell* (60) and *Howard* v. *Carusi* (61)]. Reference may be made, however, to the judgments of Grant, M. R., in *Bull* v. *Kingston* (41), of Truro, L. C., in *Watkins* v. *Williams* (45) of Burnett, J., in *Gulliver* v. *Vaux* (33) of Turner, L. J., in *Holmes* v. *Godson* (34) of Fry J., in *Shaw* v. *Ford* (47) and of Kent, C., in *Jackson* v. *Robins* (57), where the rule is defended on the grounds of uncertainty, repugnancy to the prior gift, and of public policy. As Turner, L. J., said in *Holmes* v. *Godson* (34), the law has said that if a man dies

(62) (1896) 23 Cal. 563=23 I. A. 18 (P. C.).
(63) (1882) 7 A. C. 321=46 L. T. 633.
(64) (1882) 4 All. 500=9 I. A. 70 (P. C.).
(65) (1879) 4 Cal. 23=5 I. A. 138 (P. C.).
(66) (1889) 16 Cal. 383=16 I. A. 29 (P. C.).

(67) (1856) 4 W. R. 114=6 M. I A. 526 (P. C.).
(68) (1861-63) 9 M. I. A. 123.

intestate, the real estate shall go to the heir and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make, is against the policy of law and, therefore, void. Lord Machnaghten emphasised this when be said in *Attorney-General* v. *Ailesbury* (69):

"Real estate must descend according to the ordinary rules of real property. You cannot give real estate in fee and say that on the death of the owner intestate it shall go to his next of kin."

We may add that in cases of this description, the rule of construction formulated by Tindal, C. J., in *Scarborough* v. *Savile* (70) applies:

"not only ought we to look to the words of the will alone, to determine the operation and effect of the devise, but that we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate, when such estate is once collected from the words of the will itself."

The instrument must receive a construction according to the plain meaning of the words and sentences therein contained; that is, the words are to be first read in their grammatical and ordinary sense, unless the context shows otherwise: *Hamilton* v. *Ritchie* (71), *Gordon* v. *Gordon* (72) and *Seale-Hayne* v. *Jodrell* (73). As Knight Bruce, L. J., points out in *Lowe* v. *Thomas* (74), this rule comes from the Digest (lib. 32, tit. 1, S. 69) where Marcellus says: *Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensise testatorem*," (a departure from the literal meaning of the words used is not justifiable, unless it be clear that the testator himself intended something different therefrom). But as Halsbury, L. C., said in *Leader* v. *Duffey* (75), we shall be arguing in a vicious circle if, apart from the language of the instrument, we start with the assumption that the testator intended to create such estates only as the law allows, and then read into his words a meaning they will not legitimately bear. To the same effect are the observations of Cairns, L. C., in *Coltsmann* v. *Coltsmann* (76). As Buller, J., said in *Hodgson* v. *Ambrose* (77). the question whether the intention is consistent with the rules of law or not, can never arise till it is settled what the intention was. Where there is no obscurity or ambiguity, there is no room for application of the doctrine that it is better to effectuate than to destroy the intention, for as Lord Coke quaintly puts it,

"whensoever the words of a deed or of the parties without deed may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." 1 Co. Lit., 42 *a*, *b*, *Christie* v. *Gosling* (78).

Where, however, the language is clear and unequivocal, the construction cannot be altered or wrested to something different from the plain meaning for the purpose of escaping from what may seem to be the harsh consequences of rules of law: *Dungannon* v. *Smith* (79), *Pearks* v. *Mosley* (80), *DeBeauvoir* v. *DeBeauvoir* (81), *Abbott* v. *Middleton* (21), *Bathurst* v. *Errington* (82) and *Martin* v. *Holgate* (83). We are of opinion that upon a true construction of the will before us, the following positions are incontestable, namely, *first*, that the testator gave an absolute interest in his estate to his widow with full powers of alienation; and, *secondly*, that the gift over of what might remain undisposed of by her, was void and inoperative in law. There is thus no escape from the position that after the death of the widow, the estate has devolved upon the plaintiffs as her heirs, and not upon the first defendant as the reversionary heir to the testator.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The plaintiffs will have a decree for possession of the properties in suit, exclusive of the properties mentioned in the two schedules attached to the written statement of the third defendant dated the 20th February, 1912, but inclusive of one half of property 14 of the second schedule of that written statement. The plaintiff will also be entitled to costs in both the Courts and to mesne profits from the first defendant.

V.B./R.K.

Appeal allowed.

(69) (1887) 12 A. C. 672.
(70) (1836) 3 A. & E. 897.
(71) (1894) A. C. 310.
(72) (1871) 5 H. L. 254.
(73) (1891) A. C. 304.
(74) (1854) 5 DeG. M. & G. 315.
(75) (1888) 13 A C. 294.
(76) (1868) 3 H. L. 121.
(77) (1780) 1 Douglas 337.
(78) (1866) 1 H. L. 279.
(79) (1846) 12 Cl. & F. 546.
(80) (1880) 5 A. C. 714.
(81) (1852) 3 H. L. C. 524.
(82) (1877) 2 A. C. 698.
(83) (1866) L. R. 1 H. L. 175.

A. I. R. 1916 Calcutta 782

MOOKERJEE AND RICHARDSON, JJ.

Krishna Chandra Saha Sardar and *others*—Defendants—Appellants.

v.

Hem Chandra Rai Chowdhury —Plaintiff—Respondent.

First Appeal No. 67 of 1915, decided on 26th February, 1915, against the Order of Sub-Judge, Dacca, dated 15th February, 1915.

(a) Civil P. C. (5 of 1908), O. 39, Rr. 1 and 2—Principles guiding grant of injunction are stated.

The only thing to be considered by the Court in cases of interlocutory injunctions in aid of the legal right is, if the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established No general rule can be laid down on the subject by which the discretion of the Court should in all cases be regulated. It is quite sufficient if the Court finds a case showing that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the final disposal of that question. [P. 783, C. 1.]

(b) Civil P. C. (5 of 1908), O. 39, Rr. 1 and 2—If greater damage is not proved by refusal than by grant to other side injunction should not be granted.

Where the plaintiff fails to prove that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right, the balance of convenience is against the grant of an injunction. *Child* v. *Douglas*, (1854) 2 Jur. (N. S.) 950, ref. to. [P. 783, C. 1.]

(c) Civil Procedure Code (5 of 1908), O. 39, Rr. 1 and 2—Considerable delay without sufficient reason is fatal.

A plaintiff making considerable delay without sufficient reason is not to be assisted at the expense of the defendant. *Cooper* v. *Hubbuck*, (1860) 30 Beav. 160 and *Hilton* v. *Granville*, (1841) 4 Beav. 130, ref. to. [P. 783, C. 1.]

Mohendra Nath Ray, *Surendra Nath Guha* and *Prokas Chunder Pakrasi*—for Appellants.

Rash Behary Ghose and *Dwarka Nath Chakrabarti*, *Biroj Mohan Mojumdar* and *Ramani Mohan Chatterjee* - for Respondent.

Judgment.—This appeal is directed against an order granting an interlocutory injunction. The case for the plaintiff-respondent is that under an ancient Crown grant, antecedent to the time of the Permanent Settlement, he is entitled to hold a market on every Thursday on his property known as Ram Chandradi and the defendants have maliciously started a new market on their property known as Gopaldi, which is situated at a distance of two miles. The plaintiff accordingly seeks a permanent injunction to restrain the defendants from holding their market on Thursdays, and also asks for an interlocutory injunction during the pendency of the suit. He further claims substantial damages for loss of profit from his market, due to the establishment of the new market.

It is not disputed that the market started by the defendants was opened in February 1912, and the present suit was not instituted till the 18th November, 1914. In the interval, there had been attempts at breach of the peace and criminal cases had resulted. On behalf of the plaintiff and his servants, eight criminal cases were instituted against the defendants and their people. The first of these was instituted on the 1st March, 1912, that is, within a few days of the establishment of the new market and the last was instituted on the 18th January, 1913. Every one of these cases was dismissed, and in some instances, the complainants were prosecuted and were convicted on the ground that they had instituted false cases. On the other hand, there were two counter-cases instituted by the defendants and their men, and in both instances the accused were convicted, on the 30th June, 1913 and the 31st July, 1913 respectively. Since then, so far as we can gather from the materials on the record, there have been no fresh disturbances. The Subordinate Judge, however, has granted an interlocutory injunction which restrains the defendants from holding their market on Thursdays. On behalf of the defendants-appellants, it has been argued, *first*, that the Subordinate Judge has in substance prejudged the case and has expressed an opinion on the merits; *secondly*, that as there has been considerable delay on the part of the plaintiff in the institution of this suit, no interlocutory injunction should be granted; and *thirdly*, that the application should be refused, as it has not been made *bona fide* by the plaintiff for the preservation of his right, but rather with a view to secure the destruction of the property of the defendants. We have anxiously considered the circumstances of this case and arrived at the conclusion that the injunction must be discharged.

The principle applicable to cases of this description is well settled and may be briefly stated. In cases of interlocutory injunctions in aid of the legal right, all the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. This depends upon various circumstances, and it is impossible to lay down any general rule on the subject by which the discretion of the Court should in all cases be regulated. It is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events; it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the final disposal of the question. There is no room for doubt that in the present case there is a substantial question to be investigated in the suit; but can it be contended that the interlocutory injunction is sought with a view to preserve the *status quo*. The defendants have held their market every Thursday now for three years and have incurred expenses in its establishment and maintenance. The injunction as granted by the lower Court, if maintained, will undoubtedly destroy the market started by the defendants. On the other hand, there is nothing to show that if the defendants are not restrained, at this stage, further injury would be caused to the market founded by the plaintiff; no doubt, the loss in income may continue, but in that respect the plaintiff would, if successful, be amply compensated by a decree for damages. There has been considerable delay on the part of the plaintiff for which no satisfactory reason has been assigned, and he should not now be assisted to the serious detriment of the defendants: *Cooper* v. *Hubbuck* (1), and *Hilton* v. *Granville* (2). The balance of convenience is clearly against the grant of the injunction; the plaintiff has failed to prove, as he was bound to do, that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right. *Child* v. *Doughlas* (3). It is further worthy of note that the defendants have readily submitted to the terms we imposed on them as a condition of withholding the injunction, and have brought into Court a sum of Rs. 500 for the satisfaction of the claim for damages, should the plaintiff be ultimately successful: *Rigby* v. *G. W. Ry. Co.* (4). He will be sufficiently protected, if, in addition, the trial of the suit is expedited and we shall make an order in that behalf.

It has finally been argued on behalf of the plaintiff that an interlocutory injunction should be granted to restrain the defendants from interfering with the traders and customers who might desire to attend the market held on the property of the plaintiff. That, however, would be an injunction for a purpose entirely different from what is contemplated in the injunction granted; we are clearly of opinion that we should not discharge the order of the Court below and substitute for it an entirely different injunction, the grant whereof can be justified only upon proof of facts not yet investigated. There is nothing on this record to indicate that recently there have been such acts and conduct on the part of the defendants as would necessitate the grant of such an injunction as that now proposed.

The result is that this appeal is allowed and the order of the Court below discharged. The record will be sent down at once and the Subordinate Judge directed to take up the suit for early disposal. The costs of this Court as also of the Court below will abide the result of the suit. We assess the hearing fee at two gold *mohurs*.

The amount deposited by the defendants in this Court will be transmitted to the Court below to be invested in Government securities and retained in that Court till the disposal of the suit.

V.B./R.K.

Appeal allowed.

(1) (1860) 30 Beav. 160.
(2) (1841) 4 Beav. 130.
(3) (1854) 2 Jur. (N. S.) 950=1 Kay. 560.
(4) (1846) 2 Ph. 44=1 Coop. Temp. Cott. 3.

A. I. R. 1916 Calcutta 783

MOOKERJEE AND N. R. CHATTERJEA, JJ.

Loke Nath Singh and *others*—Defendants—Judgment-debtors—Appellants.

v.

Gaju Singh and *others*—Plaintiffs—Decree-holders—Respondents.

Second Appeal Nos. 222 and 311 to 327 of 1912, decided on 19th August, 1915, from the decisions of Dist. Judge, Patna, dated 11th March, 1912.

(a) Decree—Setting aside—Compromise decree—Party to compromise not entitled to appeal—Party not joined in compromise competent to appeal.

A person who is a party to a compromise cannot challenge the validity of the consent decree by way of appeal, but the party to the suit who has not joined in the compromise is competent to appeal against the decree if he has been prejudiced it hereby. [P. 785, C. 2.]

(b) Limitation Act (9 of 1908), Art. 182—Decree against one set of defendants on contest—Against another set by consent—Appeal against whole by contesting set—Execution—Limitation.

In a suit where a decree has been obtained against one set of defendants by consent and against the other on contest and the contesting defendant appeals against the decree and thereby the validity of the entire decree is in controversy in the appeal, the decree-holder is entitled to the benefit of Clause 2 of Article 182 of Schedule I to the Limitation Act, 1908, in execution of the decree against both sets of the defendants. [P. 786, C. 2 &. 787, C. 1.]

Rash Behary Ghose, *Jogesh Roy* and *Ganesh Dut Singh*—for Appellants.

Umakali Mukherjee, *Biraj Mohan Mojumdar*, *Surendra Kumar Bose* and *Bankim Chunder Mukherjee*—for Respondents.

Judgment.—This appeal is directed against an order in proceedings in execution of a decree for delivery of possession of land made on the 17th September, 1903. The question is controversy is, whether an application for execution of this decree, made on the 7th May, 1910, is barred by limitation. The Courts below have concurrently held that the application is not barred. We are now invited by the judgment-debtors to hold that this view is erroneous in law. For the determination of the question raised before us, it is necessary to recapitulate the essential facts, which are all admitted.

The plaintiffs sued two sets of persons, who may be called *A* and *B*, for recovery of possession of land. A petition of compromise was filed on behalf of some of the defendants. The Court came to the conclusion that the compromise was operative only as regards some of them (*A*) and gave effect to it to that extent. The suit was heard on the merits as against all the other defendants (*B*). The result was a two-fold decree, *first*, for possession as against the consenting defendants (*A*), without mesne profits or costs; and, *secondly*, for possession against the contesting defendants (*B*), who were made liable for costs and mesne profits. *B* appealed to the District Judge and valued their appeal at the value of the subject-matter of the entire property involved in the suit in the Court of first instance. They did not join *A* as respondents; the only respondents to the appeal were the successful plaintiffs. The appeal was preferred on the 25th January, 1904. The parties, however, agreed to await the decision of this Court in an analogous litigation, which had been brought up here by way of first appeal. After the disposal of that appeal by this Court, the appeal before the District Judge was taken up, and was dismissed on the 8th May, 1907, on the footing of the agreement that the parties would abide by the decision of the High Court in the suit previously mentioned.

The present application for execution of the decree of the 17th September, 1903 was made on the 7th May, 1910. On the 28th August, writ for delivery was issued; and it is alleged that the decree-holders were placed in possession on the 5th September. On the 29th September, however, objection was taken by the judgment-debtors that the decree was incapable of execution as the rights thereunder had been extinguished by the Statute of Limitation. The Courts below have overruled this contention. On the present appeal, the controversy has centred round Clause 2 of the third column of Article 182 of the Schedule to the Indian Limitation Act. That Clause provides that an application for execution of a decree of a Civil Court not provided for by Article 183 or S. 43 of the Code of 1908 must be made within three years from the date of the final decree of the Appellate Court or the withdrawal of the appeal, where there has been an appeal. On behalf of the judgment-debtors appellants reliance had been placed upon the cases of *Sreenath* v. *Brojo Nath* (1), *Wise* v. *Raj Narain Chuckerbutty* (2), *Hur Proshad* v. *Enayet Hossain* (3), *Raghunath Pershad* v. *Abdul Hye* (4), *Christiana Benshawn* v. *Benarasi Proshad* (5), *Sangram Singh* v. *Rujharat Singh* (6), *Mashiat-un-nissa* v. *Rani* (7)

(1) (1870) 13 W. R. 309.
(2) (1873) 19 W. R. 30 (F.B.).
(3) (1878) 2 C. L. R. 471.
(4) (1887) 14 Cal. 26.
(5) A. I. R. (1914) Cal. 583=22 I. C. 685.
(6) (1882) 4 All. 36.
(7) (1891) 13 All. 1.

and *Baid-un-nissa* v. *Shams-ud-din* (8). On the basis of these decisions the argument has been founded that as the decree holders could have executed the consent decree obtained by them against *A*, notwithstanding the pendency of the appeal preferred by *B*, they could not claim the benefit of the Clause (2) of the third column of Article 182. The contention in substance is that in reality there are two completely distinct decrees on the same sheet of paper and the fact that an appeal had been preferred by *B* against one of these decrees, does not entitle the decree-holders to an extension of time against *A* in respect of the other decree. It is further pointed out that not only was not an appeal preferred against the consent decree, but under the law an appeal could not have been preferred against that decree. Sir Rash Behary Ghose for the appellants has, however, drawn our attention to the decisions in *Mullick Ahmed Zumma* v. *Mahomed Syed* (9), *Basant Lal* v. *Nojmunissa Bibi* (10), *Gungamoyee* v. *Shib Sunker* (11), *Nundun Lal* v. *Rai Joykishen* (12), *Kristo Churn Dass* v. *Radha Churn Kur* (13), *Nurul Hasan* v. *Muhammad Hasan* (14), *Muthu* v. *Chellappa* (15) and *Gopal Chunder* v. *Gosain Das Kalay* (16). Some of these cases are possibly distinguishable, but it has not been disputed that from the others a rule is deducible which would negative the contention of the appellants. On behalf of the respondents, reliance has been placed particularly upon the cases of *Badi-un-nissa* v. *Shams-ud-din* (8), *Gopal Chunder* v. *Gosain Das* (16) and *Ashfaq Husain* v. *Gauri Sahai* (17), which, it has been contended, negative the position taken up by the appellants.

It is not necessary for our present purpose to determine the true scope and meaning of the term 'appeal' as used in Clause 2 of the third column of Article 182; upon that matter there has been divergence of judicial opinion. While a narrow view was taken in some of the cases already mentioned, a wider interpretation was placed upon the term in the cases of *Abdul Rahiman* v. *Moidin Saiba* (18), *Shivram* v. *Sakharam* (19), *Viraraghava Ayyangar* v. *Ponnammal* (20) and *Kristnama* v. *Mangammal* (21). In these cases the position was maintained that time ran against the decree-holder from the date of the final decree in the appeal, irrespective of the question whether the appeal did or did not imperil the decree whereof execution was ultimately sought. We do not propose to enter upon an examination of this wide problem for two reasons; *first*, because, even if the view be maintained that a decree-holder is entitled to the benefit of the extended time contemplated by Clause (2) of Article 182 only when the decree whereof execution is sought, is imperilled by the appeal, the position taken up by the appellants cannot be sustained; and *secondly*, because the contention of the appellants must fail in view of the decision of the Judicial Committee in *Ashfaq Husain* v. *Gauri Sahai* (17).

As regards the *first* point, it is clear that although a person who is a party to a compromise cannot challenge the validity of the consent decree by way of appeal, it is competent to a party to the suit, who has not joined in the compromise, to appeal against the decree if he has been prejudiced thereby. This has been recognised in suits for partition of joint properties where a decree has been made by consent of some only of the parties to the litigation: *Nityamoni Dasi* v. *Gokul Chandra Sen* (22). It is also clear that circumstances may be imagined in suits of other description, for instance, suits for contribution or even suits for possession of joint property where, in the event of a compromise amongst some only of the parties to the litigation, another person, a party to the suit but not a party to the compromise, may challenge the decree by way of appeal on the ground that he has been prejudiced thereby. In the present instance, we have the unquestionable fact that the contesting defendants did prefer an appeal against the entire decree. In that appeal, there was, to use the language of the decision in *Ramachandra Gopal* v. *Antaji Vasudev* (23), the chance or risk of the Appellate Court modifying the decree of the trial

(8) (1895) 17 All. 103.
(9) (1881) 6 Cal. 194.
(10) (1884) 6 All. 14.
(11) (1879) 3 C. L. R. 430.
(12) (1889) 16 Cal. 598.
(13) (1892) 19 Cal. 750.
(14) (1886) 8 All. 573.
(15) (1889) 12 Mad. 479.
(16) (1898) 25 Cal. 594.
(17) (1911) 33 All. 264=9 I. C. 975=38 I. A. 37 (P. C.).
(18) (1898) 22 Bom. 500.
(19) (1909) 33 Bom. 39=1 I. C. 459.
(20) (1900) 23 Mad. 60.
(21) (1903) 26 Mad. 91.
(22) (1911) 9 I. C. 210.
(23) (1903) 5 Bom. L. R. 735.

Court. The entire decree was under appeal and was in peril. It is worthy of note that the contesting defendants were in a manner constrained to appeal against the entire decree. The plaintiffs sought a decree for ejectment of the defendants; the relief claimed was a joint decree against all of them. The result of the consent decree and of the decree on contest was that there was a decree for possession in favour of the plaintiffs against all the defendants, but against some, the decree was by consent while against others, it was on contest. The decree did not define the precise position of the defendants who had entered into the compromise. It did not specify their share in the property if they were in joint possession; if they were in occupation of demarcated plots, the decree did not define such portions. The result was that the decree, though made by consent as to a portion and on contest as to the remainder, was still a joint decree, in the sense that, if maintained, it entitled the plaintiffs to recover possession of the entire property in dispute from all the defendants jointly. The contesting defendants appealed against this decree. As the decree did not define their position, they were bound to appeal against the whole decree. It is thus plain that the validity of the entire decree was in controversy in the appeal, and from this point of view, the plaintiffs-decree-holders would undoubtedly be entitled to the benefit of Clause 2 of Art. 182. *Gopal Chunder* v. *Gosain Das* (16) and *Baid un-nissa* v. *Shams-ud-din* (8). Some stress has been laid upon the decision in *Christiana Benshawn* v. *Benarasi Proshad* (5), which is clearly distinguishable and is of no assistance to the appellants. In that case, there were two distinct decrees, one in favour of some of the defendants against the plaintiff, the other in favour of the plaintiff against the other defendants. An appeal was preferred against the latter portion of the decree; that appeal did not and could not imperil the other portion of the decree. In these circumstances, the decree-holder was rightly held not entitled to the benefit of Clause (2) of Art. 182. Nor is the decision of the Judicial Committee in *Batuk Nath* v. *Munni Dei* (24) of any avail to the apellants. In that case, there was no decree of the Court of Appeal, because the appeal preferred to the Judicial Committee never came up for disposal by their Lordships. The appeal was dismissed by the Registrar for non-prosecution, and it was ruled that the order of the Registrar was not a decree of the Court of Appeal.

As regards the *second* point, namely, the effect of the rule deducible from the decision of the Judicial Committee in *Ashfaq Husain* v. *Gauri Sahai* (17), we are of opinion that it is completely destructive of the contention of the appellants. There a joint decree for a sale of land was obtained by the plaintiffs against the defendants. The decree was *ex parte* against one of the defendants and was on contest as against the other. The person against whom the decree had been made *ex parte* took steps to have the decree vacated in so far as she was concerned. The decree, however, remained untouched as against the other defendants. Ultimately, the suit was retried as against the person at whose instance it had been re-opened, and a decree was made against her which was confirmed on appeal. It was ruled that the decree-holders were entitled to the benefit of Clause (2) of Article 182, not only against the defendant at whose instance the case had been re-opened, but also as against the defendants against whom a decree had been made on contest in the first instance. The Judicial Committee pointed out that the plaintiffs were entitled to a joint decree against all the defendants, and that the decree originally made was merely a step for the attainment of that ultimate object, so that time ran as against the decree-holders from the date when the final decree was made. In the case before us, the plaintiffs were entitled to a joint decree against all the defendants. On appeal by the contesting defendants, the entire matter was reopened. When the appeal was dismissed in the end, the decree of the trial Court stood confirmed; it is clear that the plaintiffs were entitled to wait till the final decree had been made in their favour. If this view were not taken, the plaintiffs might find themselves in a position of considerable embarrassment, as an attempt to execute against the consenting defendants alone a decree which did not define their liability, might lead to obvious complications. In our opinion, the plaintiffs were not bound to execute the decree till the final disposal of the appeal.

We hold accordingly that the view taken by the Courts below is correct and that the application for execution is not barred by

(24) A. I. R. (1914) P. C. 65=36 All. 284=23 I. C. 644 (P. C.).

limitation. We may add that on behalf of the appellants, Babu Joges Chandra Roy candidly admitted that the justice of the case was entirely with the respondents and that it was iniquitous on the part of the appellants, who had consented to a decree against themselves, to urge every conceivable objection against the execution of that decree. In that estimate of the merits of the case, we entirely agree.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. We assess the hearing-fee at one gold *mohur*.

Similar orders will be drawn up in each of the other appeals which will consequently be dismissed with costs, one gold *mohur* in each case.

V.B./R.K.

Appeals dismissed.

A. I. R. 1916 Calcutta 787

MOOKERJEE AND RICHARDSON, JJ.

Hera Lal Roy Chowdhury—Plaintiff—Appellant.

v.

Lokenatha Shaha and *others*—Defendants—Respondents.

Second Appeal No. 3032 of 1912, decided on 18th February, 1915, against the Decree of Sub-Judge, Barisal, dated 26th June, 1912.

(a) Easements Act (5 of 1882), S. 7—No easement can be acquired by building of latrines.

Where the plaintiff along with some of the defendants erected latrines on land which did not belong to them, and used them for a long series of years and thereafter claimed a right of easement:

Held, that no question of easement arose in the case, for an easement of this description was unknown to law and the Court would not create a new species of easement. *Keppell* v. *Bailey*. 2 Myl. & K. 517 and *Hill* v. *Tupper*, 2 H. & C. 121, ref. to. [P. 787, C. 2.]

(b) Civil P. C. (5 of 1908), O. 6, R. 17—Where claim by adverse possession would be made but has not been made—Plaintiff cannot be allowed to set up an inconsistent claim.

Where, as in the present case, the act of the plaintiff was in the nature of trespass and it might perhaps have been open to him to contend that he had acquired a good title to the disputed property by adverse possession, but where no such claim was set forth at any stage of the litigation:

Held, that the plaintiff could not be permitted to make a case inconsistent with the title alleged in the plaint and that the relief sought could not be granted. [P. 787, C. 2.]

Mohendra Nath Ray and *Brojendra Nath Chatterjee*—for Appellant.

Jogesh Chandra Roy, *Biraj Mohan Mozumdar* and *Asita Ranjan Ghose*—for Respondents

Judgment.—This is an appeal by the plaintiff in a suit for enforcement of right of easement of a novel description. The case for the plaintiff is that he, along with some of the defendants, had erected three privies on the disputed property, that they had used the latrines for many years past and that on the 5th February, 1908 the latrines were wrongfully demolished by the defendants who also raised on obstruction across the path which led to them. The claim was based on prescription, on implied grant and on necessity. The Subordinate Judge has dismissed the suit on the ground that an easement of this description is unknown to the law; he has also found that no grant can be implied in the circumstances of the case, that the alleged necessity has not been established, and that if the latrines were restored, they would constitute a nuisance to the residents of the neighbourhood. In our opinion, the view taken by the Subordinate Judge is manifestly right.

If, as is alleged by the plaintiff, he along with the defendants erected latrines on land which did not belong to them, and used them for a long series of years, no question of easement arises. An easement of this description is unknown to law, and it is well settled that the Court will not create a new species of easement [*Keppell* v. *Bailey* (1), and *Hill* v. *Tupper* (2); Laws of England, edited by Halsbury, Volume XI, S. 500]. In the present case, the act of the plaintiff was in the nature of trespass and it might perhaps have been open to him to contend that he had acquired a good title to the disputed property by adverse possession. No such claim, however, has been set forth at any stage of the litigation, and he cannot now be permitted to make a case inconsistent with the title alleged in the plaint. In our opinion, the relief sought cannot possibly be granted.

An application has finally been made to this Court for leave to withdraw the suit so that the plaintiff may have a fresh chance of litigation. We are of opinion that this application should not be granted. The Subordinate Judge has pointed out that

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(1) 2 Myl. & K. 517.
(2) (1863) 2 H. & C. 121.

there are Municipal latrines in the neighbourhood, and it is eminently undesirable that the plaintiff should have further opportunity to press an entirely unfounded claim.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 788

MOOKERJEE AND ROE, JJ.

Ramnath Gagoi—Plaintiff—Appellant.

v.

Pitambar Deb Goswami—Defendant—Respondent.

First Appeal No. 59 of 1912, decided on 24th August, 1915, from the Decree of Sub-Judge, Sibsagar, dated 18th December, 1911.

(a) Partnership—Constitution of.

A partnership is constituted whenever the parties have agreed to carry on a business or to share the profits in some way in common. [P. 789, C. 2.]

(b) Partitionship—Rights of partners to purchase partnership property.

A partner is entitled to purchase partnership property, provided there is full disclosure, and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other. [P. 790, C. 1.]

(c) Accounts—Accounts partly settled—Action for balance of settled account maintainable.

An action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. [P. 790, C. 1 & 2.]

(d) Contract Act (9 of 1872), S. 180—Bailor or bailee entitled to sue wrong-doer for deprivation or injury to chattel.

Under S. 180 of the Contract Act either the bailor or the bailee may bring a suit against a third person for deprivation or injury to chattel bailed, the latter by virtue of his possession, the former by reason of his property. [P. 790, C. 2.]

Tarakishore Chaudhuri, Brajalal Chakrabarty, Hirendra Nath Ganguli and *Kshitis Chandra Chakrabarty*—for Appellant.

Biraj Mohan Mojumdar, N. C. Bardolai and *Probodh Kumar Das*—for Respondent.

Judgment.—This is an appeal by the plaintiff for recovery of eight elephants or, in the alternative, of their price. The facts material for the determination of the rights of the parties lie in a narrow compass, and may be briefly narrated. The defendant, the Gossain of Garamur Satra, took a lease from Government of the Dayang Dhausiri *Mahal* No. 6 in the district of Sibsagar for the purpose of catching elephants during the years 1909-1910 and 1910-1911. The license fee was Rs. 2,750. per annum. On the 3rd July, 1909, the defendant took the plaintiff as a partner in the venture, and the terms settled between them are set out in a letter of that date written by the defendant to the plaintiff. The contract was subsequently embodied in a formal deed of agreement executed on the 24th November, 1909. The substance of the arrangement was that the plaintiff became a partner to the extent of a half share, and was authorised to manage the works, such as building stockades, catching elephants, &c. It was further agreed that at the time of the sale of the captured elephants, the plaintiff would give intimation to the defendant, so that the sale might be conducted in the presence of a representative of the latter. The plaintiff was made liable to pay a half share of the license fee in four equal instalments. The elephants were captured in five places during the first three months of 1910, Loengtha, Rungma, Bokajan, Hazat Ali stockade at Depupani, Itonia stockade at Depupani. Two methods were adopted for capture of the elephants, *viz.*, *melalasikar* or the noosing of wild elephants by *mahouts* mounted on tame elephants, and *khedasikar i.e.*, the driving of wild elephants into a stockade. With regard to *melalasikar*, two sets of persons had interest in the elephants captured, *viz.*, the *mahaldars* or licencees from Government, who had a one-fourth share and the *kunkidars* or the owners of tame elephants, who had the remaining three-fourths share. As regards *khedasikar*, three sets of persons had interest in the elephants captured, *viz.*, the *mahaldars* who had one-fourth, the *gardars* or builders of the stockades who had a half share, and the *kunkidars* or owners of the tame elephants employed to take the wild elephants out of the stockade, who had the remaining one-fourth share. It is obvious from the preliminary statement that the title to an elephant captured could be transferred only with the assent of all the persons who possessed an interest in the animal. It may also be added that it is customary to allot to the lessee of the *mahal* the biggest elephant caught if the operations are exceptionally successful; and

the defendant in this case was particularly anxious to secure an elephant worthy of his position. Animals were captured, as we have said, during the first three months of 1910, and the evidence shows that they were valued and sold, some to strangers, while others were taken by one or other of the parties interested in the capture. On the 28th February, 1910, a tusker six feet nine inches high was captured, was marked down to the Gossain as worthy of his position, and was actually delivered to him in the first week in April; its value, Rs. 1,500, was debited in the account against the defendant. About this time, the defendant discovered that another tusker eight feet three inches high had been captured on the 25th March in the Hazat Ali Stockade and had been marked down to the plaintiff. The defendant resented this and he appealed to the plaintiff and his brother to let him have this elephant for the sake of his dignity. This request passed unheeded and the plaintiff removed with eight of the newly caught elephants and with others belonging to himself to Akhoy Phutya, about 50 miles distant from the depot at Yamguri, where all the captured elephants were brought. The defendant, thus baffled, sent information to the Police that the plaintiff was absconding with elephants. The result was that the Police intervened and attached the elephants; one was sold while under attachment, and seven others were made over to the agent of the defendant on the 13th May, 1910. Attempts at a settlement proved abortive, and on the 1st October, 1910, the plaintiff commenced this action for recovery of the elephants taken away from him or for their value. The defendant resisted the claim mainly on the ground that plaintiff had not acquired an absolute and exclusive title to the animals, that he had no enforcible claim till the partnership accounts were adjusted, and that if the accounts were settled, it would be found that a large sum was due from the plaintiff to the defendant. The Subordinate Judge has dismissed the suit. He has held that in the suit as framed, the partnership accounts could not be adjusted, and that till the accounts between the parties were adjusted, the plaintiff was not entitled to relief.

The plaintiff has appealed to this Court and has contested the grounds for the decision of the Subordinate Judge; he has also suggested that, if necessary, leave should be granted to amend the plaint and to convert the suit into one for partnership accounts, so that the rights and liabilities of the parties might be investigated and determined.

We may state at the outset that there is no room for controversy that the plaintiff and the defendant were partners, for as Sir Montague Smith said in *Mollwo, March & Co.* v. *Court of Wards* (1), a partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common: *Pooley* v. *Driver* (2). What then was the position of the parties as partners in this venture? It is plain from the evidence that the accounts of the captures in the different places were made up separately *i.e.*, stockade by stockade. Consequently, if it be found that the accounts of one stockade have been finally settled, it cannot be maintained that the rights of the parties in the elephants captured there, remained undetermined because the accounts of some other stockade had not been finally adjusted. Now the eight elephants in dispute as described in Schedule 8 to the plaint were captured as follows—four, Nos. 1, 4, 5 and 8 at Rungma and Bokajan, three Nos. 2, 6 and 7 in the Itonia stockade, and one, No. 3 at the Hazat Ali stockade. As regards the Rungma and Bokajan elephants, we may state at once that the accounts were not finally settled. The oral evidence suggests that the agent of the defendant was present, made up an account and signed a book; these are not produced by the plaintiff and Malli Ram, the agent, was indeed not even cross-examined with regard to these accounts. There is no trustworthy evidence to show that the prices fixed by the plaintiff for elephants caught in these stockades were ever submitted to the agent of the defendant for approval. There is, on the other hand, indication in the evidence that the Rungma and Bokajan stockades were worked solely by the plaintiff. It is impossible for us to hold that the plaintiff has acquired sole ownership to the elephants captured at Rungma and Bokajan. This portion of the claim cannot possibly be sustained and we did not, indeed, think it necessary to hear the respondent on this part of the case.

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(1) (1872) 18 W. R. 384 (P. C.).
(2) (1876) 5 Ch. D. 458.

We have next to deal with elephant No. 3 captured in the Hazat Ali stockade and elephants Nos. 2, 6 and 7 in the Itonia stockade. In each of these cases, the evidence, in our opinion, proves that complete title had vested in the plaintiff. There was a sale in each instance with the concurrence of all the parties interested in the animal and the price fixed was approved on behalf of the defendant by Gopal Bhuyan and Maliram Khatomal, who was unquestionably the representative of the Gossain as contemplated by the deed of agreement. The only question is, whether the plaintiff is debarred of his remedy, because there has not been a complete adjustment of accounts. It is plain that a partner is entitled to purchase partnership property, provided there is full disclosure and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other: *Dunne* v. *English* (3) and *Imperial Mercantile Credit Association* v. *Coleman* (4), Indeed, if this principle were not adopted, the transaction might not only be fruitless but end in loss to the parties. Elephants captured cannot be forthwith sold to strangers, and there is no reason why each partner should not be allowed to take some of the animals if the transaction is perfectly fair and they are agreed as to the prices. We are of opinion that the title of the plaintiff cannot be assailed merely on the ground that he has purchased partnership properties; he did so with the assent of all the persons interested in the animals, and his purchase was in no sense in contravention of the terms of the deed of agreement. Is there, then, any reason why the plaintiff should be denied relief, because all the accounts had not been adjusted? The acquisition of an absolute title to the four elephants mentioned, was not contingent upon the adjustment of all the accounts of the partnership. In this situation, the principle formulated by Lord Cottenham in *Rowson* v. *Samuel* (5) applies, *viz.*, that an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. In the present case, there are no even cross-demands; the defendant has not chosen to sue the plaintiff for adjustment of the partnership accounts, and he cannot invite the Court to assume that the balance of that account would be found to be in his favour. Reference may be made to the earlier decision in *Prestom* v. *Strutton* (6), where the pendency of an unsettled partnership account upon which the balance was in dispute, was held to be no ground for an injunction to restrain execution upon a judgment which had been obtained upon a note given for a balance upon a former settlement. In the present case, the plaintiff had acquired a complete and indefeasible title to the elephants mentioned; he was in lawful possession of them; he was deprived of that possession, because the defendants set the Police authorities in motion on untrue information, and thus obtained possession of the animals. We may observe that at least as regards one of the elephants, it was argued that the evidence showed that the plaintiff was not himself the owner as he had made the purchase for the benefit of another person. The contention in substance is that the suit in respect of such elephants could be maintained only by the person for whose benefit the purchase had been made. There is no foundation for this argument, as S. 180 of the Indian Contract Act provides that if a third person deprives the bailee of the use or possession of the goods bailed or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. This is good sense and conforms to what is now well-settled law in England (Story on Bailments, S. 93-F, *Giles* v. *Grover* (7) and *Jeffries* v. *Great Western Railway Co.* (8). As was said by Baron Parke in *Manders* v. *Williams* (9), no proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer, the latter by virtue of his possession,

(3) (1874) 18 Eq. 524.
(4) (1873) 6 H. L. 189.
(5) (1841) Cr. & Ph. 161.
(6) (1792) 1 Anstruther 50.
(7) (1832) 6 Bligh (N. S.) 277.
(8) (1856) 5 El. & Bl. 802.
(9) (1849) 4 Exch. 339.

the former by reason of his property. We hold accordingly that the plaintiff is entitled to the value of the four elephants Nos. 2, 3, 6 and 7. But we are not prepared to allow him a decree for the sums claimed as expenditure for tending and training the animals; there is no satisfactory evidence in support of this claim.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The plaintiff will be awarded a decree for Rs. 4,600; this sum will carry interest at 6 per cent. per annum from the date of the institution of the suit to the date of realisation; we observe that the plaint does not include a claim for interest antecedent to the suit. Each party will receive and pay costs in proportion to his success and defeat in both the Courts.

V.B./R.K.

Appeal allowed in part;
Decree modified.

A. I. R. 1916 Calcutta 791

CHAPMAN AND RICHARDSON, JJ.

Kalyan Singh and *others*—Plaintiffs—Appellants.

v.

Ram Gulam Singh and *others*—Defendants—Respondents.

First Appeal No. 12 of 1913, decided on 4th June, 1915, against the Decree of Sub-Judge, Monghyr, dated 14th August, 1912.

Civil Procedure Code (5 of 1908), O. 9, R. 8—Dismissal under R. 8 bars fresh suit.

Where the dismissal of a suit takes place under the provisions of S. 102 of the old Code (O. 9, R. 8 of the new Code), the plaintiffs are precluded under O. 9, R. 9, (S. 103 of the old Code) from bringing a fresh suit on the same cause of action. [P. 791, C. 2 & P. 792, C. 1.]

Kali Kinkar Chakravarti—for Appellants.

Joges Chandra Roy and *Haradhan Chatterjee*—for Respondents.

Chapman, J.—This is an appeal from a judgment of the learned Subordinate Judge of Monghyr, dated the 14th August, 1912. The suit was brought by the plaintiffs who are the appellants to this Court, to recover possession of certain lands—a share in a *patti* called Busi Sing's *patti*. This property was leased out by the plaintiffs by a document dated the 1st March, 1889 to one Mr. Hollway for a term of nine years and on the same day Hollway sub-let the property back to the plaintiffs. On the 16th January, 1893, Mr. Hollway granted a lease of the property to the defendants, the defendants, therefore, dispossessed the plaintiffs. The plaintiffs then brought on the 27th September, 1894, a suit (No. 95 of 1894) asking for possession of the property, the subject-matter of the suit, namely 105 *bighas* 24 *cottas* of land. The suit was decreed by the Court of first instance and the plaintiffs then obtained possession of the property in execution. On the 4th September, 1896, the defendants preferred an appeal to this Court against that decree. In May, 1897 that appeal was allowed and the defendants applied to be restored to possession in execution of the High Court's decree. The plaintiffs objected that the lease under which Hollway held the property had expired; but the Court held that it could not go into such a matter in the execution proceeding. An appeal was then filed to this Court against the latter order and the plaintiffs had also prior to the filing of that appeal instituted a regular suit against the defendants, being Suit No. 359 of 1900. This Court dismissed the appeal against the refusal of the learned Judge to allow this question, which was raised by the present plaintiffs, to be gone into in execution, the Court remarking that the present defendants undertook that neither the proceedings for restitution nor the fact that the previous suit brought by the appellants (No. 359 of 1900) was subsequently dismissed for non-prosecution on the 5th March, 1903, should in any sense be treated as a bar to any fresh suit which the present appellants might be advised to institute in relation to the disputed property. The question is whether the Court could place such a condition upon the respondents. It seems to me it could not. The decree in Suit No. 359 of 1900 shows that the case was one where the dismissal took place under the provisions of S. 102 of the old Code of Civil Procedure which corresponds with O. 9, R. 8 of the new Code. That being so, the plaintiffs were precluded by law, that is under S. 103, from bringing a fresh suit on the same cause of action. No Court in its judgment can say that, in a future suit,

S. 103 should not operate as a bar to the plaintiffs' suit. The real truth is that the plaintiffs ought to have applied in the manner provided by S. 103 of the old Code to set aside the order of dismissal of Suit No. 359 of 1900, and the order of the Court saying that the fact that the suit had been dismissed for non-prosecution should not be treated in any sense as a bar to any fresh suit, is obviously *obiter* and not binding upon the defendants. It is an unfortunate position no doubt but we cannot give the go-by to S. 103 of the old Code of Civil Procedure. That section is manifestly a bar to the present suit.

Whether or not the plaintiffs can now have their appeal revived against the refusal of the learned Judge to go into this question in execution, which was dealt with by the judgment of the 12th February, 1906, it is not necessary for us to consider. All that we say in this case is that the farmer dismissal of Suit No. 359 of 1900, is a clear bar to the present suit brought by the plaintiffs. The result, therefore, is that, though for different reasons, I concur in the result arrived at by the learned Judge of the Court below and dismiss the appeal. As this point is one for which the plaintiffs themselves are not responsible, I think there should be no order for the costs of this appeal.

Richardson, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R 1916 Calcutta 792

MOOKERJEE AND NEWBOULD, JJ.

Khub Lal Singh and *another*—Plaintiffs—Appellants.

v.

Ajodhya Misser—Defendant—Respondent.

Second Appeal No. 1113 of 1913, decided on 17th August, 1915, from the Decree of Dist. Judge, Gaya, dated 12th December, 1912.

(a) Hindu Law—Widow—Alienation—Validity of—Necessity—Test of.

Where a deed by a limited owner with qualified power of alienation is impeached, the test is, is the transaction fair and proper, lawful and valid and justified by Hindu Law; necessity is only one of the phases of the test of propriety. [P. 793, C. 1.]

(b) Hindu Law—Widow—Alienation—Power of disposition for religious or charitable purposes.

A widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. [P. 793, C. 1 & 2.]

(c) Hindu Law—Widow—Alienation—Disposition for legal necessity for worldly purposes and for promotion of spiritual welfare—Distinguished.

There is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and within proper limits the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce, to his spiritual benefit. [P. 794, C. 2.]

(d) Hindu Law—Widow—Alienation—Widow entitled to alienate small portion of estate for religious purposes.

A Hindu widow, daughter or mother, is entitled to alienate a small portion of the estate in her hands for religious purposes. [P. 794 C. 1.]

(e) Hindu Law—Widow—Alienation—Disposition for excavation and consecration of tank valid and lawful.

Under the Hindu Law the excavation and consecration of a tank are acts of high religious merit and a disposition made by a widow for such a purpose is lawful, valid and proper. [P. 795, C. 1.]

(f) Hindu Law—Widow—Alienation—Extent of alienation—Validity—Illustrated.

An alienation of an area slightly over two *bighas* out of ten *bighas* by a widow for the performance of a work of recognized religious merit, is not unreasonable in extent. [P. 795, C. 2.]

Lachmi Narayan Singh and *Sivandan Roy*—for Appellants.

U. P. Roy and *Harihar Prasad Singh*—for Respondent.

Judgment.—The subject-matter of the litigation which has culminated in this appeal is immovable property admittedly included in the estate of one Syamlal Misser, who died in 1889. He was succeeded by his widow Puna Koer, who, on the 2nd May, 1899, granted two permanent leases of the disputed land to the defendants on nominal rents. Puna Koer died in 1910. On the 20th May, 1911 the plaintiff, whose paternal grandfather was the brother of the father of Syamlal Misser, instituted this suit for recovery of possession on declaration that he had succeeded to the estate as reversionary heir and was not bound by the permanent leases granted by the widow. The defendants resisted the claim on the ground that the transactions impeached were lawful, valid and justified by Hindu Law. The Courts below have concurrently found that the leases had been granted to raise money for the excavation and

consecration of a tank and for the erection of a wall in connection with a temple founded by Syamlal Misser shortly before his death ; and the evidence shows that the premium for the two leases, namely, Rs. 528 was applied for the aforesaid purpose. The Courts below have, however, decreed the suit, in the view that the excavation and consecration of the tank and the erection of the wall were not legal necessities. On the present appeal by the defendants, we have been invited to hold that the objects specified, justified the alienations which are consequently operative against the inheritance in the hands of the reversionary heir.

The test in cases of this description, where a deed by a limited owner with qualified power of alienation is impeached, is, whether the purpose for which the alienation was made was proper or legitimate. The limits of this power were defined by Turner, L. J., in a celebrated passage in the judgment of the Judicial Committee in *Collector of Masulipatam* v. *Cavaly Vencata Narrainpah* (1): "The widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possess for purely worldly purposes. To support an alienation for the last she must show necessity." To maintain that in every case where an alienation by a limited owner is impeached, legal necessity therefor must be established to support its validity, is to take a narrow and restricted view of the scope of the true rule on the subject. The test is, is the transaction fair and proper, lawful and valid and justified by Hindu Law ; necessity is only one of the phases of the test of propriety. This is manifest from the observations of Sir James Colvile in *Raj Lukhee Debea* v. *Gokool Chunder* (2), of Lord Davey in *Sham Sundar Lal* v. *Acchan Kunwar* (3) and of Lord Moulton in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (4). It is unquestionable then that the widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary ; but some of them were mentioned by way of illustration in an opinion of the Pandits quoted with approval by Lord Gifford in delivering the judgment of the Judicial Committee in *Cossinaut Bysack* v. *Hurroosoondry Dossee* (5),

"religious purposes include dowry to a daughter, building temples for religious worship, digging tanks, and the like."

The Pandits added

"the widow has a life-interest (in both movable and immovable property), and is entitled to the enjoyment of the same, and to dispose of the same by gift, mortgage, sale. or otherwise, for the benefit of her departed husband's soul, even without the consent of her husband's kinsmen; in so doing, she will observe moderation."

We may here refer to some very weighty observations, made by Lord Gifford, on the mode of determination of questions of this character by our Tribunals :

"This being a question purely of Hindu Law, great care must be taken in coming to a decision upon that subject, in order to prevent the judgment of English Judges being warped by impressions made upon their minds in consequence of their habitual application of English Law and the nature of English decisions to which they are accustomed, and *to consider in what way, a Hindu Court of Justice would have decided the point.*"

These remarks could hardly have been borne in mind in some of the decisions quoted before us. It is not necessary for our present purpose to enter upon a minute analysis of the cases on the subject, but reference may be made to the decisions in *Mahoda* v. *Kuleani* (6), *Ramchunder* v. *Gungagovind* (7), *Kartick Chunder Chukerbutty* v. *Gour Mohun Roy* (8), *Runjeet Ram Koolal* v. *Mahomed Waris* (9), *Ram Kawal Singh* v. *Ram Kishore Das* (10), *Churaman Sahu* v. *Gopi Sahu* (11), *Harmanage Narain Singh* v. *Ram Gopal Achari* (12), *Jagjiban* v. *Deo Shankar* (13), *Kupoor* v. *Sebak Ram* (14),

(1) (1865) 2 W. R. 61=8 M. I. A. 529 (P. C.).
(2) (1869) 12 W. R. 47=13 M. I. A 209 (P. C.).
(3) (1899) 21 All. 71=25 I. A. 183 (P. C.).
(4) A. I. R. (1914) P. C. 128=41 Cal. 793=23 I. C. 162 (P. C.).
(5) (1820) 2 Morley's Digest 198.
(6) (1803) 1 Mac. Sel. Rep. 82.
(7) (1826) 4 Mac. Sel. Rep. 147.
(8) (1864) 1 W. R. 48.
(9) (1874) 21 W. R. 49.
(10) (1895) 22 Cal. 506.
(11) (1909) 1 I.C. 945=37 Cal. 1.
(12) (1913) 19 I.C. 417.
(13) (1812) 1 Bor. 394.
(14) (1816) 1 Bor. 405.

Chunnee Lal v. *Jussoo* (15), *Gopalla* v. *Narayana* (16), *Rama* v. *Ranga* (17), *Lakshminarayanna* v. *Dasu* (18), *Vappuluri* v. *Garinalla* (19), *Gudimetla Vancatarazu* v. *Bolloza Kottaya* (20) and *Puran Dai* v. *Jai Narayan* (21). These cases generally recognise the doctrine that a Hindu widow, daughter or mother is entitled to alienate a small portion of the estate in her hands for religious purposes, though the actual result reached in individual decisions may be open to criticism upon their special facts. In some of these cases, however, a distinction is drawn between acts of which the religious merit is solely acquired by the female heir and acts of which the religious merit accrues to the deceased or is shared by the female heir with him. As Prannath Saraswati points out, however, in his erudite lecture on the Hindu Law of Endowments (page 167), this distinction is not supported by the texts in the case of the widow, though it may be valid in the case of the daughter or the mother. According to a text of Vrihaspati quoted in the Dayabhaga, Chapter 11, S. 1, the husband and wife participate in the effects of good and civil actions, and this mutual relation is not dissolved by the death of either partner. This is emphasized in another passage (Dayabhaga, Chapter XI, S. 1, Clauses 43 and 44), where it is expressly stated that the widow performs acts spiritually beneficial to her husband from the date of her widowhood, and she is enjoined to be assiduous in the performance of religious duties, because, according to a text of Vyasa, she thereby conveys her husband, though abiding in another world, and herself to a region of bliss. To the same effect, is the Viromitrodaya of Mitra Misra, Chapter III, part 1, S. 3 (Shastri Gulap Chander Sarkar's translation, page 136), where reference is made to a text of Katyayana which recognises the right of the widow to make gifts for spiritual purposes and also to mortgage or sell so much as is sufficient for such purposes, even in religious ceremonies that are optional, and *a fortiori*, in those daily and occasional ceremonies which are enjoined by the Shastras and the omissions whereof entail demerit. The Viromitrodaya (page 141) also maintains that in making gifts for spiritual purposes as well as in making sales or mortgages for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right extends to the entire estate of her husband; the author, in fact, reads the injunction as to moderation as restricted to improper temporal uses. This view, however, has not been accepted, and it has been ruled that a gift of a moderate portion of the property of her husband by the widow, with a view to his spiritual benefit, is valid (See Jagannath's Digest, translated by Colebrooke, Book I, Ch 5, S. 3, Pl. 195; Book II, Ch. 4, S. 1, Pl. 2 & 3 and Book V, Ch. 8, Pl. 399). The true rule thus appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit.

Tested in the light of these principles, what is the position of the parties here? Shyamlal Misser had, shortly before his death, founded a temple. His widow raised Rs. 528 by the grant of two perpetual leases with a view to excavate and consecrate a tank and to complete the walls of the temple buildings. The deeds contain recitals that her husband had enjoined her to carry out the works mentioned. These recitals, as pointed out by the Judicial Committee in *Brij Lal* v. *Musammat Inda Kunwar* (22), are not by themselves conclusive evidence of their truth, and the facts alleged should be proved *aliunde*. But obviously, after the death of both Shyamlal Misser and Puna Koer, independent evidence is not likely to be available for the determination of the question, whether or not the husband gave any specific instruction to the widow. Assume, then, that the alleged instructions have not been proved; still the fact remains that the widow raised money and applied the same for completion of the buildings and

(15) (1813) 1 Bor. 55.
(16) (1850) Mad. S.D.A. 74.
(17) (1885) 8 Mad. 552.
(18) (1888) 11 Mad. 288.
(19) (1911) 34 Mad. 288=6 I. C. 240
(20) (1912) 16 I.C. 139.
(21) (1882) 4 All. 482.

(22) A. I. R. (1914) (P. C.) 38=36 All. 187 (P. C.).=23 I. C. 715.

for the excavation and consecration of a tank in connection with the temple. The water of the tank would be needed for purposes of ablution and worship but even apart from this, the excavation and consecration of a tank are acts of high religious merit, as is authoritatively laid down in a series of texts quoted in the Jalashaotsargatattwa of Raghunandan and the Chaturbargachintamoni of Hemadri (Denakhanda, Ch. XIII, Asiatic Society's Ed. p. 1003). Many of these texts which extol the religious merit of the construction, consecration and maintenance of tanks and other reservoirs for storage of water, are translated by Prannath Saraswati in his tenth lecture on the Hindu Law of Endowment. We feel no doubt what answer a Hindu Court of Justice would have given, if a question had been raised before it as to the propriety and validity of these acts of the widow from the point of view of Hindu Law. As Lord Gifford said in *Cossinant Bysack* v. *Hurroosoondry Dossee* (5), it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition. In the case before us, the disposition has been made for the performance of a work of recognised religious merit and cannot consequently be treated as other than lawful, valid and proper.

One other question requires consideration, namely, whether the alienation covers a reasonable portion of the property of the husband of the lady; this, as Lord Gifford said, must be determined with reference to the circumstances of the particular disposition. The Courts below did not direct their attention to this aspect of the case, possibly because its true bearing on the question in issue was not realised; and it seemed at one stage as if a remand might be necessary for the investigation of this point on fresh evidence. An examination of the record, however, shows that there are materials sufficient to enable us to come to a conclusion on the matter. Several other suits were instituted, simultaneously with the present suit, for the cancellation of other alienations by Puna Koer. These cases show that Shyamlal Misser left more than ten *bighas* of land and that the area now in dispute slightly exceeds two *bighas*. We are of opinion that, in the circumstances of this case, the area alienated did not constitute an unreasonably large fraction of the entire estate. In the case of *Ramchunder* v. *Gungagovind* (7), the Pandits indicated their opinion that the widow might validly alienate, for religious purposes, three-sixteenths of her husband's property. In *Churaman Sahu* v. *Gopi Sahu* (11), the gift which was sustained was of a portion of the estate worth more than one-fourth and less than one-third of the total value. In these circumstances, we are unable to say that the alienation was unreasonable in extent.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 795

SHARFUDDIN AND RICHARDSON, JJ.

Surendra Narayan Singh — Decree-holder — Petitioner.

v.

Lachmi Koer and *another*—Judgment-debtors—Opposite Party.

Civil Rules Nos. 58 and 59 of 1915, decided on 9th April, 1915, against the Decree of Munsif, Katihar.

Bengal Tenancy Act (8 of 1885), S. 174—Deposit under S. 174—Only judgment-debtor and not his assignee is competent.

A deposit made under S. 174 of the Bengal Tenancy Act must be made by the judgment-debtor himself and by no other person. A transferee of the judgment-debtor does not come under that section. 15 I. C. 561, foll.

[P. 796, C. 1.]

D. N. Mitra and *Rishendra Nath Sarkar* – for Petitioner.

Judgment.

Rule No. 58 of 1915.—This Rule was issued on the opposite party to show cause why the order of the Munsif, dated the 22nd October, 1914, should not be set aside on the ground that the opposite party was not the judgment-debtor within the meaning of S. 174 of the Bengal Tenancy Act.

It appears that the petitioner obtained a decree against an occupancy *ryot* for arrears of rent and in execution of that

decree, the holding was sold on the 8th September, 1914 and was purchased by the petitioner. On the 22nd October, 1914 a deposit of the decretal amount was made by the wife of the transferee of the tenant in question and on that day in consequence of the deposit thus made, the sale was set aside by the Munsif of Katihar in the following terms:

"The judgment-debtor has deposited the entire decretal amount and compensation within time. Let the sale be set aside and the case dismissed after full satisfaction of claim."

The petitioner obtained the present Rule on the ground that S. 174 of the Bengal Tenancy Act under which the deposit in question was made, refers only to a deposit by the judgment-debtor himself and hence the transferee of the judgment-debtor does not come under S. 174 of the Act. It was contended that the deposit that was made by him was no deposit by the judgment-debtor and that the sale, therefore, should not have been set aside.

In *Ranjit Kumar Ghosh* v. *Jogendra Nath Roy* (1) it was held that the application under S. 174 of the Bengal Tenancy Act can be made by the judgment-debtor alone and by no other person.

We, therefore, make the Rule absolute, set aside the order of the Munsif and confirm the sale.

This order will govern the other Rule No. 59 of 1915.

V.B./R.K.

Rules made absolute.

(1) (1912) 15 I. C. 561.

A. I. R. 1916 Calcutta 796

CHATTERJEE AND CHAPMAN, JJ.

Sanatan Chakravarti and *another*—Defendants—Appellants.

v.

Kauri Mani Dasi and *others*—Plaintiffs—Respondents.

Second Appeal No. 1253 of 1913, decided on 12th May, 1915, from the Decree of Addl. Dist. Judge, 24 Parganas, dated 14th March, 1913.

Transfer of Property Act (4 of 1832), S. 60—Mortgage by husband if for binding debts—Widow cannot be allowed to redeem without payment.

In a case where the wife wants to recover the property which is found to have been mortgaged by her husband for debts for which her husband's property in her hands would be justly liable:

Held, that to allow her to recover her property without any condition is not equitable.

[P. 797, C. 1.]

Atul Krishna Roy—for Appellants.

Sib Chandra Palit and *Jogesh Chandra Bose*—for Respondents.

Judgment.—The admitted facts of the case are that one Kala Chand Naskar died leaving three sons, Gopinath, Hem and Uma Charan and a widow, Muktakeshi. Uma Charan was a minor at the time. Gopinath, Hem and Muktakeshi on behalf of the minor mortgaged 16 annas of certain property to defendant No. 5. Defendant No. 5 sold the mortgage to the grandfather of the appellants, defendants Nos. 1, 2 and 3. Jadunath, the father of the appellants, brought a suit on the mortgage against Hem alone, as Muktakeshi, Gopinath and Uma Charan were all dead at the time. It appears, however, that Gopinath left a widow, who is the plaintiff and who was not made a party to the mortgage suit. A decree was made in favour of Jadunath, and Jadunath in execution of his decree purchased the mortgaged property. One Gopal Chandra Ghose having obtained a money-decree against Jadunath sold the right, title and interest of Jadunath in execution and purchased it himself. Gopal Chandra then sold the right so purchased by him to defendant No. 7, Hari Das, and defendant No. 7 let out the property to Jadunath, the father of the appellants. After this, the widow of Gopinath brought a suit for recovery of an 8-annas share to which her husband was entitled. Upon the admitted facts of the case, the plaintiff was not bound by the mortgage-decree. She was, therefore, entitled to redeem the mortgage of Jadunath which would be vested in defendant No. 7; and the Court of first instance made a decree in favour of the plaintiff for possession of her 8-annas share upon redemption. The order was—

"The plaintiff be put in joint possession of the property to the extent of her half share in it, on her payment of Rs. 200; towards the redemption of the mortgage as found in the judgment, to defendants Nos. 1—3 and defendant Haridas Ghose. After the redemption either party may sue for partition."

There was an appeal to the learned District Judge by the plaintiff and we understand that there was also a cross-appeal by the appellants. The learned

Judge in dealing with the appeal has made a mistake with regard to the law applicable to the case. He has held that the purchaser in execution of the mortgage-decree purchased the right, title and interest of the judgment-debtor Hem Chandra and nothing else.

There is no dispute in this Court that that judgment is not right. The point, however, which is disputed is that the appellants who were the lessees of Hari Das have not the same rights as Hari Charan had and as Hari Das has not appealed, the decree as made by the Court of Appeal below, that the plaintiff should recover her 8-annas share of the property unconditionally, ought to remain, subject in future to the working out of any rights which Hari Das or anybody claiming under him may have. Ordinarily that may be the right mode of looking at the facts of the case. This, however, is a case in which the plaintiff wants to recover the property which, upon the finding, was mortgaged by her husband for the debts for which her husband's property in her hands would be justly liable. To allow her, therefore, to recover her property without any condition would not be equitable. At the same time the appellants claiming merely as lessees would not be entitled to the same rights as Hari Das. But Hari Das is a party respondent before us, and under O. 41, R. 33 of the Civil Procedure Code, we can pass a decree that ought to be passed. We think the most proper decree in this case would be something like what was passed by the learned Munsif in this case, that is, that Hari Das must be redeemed, and that the plaintiff will recover possession upon payment of Rs. 200 to Hari Das or anybody that may establish a title to the rights of Hari Charan.

It is alleged that Hari Charan has executed a conveyance in favour of the appellants pending this appeal. But that document is not before us, and we leave that to be worked out during the execution of the appellants' claim under their conveyance from Hari Das.

In the circumstances of the case, we make no order as to the costs in this appeal.

V.B./R.K.

Ordered accordingly.

A. I. R. 1916 Calcutta 797

MOOKERJEE AND NEWBOULD, JJ.

Nikunja Rani Chowdhurani—Defendant—Appellant.

v.

Secretary of State Plaintiff—Respondent.

Second Appeal No. 637 of 1915, decided on 11th August, 1915, against the Decree of Dist. Judge, Faridpore dated 8th February, 1912.

(a) Civil P. C. (5 of 1908), S. 9—Suit for recovery of penalty imposed maintainable.

Unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council for recovery of a penalty lawfully imposed. [P. 799, C. 1.]

(b) Jurisdiction—Civil and Revenue Courts—Order of imposition of penalty by Revenue Courts *ultra vires*—Civil Court has jurisdiction to take cognizance of suit.

Where a penalty has been imposed by a Revenue Authority, a Civil Court has no jurisdiction to review the decision on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised, but if the action of the Revenue Authority is *ultra vires* there is no enforceable claim which a Civil Court is bound to recognize. [P. 799, C. 1.]

(c) Court Fees Act (7 of 1870), S. 19-E—Object of—Revenue Court not authorised to impose penalty.

S. 19-E of the Court Fees Act contemplates an application on the part of the person who had taken out Probate and produce the same to be duly stamped and applies where the estimated value of the estate is less than what the value has afterwards proved to be: and in the absence of any such application, it does not authorize a Revenue Authority to impose any penalty.

[P. 799, C. 2 & P. 800, C. 1.]

(d) Court Fees Act (7 of 1870), S. 19-F—Penalty imposed *ultra vires*—Suit for recovery held not maintainable.

In a Probate case notice was issued to a Collector under sub-S. 1 of S. 19-H of the Court Fees Act. As no reply was received from the Collector, Probate was issued to the petitioner on payment of the duty payable upon her valuation of the estate. The Collector, thereafter, held that the value of the estate was much more and directed a notice to the petitioner to amend the valuation, and to explain the cause of under-valuation. The petitioner did not accept the Collector's valuation but in order to avoid litigation deposited the additional fee. The Board, however, ordered that double the fee payable be levied as penalty and a suit was instituted to recover the amount.

Held, that the imposition of the penalty was *ultra vires* and, therefore, the suit was not maintainable. [P. 800, C. 1.]

(e) Court Fees Act (7 of 1870), S. 19-E—Revenue Authority entitled to refuse to stamp

Probate till payment of penalty—Penalty whether recoverable from estate or person.

Semble.—In a case where S. 19-E is properly applicable, the petitioner is entirely in the hands of the chief controlling Revenue Authority, who is at liberty to refuse to stamp the Probate till the penalty has been paid. [P. 800, C. 1.]

Quaere.—Whether the penalty imposed in such a case is personal and not recoverable from the estate. [P. 800, C. 1.]

Rash Behary Ghose and *Dwarka Nath Chakraburty* and *Chandra Kanta Ghose* —for Appellant.

Ram Charan Mitra—for Respondent.

Judgment.—This is an appeal by the defendant in a suit for recovery of a penalty imposed on her under S. 19-E of the Court Fees Act, 1870. The facts material for the determination of the questions of law raised before us are undisputed, and lie in a narrow compass. The appellant applied for Probate of a will executed by her husband Kailas Chandra Choudhury. Thereupon notice was issued to the Collector of Faridpore under sub-S. 1 of S. 19-H of the Court Fees Act. As no reply was received from the Collector, Probate was issued to the petitioner on the 28th August, 1900 on payment of Rs. 1,563, the duty payable upon her valuation of the estate. On the 10th December, 1908, the Collector of Faridpore, who had meanwhile communicated with the Collector of Backergunge where some of the properties were situated, held that the value of the estate was Rs. 1,69,123 and not Rs. 78,122 as stated by the petitioner in her application for Probate. He accordingly directed the petitioner to amend the valuation and to explain the cause of under-valuation. Notice was served upon her on the 15th December, 1908. On the 2nd January, 1909, she presented a petition to the Collector, in which she stated that the valuation as made by her agents and accepted by her in good faith was correct, as the majority of the properties were small shares in various estates and could not fetch large values. She added, however, that she had no desire to litigate the matter and deposited Rs. 1,821, the additional fee payable, on the hypothesis that the valuation of the Collector was correct. On the 16th January, 1909, the Collector recommended to the Commissioner that the additional sum might be accepted, and the Probate amended. This was endorsed by the Commissioner and submitted by him to the Board of Revenue for sanction. The Board however, on the 4th July, 1909, directed that double the fee payable, that is Rs. 6,768, be levied as penalty from the petitioner under S. 19-E of the Court Fees Act. This order, made without any notice to the petitioner, was communicated to her on the 15th August, 1909. On the 11th September, 1909, she petitioned to the Board to re-consider the matter, but during the pendency of her application for review, the Collector instituted the present suit on the 11th December, 1909 for recovery of Rs. 6,768. On the 16th January, 1910, the Board, on review, reduced the penalty to Rs. 3,384. On the 8th August, 1910, the plaint was amended and the claim was reduced to that sum. The defendant resisted the claim substantially on three grounds, namely, *first*, that the suit as framed was not maintainable, *secondly*, that the penalty had not been imposed in accordance with statutory provisions, and consequently could not be recovered, and *thirdly*, that even if the penalty was recoverable, no decree could be made against the estate in her hands. The Subordinate Judge overruled these contentions and decreed the suit. Upon appeal that decree has been affirmed by the District Judge. The present appeal was summarily dismissed under R. 11 of O. 41 of the Civil Procedure Code by Brett and Sharfuddin, JJ. The appellant then applied for review of judgment and obtained a Rule. After the retirement of Brett, J., the Rule was made absolute by Sharfuddin, J., on the ground that important questions of law were involved in the appeal. The appeal has now come up before us for final disposal, and on behalf of the appellant the three grounds urged in the primary Court in answer to the claim have been reiterated.

As regards the *first* objection, namely, that the suit is not maintainable, we are of opinion that there is no foundation for it. Assuming that the penalty has been rightly imposed, there must be some method for its recovery. A suit for its recovery is not barred either explicitly or impliedly. There is no provision in the law for recovery of the penalty by summary process, as S. 19-E is not mentioned in sub-S. 1 of S. 19-J. But even if a summary remedy had been provided, it

would not follow that the Crown was not entitled to the ordinary remedy by a suit, which is open to all its subjects. In England, where the Crown claims sums due to it by way of penalty or otherwise, the recovery may be had by information: *Attorney-General* v. *Freer* (1), *Bradlaugh* v. *Clarke* (2) and *Cawthorne* v. *Campbell* (3). We feel no doubt that unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council for recovery of a penalty lawfully imposed.

As regards the *second* objection, namely, that the penalty has been imposed in contravention of the Statute and is consequently not recoverable, the question has been raised whether it is open to the Civil Court to determine the matter. The decision in *Manekji* v. *Secretary of State for India* (4) shows that a Civil Court has no jurisdiction to review the decision of a Revenue Authority on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised. But the position is different when the order for imposition of penalty is assailed on the ground that it has not been made in accordance with the Statute. If the action of the Revenue Authority is *ultra vires*, if he has not followed the procedure prescribed by the Statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognize. We must consequently determine whether the imposition of the penalty in the case before us, was *ultra vires*.

S. 19-I of the Court Fees Act contemplates the pre-payment of duty before an order for grant of Probate is made: *In the goods of Omda Bibi* (5). In the case before us, this appears to have been done. A notice was thereupon issued to the Collector under S. 19-H to enable him to test the valuation. As no communication was received from him, the Court issued the Probate. Subsequently, the Collector called upon the petitioner to amend the valuation under sub-S. 3 of S. 19-H. The applicant for Probate did not accept the valuation made by the Collector. She maintained, on the other hand, that the original valuation made by her was not inadequate, but with a view to avoid expense and litigation, she deposited the excess sum demanded. The Board of Revenue thereupon proceeded to impose a penalty on the applicant under S. 19-E. In our opinion, S. 19-E had no application in the events which had happened. As pointed out in the case of *Manekji* v. *Secretary of State for India* (4), S. 19-E contemplates an application on the part of the person who has taken out Probate and produces the same to be duly stamped. There was no such application in the present case. The section further contemplates that the estimated value of the estate is less than what the value has afterwards proved to be. In the present case, there was no determination of the valuation by the Probate Court; there was, on the one hand, an estimate by the petitioner, there was on the other hand, an assessment by the Collector which was not accepted as correct by the applicant; indeed, she disputed the correctness of the grounds for the higher assessment. There was consequently no room for the application of S. 19-E. If it was intended to take proceedings under S. 19-E, as the petitioner disputed the correctness of the assessment by the Collector, the Court should have been moved for an enquiry into the true value of the assets under S. 19-H and if the Collector had adopted such a course, it would have been incumbent upon him, as explained in the case of *In the goods of Stevenson* (6), to make out a case for enquiry upon definite facts. No such step was, however, taken, possibly for the reason that the Collector was of opinion that no penalty should be imposed. But whatever the reason might be, it is plain that there was no compliance with the statutory requirements and that the contingency contemplated in S. 19-E had not arisen. Nor was action taken under S. 19-G, which is moulded on S. 43 of 55 Geo. III, Ch. 184 and S. 122 of 56 Geo. III, Ch. 56. We may here point out the reason why S. 19-J, which prescribes the mode of recovery of penalties, makes no mention of S. 19-E. In a case where that section is properly applicable, the petitioner is entirely in the

(1) (1822) 11 Price 183=147 E.R. 441.
(2) (1883) 8 A. C. 354=52 L. J. Q. B. 505=48 L.T. 681.
(3) (1790) 1 Anst. 205=145 E.R. 846.
(4) (1896) Bom. P.J. 751.
(5) (1899) 26 Cal. 407.
(6) (1902) 6 C. W. N. 898.

hands of the chief controlling Revenue Authority, who is at liberty to refuse to stamp the Probate till the penalty has been paid ; no occasion can consequently arise for recovery, by summary process or by suit, of the penalty imposed under S. 19-E. We are of opinion that the action of the Board of Revenue was entirely misconceived and that the imposition of the penalty under S. 19-E was *ultra vires*. There is thus no legal foundation for the claim.

As regards the *third* objection, namely, that the penalty is personal and is not recoverable from the estate, we need only say that it raises a question of first impression and of some nicety, which need not be determined in view of our decision on the second objection.

The result is that this appeal is allowed, the decree of the District Judge reversed and the suit dismissed with costs in all the Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 800

MOOKERJEE AND RICHARDSON, JJ.

Sures Kanta Banerjee Chowdhury—Plaintiff—Appellant.

v.

Nawab Ali Sikdar and *another*—Defendants—Respondents.

Second Appeal No. 861 of 1913, decided on 24th February, 1915, against the Decree of Sub-Judge, Backergunj, dated 4th November, 1912.

Limitation Act (9 of 1908), Art. 89—Suit for accounts against agent within 3 years of termination of agency if no demand and refusal is proved is within time.

Where an agency was created on the 24th May, 1896, for the management of a certain immovable property, and in 1897 the principal transferred the property to his wife and two years later the wife re-transferred it to her husband, but the agent, continued to manage it as if no transfer had been effected and the agency was finally terminated in 1910, and the present suit was commenced on the 22nd March, 1911 for accounts in respect of the years 1306 to 1317:

Held, that Article 89, Schedule I, of the Limitation Act, was applicable to the suit and that in the absence of any demand and refusal during the continuance of the agency as the suit was instituted within three years from the date of the termination of the agency, the plaintiff was entitled to the accounts claimed. 32 Cal. 719 and 35 Cal. 298 ref. and 5 I. C. 59, diss. from. [P. 801, C. 1.]

Jogesh Chandra Roy and *Prokas Chandra Mozumdar*—for Appellant.

A. K. Fazlul Haq and *Sarat Chandra Dutt*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit by a principal against his agent for accounts. The agency was created on the 24th May, 1896, for management of immovable property. In 1897 the principal transferred the property to his wife and two years later the wife re-transferred the property to her husband. The agent, however, continued to manage the properties as if no transfer had been effected. The agency was finally terminated in 1910, and the present suit was commenced on the 22nd March, 1911 for accounts in respect of the years 1306 to 1317. The Court of first instance held that the terms of the agreement were enforceable and made a decree accordingly. By the agreement, which was embodied in a registered document, immovable property had been hypothecated and the Court of first instance held that the suit was in essence a suit to enforce a charge against immovable property within the meaning of Article 132 of the first Schedule to the Indian Limitation Act. On appeal, the Subordinate Judge has held that effect of the transfer of the property, for management whereof the agent was appointed, was to terminate the agency, and, that when the property was re-transferred by the wife to the husband, a new agency was created independently of the terms of the original contract: *Behari Lal* v. *Hara Kumar* (1). In this view, he has held that Article 132 was not applicable; he has thus treated the suit as one for accounts by a principal against his agent. At the same time, he has held not quite consistently with his view as to the effect of the transfer, that as under the original agreement accounts were to be rendered at the end of each year, the plaintiff was entitled to accounts only in respect of the three years antecedent to the suit. On the present appeal, it has been argued that the judgment is inconsistent and that if the transfer by the husband in favour of the wife was a real transaction which terminated the agency and if a new agency was created in 1899 on the re-transfer by the wife to the husband, no

(1) (1915) 29 I. C. 748.

reference can legitimately be made to the terms of the original agreement. The argument in substance is that Article 89 is applicable to the suit and that as it has been instituted within three years from the date of the termination of the agency, the plaintiff is entitled to the accounts claimed. In our opinion this contention is well founded and must prevail.

Article 89 provides that a suit by a principal against his agent for movable property received by the latter and not accounted for, must be instituted within three years from the date when the agency terminates or from the date when there has been a refusal to render accounts during the continuance of the agency. As in this case, there was no demand and refusal during the continuance of the agency, and as the suit has been instituted within three years of the date when the agency terminated, the plaintiff is clearly entitled to the accounts claimed. On behalf of the respondent it has been contended, however, that the accounts should be limited to the three years antecedent to the suit. For this proposition no authority has been cited and the terms of Article 89 do not support the contention; on the other hand, the view we take is supported by the decisions of this Court in the cases of *Shib Chandra Roy Chowdhury* v. *Chandra Narain Mukerjee* (2) and *Hafezuddin Mandal* v. *Jadu Nath Saha* (3). Reference has been made to the fact that a different view was taken in *Jogesh Chandra* v. *Benode Lal Roy* (4), where the decision in *Mati Lal Bose* v. *Amin Chand Chattopadhay* (5) was accepted as good law. As pointed out, however, in the case of *Troilukhyanath Mandal* v. *Abinash Chandra Roy* (6), the attention of the learned Judges who decided the case of *Jogesh Chandra* v. *Benode Lal Roy* (4) was not drawn to the earlier decision in *Hafezuddin Mandal* v. *Jadu Nath Saha* (3), and we are not prepared to accept it as good law.

The result is that this appeal is allowed and the decree of the Court below discharged. A preliminary decree is made in favour of the plaintiff for the accounts claimed in the suit. This decree is made on the assumption that a new agency was created in 1899 irrespective of the agreement of 1896. The case will now be remitted to the Court of first instance in order that the accounts may be taken. The appellant is entitled to his costs both in this Court and in the Court of the Subordinate Judge.

V.B./R.K.

Appeal allowed; Case remanded.

(2) (1905) 32 Cal. 719.
(3) (1908) 35 Cal. 298.
(4) (1910) 5 I. C. 59.
(5) (1905) 1 C. L. J. 211.
(6) A. I. R. (1915) Cal. 118=24 I. C. 18.

A. I. R. 1916 Calcutta 801

MOOKERJEE AND RICHARDSON, JJ.

Har Shyam Choudhury—Defendant—Appellant.

v.

Shyam Lal Sahu—Plaintiff—Respondent.

Second Appeal No. 2757 of 1912, decided on 25th March, 1915, from the Decree of Dist. Judge, Darbhanga, dated 2nd February, 1912.

(a) Mortgage—Rights of mortgagee—Subrogation—Satisfaction of charge undertaken to be satisfied—Doctrine of subrogation—Applicability—Purchase subject to two mortgages—Payment to first incumbrancer—Right of subrogation does not apply.

The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase-money for payment to the mortgagees, but pays the first incumbrancer alone and not the second, he cannot treat the first mortgage as kept alive for use as a shield against the second; nor can he claim to be subrogated to the position of the mortgagee whose debt he has satisfied.

[P. 802, C. 1 & 2.]

(b) Mortgage—Right of mortgagee—Doctrine of subrogation—Fraud committed in respect of existence or satisfaction of prior charge—Effect.

If *A* purchases property subject to three successive charges *X*, *Y* and *Z* with full knowledge of their existence and retains a portion of the purchase-money in his hands with a view to satisfy the mortgages *Y* and *Z*, but subsequently discharges the security *Z*, he cannot, on satisfaction of the mortgage *X*, use it as a shield against the mortgage *Y*. But if the acceptance of the mortgage-deed with an untrue recital as to the satisfaction of the mortgage *X* by the mortgagee *Y* enabled the mortgagor to commit a fraud upon the purchaser, the latter can, on discovery and satisfaction of the mortgage *X* use it as a shield against the mortgagee *Y*.

[P. 802, C. 2 & P. 803, C. 1 & 2.]

(c) Contract—Stranger—Right to claim benefit of performance.

Although a stranger to a contract may sometimes be entitled to claim the benefit of the performance thereof, the doctrine cannot be

allowed to be invoked to defeat the ends of justice. [P. 804, C. 2.]

Narendra Kumar Bose—for Appellant.

Lakhshmi Narain Singh—for Respondent.

Judgment.—This is an appeal by the fifth defendant in a suit to enforce a mortgage security. The property in dispute has been the subject of three mortgage transactions. The first mortgage was created on the 29th March, 1888 for a sum of Rs. 700 which carried interest at the rate of 24 per cent. per annum; the second was on the 22nd July, 1895 to secure a loan of Rs. 500 on interest at 18 per cent. per annum. The third mortgage, now sought to be enforced, was created on the 27th December, 1897 to secure a loan of Rs. 700 which bore interest at 18 per cent. per annum. On the 15th October, 1901, the mortgagors transferred the equity of redemption to the appellant for a sum of Rs. 2,238. The conveyance recited that there were only two mortgages on the property, namely, those of 1895 and 1897. The purchaser, who was allowed to retain in his hands the entire consideration, agreed to apply the money in satisfaction of the dues on these two mortgages. He subsequently discovered that there was a prior mortgage on the property purchased by him, namely, the mortgage of 1888. He accordingly satisfied the mortgages of 1888 and 1895. The mortgagee of 1897 then commenced this action on the 21st June, 1910 to recover his dues. The suit has been contested by the appellant, the purchaser under the conveyance of 1901, who argues that he is entitled to priority to the extent of the mortgages of 1888 and 1895. The District Judge has overruled this contention and has made the usual mortgage-decree in favour of the plaintiff. On the present appeal by the purchaser of the equity of redemption, it has been urged that as he has satisfied the mortgages of 1888 and 1895, he is entitled to use them as shields against the mortgagee of 1897.

In so far as the mortgage of 1895 is concerned, it is plain that this contention cannot prevail. It was ruled by this Court in the case of *Surjiram Marwari* v. *Barhamdeo Pershad* (1), that the doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase-money for payment to the mortgagees, but pays the first incumbrancer alone and not the second, he cannot treat the first mortgage as kept alive for use as a shield against the second: he cannot claim to be subrogated to the position of the mortgagee whose debt he has satisfied. The same principle was applied in the cases of *Bisseswar Prosad* v. *Lala Sarnam Singh* (2) and *Sat Narain Tewari* v. *Sheobaran Singh* (3). The cases of *Tara Sundari Debi* v. *Khedan Lal Sahu* (4) and *Prayag Narain* v. *Chedi Rai* (5) are not in principle opposed to this view; they merely furnish illustrations of cases which the Court thought, (whether rightly or wrongly, it is needless to discuss for our present purpose) fall outside the scope of the rule enunciated in *Surjiram Marwari* v. *Barhamdeo Pershad* (1). In respect of the mortgage of 1895, it is clear that the appellant discharged an obligation which he had undertaken to fulfil, namely, to satisfy the mortgage, not with his own money, but with money which belonged to his vendors and had been placed at his disposal for that specific purpose. If his vendor had satisfied the mortgage of 1895, as he might well have done, it is plain that he, as mortgagor, could not have treated the mortgage satisfied by him as available by way of defence against the mortgagee of 1897. It follows consequently that the appellant is not entitled to priority on the basis of the payment made by him to satisfy the mortgage of 1895.

A question of some nicety, however, arises in respect of the mortgage of 1888. The appellant had undertaken to satisfy the mortgage of 1897; he did not fulfil his obligation, but chose to satisfy the mortgage of 1888. Is he then entitled to use the mortgage of 1888 as a protection against the mortgage of 1897? There can be no room for doubt that if *A* purchases property subject to three successive charges *X*, *Y* and *Z* with full

(1) (1905) 2 C. L. J. 288.

(2) (1907) 6 C. L. J. 134.
(3) (1911) 11 I. C. 649.
(4) (1910) 7 I. C. 910.
(5) (1910) 7 I. C. 979.

knowledge of their existence, and retains a portion of the purchase-money in his hands with a view to satisfy the mortgages *Y* and *Z*, but subsequently discharges the security *Z*, he cannot, on satisfaction of the mortgage *X*, use it as a shield against the mortgage *Y*. This follows from the case of *Bisheswar Prosad* v. *Lala Sarnam Singh* (2), where reference is made to the decision in *Heim* v. *Vogel* (6). In that case, *A* obtained title to a property subject to two prior charges, and at the same time undertook to satisfy the second charge. He did not fulfil his obligation, but subsequently, when he had acquired rights under the first charge, took his stand thereon as protection against the second charge. His contention was overruled on the ground that he was bound to satisfy the second charge with the money at his disposal; and so long as that money was retained by him, he could not be allowed to prejudice the position of the second encumbrancer by means of title acquired under the first charge. If, consequently, nothing else was known in this case except that there were the three successive charges of 1888, 1895 and 1897 and that the appellant had undertaken to pay the charges of 1895 and 1897 with money placed at his disposal by the mortgagor, the mere fact that he had satisfied the prior charge of 1888 would not entitle him to use it as a shield against the mortgagee of 1897. The latter would *prima facie* be entitled to contend that as the appellant had in his hands money placed at his disposal by the mortgagor for the satisfaction of his dues, he could not be prejudiced by reason of the payment made by the appellant to satisfy the debt of 1888. There are, however, special circumstances in this case which, as we shall presently see, take it out of the general rule already explained.

The mortgage of 1897 recited that Rs. 400 out of the Rs. 700 secured thereby had been applied by the mortgagor to satisfy the mortgage of 1888, that the mortgagor had redeemed the mortgage and had obtained the mortgage instrument which he had made over to the new mortgagee as evidence of his title. This was, it is now conceded, an entirely false recital. The sum of Rs.400 had not been applied to discharge the mortgage of 1888; the mortgage instrument had not been taken back from the mortgagee but was still in his custody. The appellant contends that he was misled by this recital and purchased the property from the mortgagor in the belief that it was subject to two charges only, namely, those of 1895 and 1897. It is indisputable that the acceptance of this instrument with an untrue recital by the mortgagee of 1897 enabled the mortgagor to commit a fraud on the appellant. He intended to acquire a clear title to the property free of all prior charges thereon; he found on enquiry that there were only two subsisting charges to be satisfied, namely, those of 1895 and 1897. He discovered after his purchase that there was a prior charge of 1888 which was falsely described as satisfied in the mortgage instrument of 1897 held by the respondent. Consequently, if we apply the test of intention of the person who satisfies the prior charge, as ruled in the cases of *Mohesh Lal* v. *Mohant Bawan Das* (7), *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (8), *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (9), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (10), *Liquidation Estates Purchase Co. Ltd.* v. *Willoughby* (11), *Thorne* v. *Cann* (12), *Whiteley* v. *Delaney* (13) and *Shib Narain* v. *Baikuntha Nath Santra* (14), the answer must be in favour of the appellant, for there is no shadow of a doubt that when he satisfied the mortgage of 1888, he intended to keep the security alive for use as a protection against the mortgage of 1897. On the other hand, if as explained in *Gurdeo Singh* v. *Chandrika Singh* (15), we treat the doctrine of subrogation as based on equitable grounds, to be applied only where needed to accomplish the ends of justice, it is equally plain that the plaintiff has no claim to consideration as against the appellant; for it was the conduct of the plaintiff which

(6) (1879) 69 Missouri 529.

(7) (1883) 9 Cal. 961=10 I.A. 62 (P C.).
(8) (1889) 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).
(9) (1902) 29 Cal. 154=29 I.A. 9 (P.C.).
(10) (1912) 39 Cal. 527=14 I.C. 496=39 I. A. 68 (P.C.).
(11) (1898) A. C. 321=67 L. J. Ch. 251=78 L.T. 329.
(12) (1895) A.C. 11=64 L.J. Ch. 1=11 R. 67.
(13) (1914) A. C. 132=83 L. J. Ch. 349=110 L. T. 434.
(14) (1913) 20 I. C. 864.
(15) (1909) 36 Cal. 193=1 I. C. 913.

enabled his mortgagor to commit a fraud on the appellant. The plaintiff has also no claim as against the appellant on any contractual basis; he is in no sense privy to the agreement between the appellant and his vendor; and although it has recently been held that a stranger to a contract may sometimes, as explained in *Jahandar Baksh* v. *Ram Lal* (16), be entitled to claim the benefit of the performance thereof, as in *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (17) and *Deb Narain Dutt* v. *Ram Sadhan Mundal* (18), that doctrine cannot be allowed to be invoked to defeat the ends of justice. From whatever point of view the case may be considered, it is consequently plain that the appellant is entitled to priority in respect of the payment made by him to satisfy the mortgage of 1888.

The result is that this appeal is allowed in part and the decree of the District Judge modified. The appellant is entitled to priority in respect of a sum of Rs. 344, proportionate to the share of the property now in suit. We direct that the property covered by the mortgage of 1897 be sold in execution of the decree made by the District Judge free of the charges of 1888, 1895 and 1897. Out of the sale-proceeds, the appellant will be first entitled to Rs. 344 and the costs of this suit; from the balance left, the plaintiff decree-holder will be entitled to his dues; the surplus, if any, will belong to the appellant. The appellant is entitled to his costs as against the plaintiff throughout this litigation.

V.B./R.K.

Appeal allowed in part.

(15) (1910) 37 Cal. 449=5 I. C. 565.

(17) (1910) 32 All. 410=7 I. C. 237=37 I. A. 152 (P. C.).

(18) A. I. R. (1914) Cal. 129=20 I. C. 630=41 Cal. 137.

A. I. R. 1916 Calcutta 804

CHATTERJEE AND CHAPMAN, JJ.

Rama Nath Chakravarti—Plaintiff—Appellant.

v.

The Collector of Khulna and *others*—Defendants—Respondents.

Appeal No. 357 of 1912, decided on 25th March, 1915, from the Original Decree of Sub-Judge, Khulna, dated 15th August, 1911.

Probate and Administration Act (5 of 1881), S. 58—Will contested by heirs—Government has no *locus standi* to oppose grant of probate in presence of heirs.

An application for Letters of Administration with the will annexed was filed before the District Delegate and upon an objection being made by a third party, the case was sent up to the District Judge and taken up as a contested case. In the meantime the Chairman of the local Municipality made a report to the Sub-Divisional Officer that the will was forged, whereupon the latter took some "confidential" proceedings and sent the record to the Collector asking him to oppose the grant of the Probate, who did so on behalf of Government:

Held (1), that the "confidential" proceedings of the Sub-Divisional Officer were not in accordance with law; [P. 805, C. 2.]

(2) that at the inception of the proceedings the Governmnnt had a *locus standi* in the matter but that as soon as it appeared that there were "heirs" in existence, the Government ought to have retired. [P. 805, C. 1.]

Sarat Chandra Roy Chowdhury and *Charu Chandra Bhattacharjee*—for Appellant.

Srish Chandra Chowdhury for *Ram Chandra Mitra*—for Respondents.

Judgment.—This appeal arises out of an application for Letters of Administration with the will annexed of one Mati Moyi Debya. The will purported to give away all the properties in the possession of the testatrix, being her own self-acquired property as well as the property inherited by her from her husband. At first the application was filed before the District Delegate and upon an objection being made by one Sarba Sundari, the case was sent up to the District Court and taken up as a contested case. In the meantime the Chairman of the Debhatta Municipality is said to have made a report to the Sub-Divisional Officer, Babu A. N. Sen, that the will of which Probate had been asked for by Rama Nath Chakraburty was a forged one. Upon that information the Sub-Divisional Officer took some proceeding which he headed as confidential and examined certain witnesses, and then sent the record to the Collector asking him to oppose the grant of the Probate. It is not quite clear under what law this proceeding was taken. It appears that immediately upon the death of the deceased, the petitioner removed certain movable property to his house and upon that Sarba Sundari lodged a complaint at the *thana* about this matter and he was arrested and taken to the *thana*. It is a question whether at

the *thana* he did or did not make any mention of the will. The Court, however, under these circumstances allowed Government to put in a caveat. There were three objectors, Sarba Sundari, the Government and a third person named Rama Nath Banerjee, who claimed under a *kobala* from the brothers of the deceased. As the Government took up the case, the caveators did not take any steps in opposition of the will. Witnesses were examined on behalf of the petitioner and also on behalf of the Government and the lower Court has held that the will was a spurious one and has, therefore, refused to grant Letters of Administration.

On appeal it is contended that the Government has no *locus standi* to oppose the grant in this case and *secondly*, that on the evidence taken as a whole even if the evidence adduced on behalf of the Government be taken into consideration, the will should be taken as proved. As regards the *first* contention, we think regard being had to the statement in paragraph 5 of the petition for Letters of Administration, "The deceased left no (near or distant) relative as her heir," the Government may have been led into thinking that this was really a case in which there were no heirs and although the Collector might have made an inquiry as to the existence or non-existence of heirs so as to attract the right by escheat before launching the Government into an expensive litigation, we cannot say that at the inception of the proceeding the Government had no *locus standi*. Although we decide this question of the *locus standi* of the Government to oppose the application in favour of the Government at its inception, we think that as soon as it appeared that there were heirs in existence who would inherit, the Government ought to have retired.

It appears from the evidence that the deceased left two brothers, who upon the evidence would be the legal heirs of her pre-deceased son whom she had succeeded. However, the first question raised in appeal is so far decided in favour of the Government.

In regard to the *second* question we think that on the whole we cannot agree with the decision of the learned Judge. It appears from the evidence that this woman was living with the petitioner and if anybody was more near to her than anyone else it was the petitioner and it was, therefore, natural that she should have liked to have the properties of which he had been the manager after her husband's death to go to him. The will is proved by the petitioner, Uma Nath Chakraburty, the writer of the will, and Khetra Nath Chakraburty, one of the attesting witnesses to the will, and one of the witnesses examined on behalf of the Government. We find that Pran Krishna Bhattacharjee as a witness said:

"Rama Nath said when I saw him at the *thana* that he had seized her property as she had executed a will in his favour Gokul, the Head Constable, was present then. He wanted to see the will. Rama Nath said he had a will."

Therefore the case of the existence of the will was made out as soon as he was arrested, and that was only a few days after the death of Mati Moyi. Then the Head Constable Gokul was examined and he said:

"I brought him up to the *thana* at Debhatta. There he told me he had a will which was in the custody of Paresh Babu, a Pleader. I then asked him who was the scribe and who were the attesting witnesses to the will. He could not give me their names."

Then we have the depositions of the Doctor Bhupendra Bhusan Biswas who treated the deceased. It appears that this man was examined by the Deputy Magistrate in his confidential proceeding. In his depositions he is said to have stated that he did not sign any will of Mati Moyi as an attesting witness or otherwise. Being examined by the Court, however, he proved the will and as regards his depositions made before the Deputy Magistrate he said:

"The Sub-Divisional Officer asked me if I had attested a will forged by Rama Nath said to have been executed by Mati Moyi. I replied 'no'. I gave my answer in Bengali."

Considering the whole of the evidence of this witness we think that his statements should be believed and that his evidence must have been imperfectly recorded at the summary and confidential proceeding by the Deputy Magistrate. In any case we find that the execution of the will is proved by this witness and that the *zemindari's naib*, Bharat Chandra Mukerjee who appeared as a witness on behalf of the Government must have had some hand in the matter of the opposition to the will. The petitioner says that this man had demanded certain sums of money as a consideration for supporting the will and that being refused, he turned against him and brought about this trouble. We do not

think that this is very improbable. Both the witnesses Pran Krishna and the Head Constable Gokul said that the petitioner had spoken to them of the will, after his arrest, at the *cutchery* in which Bharat lived and yet Bharat said that he did not hear him say to the Head Constable, when he was arrested at the rent office, that he had a will executed by Mati Moyi in his possession.

It is not within the scope of this proceeding to say whether or not the petitioner is entitled to the property covered by the will. This is a matter which the party that may be entitled will see to. But so far as this proceeding is concerned, we think that the will is proved and we direct that Letters of Administration with the will annexed be granted to the petitioner.

The order of the Court below is set aside.

The petitioner is entitled to his costs in this Court, hearing-fee four gold *mohurs*.

V.B./R.K.

Order set aside.

A. I. R. 1916 Calcutta 806

MOOKERJEE AND ROE, JJ.

Juggobundhu Saha—Defendant—Petitioner.

v.

Chand Mohan Saha—Plaintiff—Opposite Party.

Civil Rule No. 161 of 1915, decided on 24th May, 1915, from the decision of Sub-Judge, Dacca, dated 6th July, 1914.

(a) Arbitration—Award—Delegation of function by arbitrator, judicial misconduct—Award invalid.

An arbitrator has no authority to delegate his functions, except possibly the performance of what are called 'ministerial acts,' and if he does so, he is guilty of judicial misconduct and his award is invalid. [P. 806, C. 2.]

(b) Arbitration—Award — Arbitrators entitled to take assistance of experts on technical matters.

It is permissible to an arbitrator to take assistance in technical matters, in so far as such assistance is necessary for the discharge of his duties. The decision, however, must ultimately be his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts. [P. 807, C. 1.]

(c) Arbitration— Award— Court overruling objection of Judicial misconduct of arbitrators without inquiry—Material irregularity.

A Court acts with material irregularity in the exercise of its jurisdiction, if it overrules the objection of judicial misconduct on the part of the arbitrator, without inquiry and without reception of evidence material for the determination of the issue. [P. 807, C. 1.]

(d) Arbitration—Award dealing with matters not covered by submission—Award as regards portion in excess of submission void.

A submission furnishes the source and prescribes the limits of the arbitrator's authority and the award both in substance and in form must conform to the submission, and if the award extends to matters not within the scope of the submission, it is void as regards the portion in excess of the submission. [P. 807, C. 2.]

(e) Arbitration— Award— Illegal parts of award severable—Legal part can be given effect to.

Where the different parts of an award are severable and not dependent on each other, the illegal portion may be cancelled and effect given to the remainder. [P. 807, C. 2.]

Biraj Mohan Mojumdar and *Rajendra Chunder Guha*—for Petitioner.

Dwarka Nath Chuckerbutty, *Upendra Lal Roy*, *Sures Chunder Das* and *Prokas Chunder Pakrasi*—for Opposite Party.

Judgment.—This Rule was granted on the application of the second defendant in a suit for partition to set aside the decree made therein by the Court below on the basis of an arbitration award. The petitioner impugns the decree on two grounds, *first*, that the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction when he declined to examine the arbitrator at the request of the second defendant, who alleged that the arbitrator had been guilty of judicial misconduct, and *secondly*, that the decree made by the Subordinate Judge in conformity with the award is, in part, made without jurisdiction, because it affects immovable property which is not the subject-matter of the litigation.

As regards the *first* ground, it appears that when the award had been submitted, objection thereto was taken by the petitioner on the allegation that the arbitrator had delegated his authority to a stranger and that the award was in essence not the act of the arbitrator, but of that person. This was a serious charge of judicial misconduct. and, if established, would invalidate the award for it cannot be disputed that an arbitrator has no authority to delegate his functions, except possibly the performance of what are called " ministerial acts": *Lingood*

v. *Eade* (1), *Emery* v. *Wase* (2), *Little* v. *Newton* (3), *Tandy. In re* (4), *Whitmore* v. *Smith* (5) and *Eads* v. *Williams* (6). The Subordinate Judge states in his judgment that the arbitrator was authorised to take assistance in technical matters; that, indeed, was permissible to him, in so far as such assistance was necessary for the discharge of his duties: *Caledonian Ry. Co.* v. *Lockhart* (7), *Emery* v. *Wase* (2), *Hopcraft* v. *Hickman* (8) and *Anderson* v. *Wallace* (9). But this would not entitle him to delegate his powers practically to another person. The decision must ultimately be his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts: *Nanjappa* v. *Nanja Rao* (10). When a charge of judicial misconduct of this description was made against the arbitrator, it was incumbent upon the Court to examine him to ascertain whether the allegation was well founded or not. This is obviously good sense; but if authority is needed for this elementary proposition, reference may be made to the decision of the Judicial Committee in *Amir Begam* v. *Budruddin Hussain* (11). There is consequently no escape from the position that the Subordinate Judge has acted with material irregularity in the exercise of his jurisdiction, inasmuch as he has overruled the objection of judicial misconduct on the part of the arbitrator, without enquiry and without reception of evidence material for the determination of the issue.

As regards the *second* ground, it is not disputed that the arbitrator did, by his award, impose restrictions upon the use of immovable property which did not form the subject-matter of the litigation and of the reference. The decree of the Subordinate Judge, in so far as it confirms that award in this respect, is consequently made without jurisdiction. It is an elementary rule that the submission furnishes the source and prescribes the limits of the arbitrator's authority and the award both in substance and in form must conform to the submission. Consequently, as the arbitrators are inflexibly limited to a decision of the particular matters referred, if the award extends to matters not within the scope of the submission, it is void as regards the portion in excess of the submission: *Hill* v. *Thorn* (12), *Hide* v. *Petit* (13), *Price* v. *Popkin* (14), *Pascoe* v. *Pascoe* (15), *Baillie* v. *Edinburgh Oil Gas Light Co.* (16), *Buccleuch* v. *Metropolitan Board of Works* (17), *Moshahel* v. *Konomutty* (18) *Narsingh Narain Singh* v. *Ajodhya Prosad Singh* (19) and *Mohammad Mumtaz Ali Khan* v. *Sakhawat Ali Khan* (20). At the same time upon the materials placed before us, it seems that the award might have been amended so as to meet the objection taken on this ground; for as laid down by the Judicial Committee in *Amir Begam* v. *Badruddin Hussain* (11), where the different parts of an award are severable and not dependent on each other, the illegal portion may be cancelled and effect given to the remainder. See also *Buta* v. *Municipal Committee* (21) and *Buccleuch* v. *Metropolitan Board* (17). The Subordinate Judge will deal with this matter, when the case goes back to him.

The result is that this Rule is made absolute, the decree of the Subordinate Judge set aside and the case remanded to him in order that it may be re-heard upon these two points. If the first objection succeeds, the award will be set aside and the Court will itself proceed to try the suit. If the first ground fails, the Court will proceed to consider how the award can be amended so that no restriction may be imposed upon the user of property which is not the subject-matter of the litigation. The costs of this Rule will abide the result. We assess the hearing fee at two gold *mohurs*.

V.B./R.K.

Rule made absolute; Case remanded.

(1) (1742) 2 Atk. 501.
(2) (1801) 5 Ves. 846.
(3) (1841) 9 D. P. C. 437.
(4) (1841) 9 D. P. C. 1044.
(5) (1861) 7 H. & N 509.
(6) (1854) 4 De G. M. & G. 674.
(7) (1860) 3 Macqueen H. L. 808.
(8) (1824) 2 S. & S. 130.
(9) (1835) 3 Cl. & F. 26.
(10) 16 Ind. Cas. 478.
(11) A. I. R. (1914) P. C. 105=36 All. 336=17 O. C. 120=23 I. C. 625 (P. C.).
(12) (1680) 2 Modern 309.
(13) (1670) 1 Ch. Cos. 185.
(14) (1839) 10 A. & E. 139.
(15) (1837) 3 Bing. (N. C.) 898.
(16) (1835) 3 Cl. & F. 639.
(17) (1870) 5 Ex. 221.
(18) (1871) 15 W. R. 172.
(19) (1912) 13 I. C. 118.
(20) (1901) 23 All. 394=28 I. A. 190 (P. C.).
(21) (1902) 29 Cal. 854=29 I. A. 168 (P. C.).

A. I. R. 1916 Calcutta 808 (1)

HOLMWOOD AND WALMSLEY, JJ.

Hankar Rai—Defendant—Appellant.

v.

Kamta Proshad Sahu and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2218 of 1912, decided on 22nd March, 1915, against the Decree of Sub-Judge, 1st Court, Shahbad, dated 27th June, 1912.

Civil P. C. (5 of 1903), O. 34, R. 1—Puisne mortgagee impleaded—*Ex parte* decree passed—He cannot subsequently plead that he is in the position of prior mortgage by having satisfied it—Test is he must be a necessary party.

A subsequent mortgagee who has been made party to a suit on a prior mortgage but who has failed to appear cannot afterwards raise the plea that he had paid off a prior lien and was, therefore, in the position of a prior mortgagee. 39 Cal. 527 (P.C.), foll. [P. 808, C. 1.]

The test in all such cases is, was the defendant impleaded as a puisne mortgagee and, therefore, a necessary party, if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. 26 I. C. 673, ref. [P. 808, C. 2.]

Chandra Sikhar Prosad Singh and *Khurshed Hossein*—for Appellant.

Umakali Mukherjee and *Sudhanshu Sikhar Mukherjee*—for Respondents.

Judgment.—The simple question which arises in this second appeal is the same as that which was decided in the Court of Appeal below, namely, whether defendant No. 1 not having set up his alleged prior lien in the suit brought by Gopal Sahu to which he was made a party, is precluded from raising the plea in the present suit. On the authorities cited by the learned Judge in the Court below in his judgment and on the further authority of the Judicial Committee in the case of *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (1), we are clearly of opinion that the learned Judge in the Court below was right when he says that these decisions clearly lay down that a subsequent mortgagee, who has been made party to a suit on a prior mortgage but who has failed to appear, cannot afterwards raise the plea that he had paid off a prior lien and was, therefore, in the position of a prior mortgagee. The same question was recently discussed at length in *Mohunt Kishen Dyal Gir* v. *Mahomed Amirul Hussein* (2) which was decided by one of us sitting with Mr. Justice Carnduff on the 16th December, 1914, in which we said, the test in all cases we have had laid before us is, was the defendant impleaded as a puisne mortgagee and, therefore, a necessary party, if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. That being so, we can have no doubt that the decision of the lower Court is correct.

As regards any equitable relief which might have been given to the parties on the facts, we do not think that in second appeal we can deal with that question. The only question before us is whether the learned Judge in the Court below was right or wrong in the matter of the law as laid down by him.

The result is that the appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1912) 39 Cal. 527 = 14 I.C. 496 (P.C.).
(2) (1915) 26 I.C. 673.

A. I. R. 1916 Calcutta 808 (2)

SHARFUDDIN AND NEWBOULD, JJ.

Hazari Lal Sarkar—Plaintiff—Appellant.

v.

Maharaj Kumar Kshaunish Chandra Roy Bahadur and *others*—Defendants—Respondents.

Second Appeal No. 741 of 1912, decided on 25th March, 1915, from the Decree of Dist. Judge, Nadia, dated 2nd January, 1912.

Landlord and tenant—Nature of tenancy—*Durpatni* lease—*Chakran* tenants—Agreement to pay *khut* rent—Resumption of *chakran* tenancy—Right of *zemindar* to settle land with tenants—*Durputnidar*, held, entitled to *khas* possession and mesne profits.

A was originally holding the lands in dispute as *chakran* lands under *B*, the *zemindar*. *B* resumed the lands and settled them at a money rent with *A*. The plaintiff, who was the *durputnidar*, sued for *khas* possession of the lands and in the alternative prayed that fair and equitable rents might be fixed for them. It was a condition of the *durpatni* settlement that the tenants who held *chakran* lands for service should pay to the *durputnidar khut* rent which was assessed on the proporation of land revenue payable to Government on that portion of the estate:

Held, that the payment of the *khut* rent could not create the relationship of landlord and tenant between the *durputnidar* and the tenant *A*.

Held, further, that so long as the *chakran* tenancy continued *B*, and not the plaintiff, had the right to settle tenants on the land, but tha

B had no right after he had resumed the *chakran* tenancy.

Held, also, that under the circumstances, the plaintiff was entitled to *khas* possession as well as mesne profits. [P. 809, C. 2.]

Jadu Nath Kanjilal and *Jogendra De*—for Appellant.

Ram Chunder Mozumdar, *Biraj Mohan Mojumdar* and *Harendra Lal Roy*—for Respondents.

Judgment.—In this case the defendant No. 1 is the *zemindar* and the defendants Nos. 2 to 4 are the tenants in occupation of the lands in suit. These defendants were originally holding the lands as *chakran* lands under the *zemindar*. In 1901, the *zemindar* resumed these lands and settled them with these defendants at a money rent. The plaintiff who is the *durputnidar* brought this suit to recover *khas* possession of these lands and also prayed, in the alternative, that fair and equitable rents might be fixed for them.

The first Court granted a decree holding that the *zemindar* was liable to pay rent to the plaintiff. On appeal to the District Judge, the plaintiff has been granted a decree against the defendants Nos. 2 to 4 and has had his title declared to realise from them fair and equitable rents for the lands, the amount of which will be settled in a rent suit.

As the appeal has been argued, the only question we have to decide is whether the plaintiff is entitled to *khas* possession or not. This point turns on the question whether these lands were really *chakran* lands or not.

It has been found by the lower Court that the *zemindar*, under the terms of the *putni* and *durputni* leases, had no right to re-settle the lands in suit. The plaintiff who is the appellant contends that on that finding, he is entitled to a decree for *khas* possession. For the respondent, it is contended that the tenancy of the defendants Nos. 2 to 4 in these lands is not a purely *chakran* tenancy. It was a condition of the *durputni* settlement that the tenants who held *chakran* lands for services should pay to the *durputnidar* what is called *khut* rent, and this *khut* rent was assessed on the proportion of land revenue that would be payable to Government on this portion of the estate. The condition, therefore, was that the *chakran* tenants did not get the land rent-free, but instead of paying rack rent, they had to pay only the share of the revenue on the land they held. It was contended on behalf of the respondent that this payment of *khut* rent to the *durputnidar* was sufficient to create the relationship of landlord and tenant between them and that consequently the *durputnidar* has now no right to *khas* possession.

It is to be observed that in their written statement, these defendants denied ever having paid this *khut* rent to the plaintiff, but now on their behalf, reliance is placed on the statement in the plaint that the defendants Nos. 2, 3 and 4 have stopped paying *khut* rent to the plaintiff, which clearly implies that before the settlement made by the *zemindar*, these defendants had been paying this rent to the plaintiff. It is clear that under the terms of the *durputni* lease, these defendants were liable to pay *khut* rent to the plaintiff and it is immaterial whether it was actually paid or not. This *khut* rent was not really rent but a proportion of the revenue payable to Government which, under the terms of the *durputni* lease, was payable to the plaintiff in respect of those lands of which he got no benefit under his lease. Such a payment could not create the relationship of landlord and tenant between the plaintiff and these defendants. The plaintiff never recognised these defendants as his tenants. So long as the *chakran* tenancy continued, the *zemindar*, and not the plaintiff, had the right to settle tenants on the land. On the termination of the *chakran* tenancy, the *zemindar*, although he had no right to do so, settled these tenants on the land. This settlement would not give these defendants the right to remain on the land against the wish of the plaintiff.

As was held in the case of *Upendra Narain Bhattacharjee* v. *Pratap Chunder Pardhan* (1), it is clear that the proper remedy in this case is a decree for *khas* possession and this has not been seriously contested on behalf of the respondent, who bases his objection to a decree for *khas* possession on the contention that the tenancy was not a purely *chakran* tenancy.

(1) (1904) 31 Cal. 703.

We accordingly decree this appeal with costs and modify the decree of the lower Court by declaring that the plaintiff is entitled to *khas* possession of the lands in suit. He will be entitled to recover mesne profits for three years before the institution of the suit and also for a period from the date of the institution of the suit until recovery of possession. An inquiry will be made by the lower Court to ascertain the amount of mesne profits payable to the plaintiff.

V.B./R.K.

Appeal decreed.

A. I. R. 1916 Calcutta 810

SHARFUDDIN AND COXE, JJ.

Ram Deo Singh—Defendant—Appellant.

v.

Moheswar Prosad—Plaintiff—Respondent.

Second Appeal No. 2936 of 1914, decided on 22nd February, 1915, against the decision of Dist. Judge, Muzufferpur, dated 17th June, 1911.

(a) Bengal Tenancy Amendment Act (1 of 1907), S. 31 (a)—(Per *Sharfuddin, J.*)—What is prevailing rate stated—No enhancement can be ordered if no prevailing rate is found--Principle of prevailing rate applies only under S. 31 (a).

Per *Sharfuddin, J.*—The 'prevailing rate' is not the average rate of rent of neighbouring villages.

Where it is found that there is no prevailing rate in the neighbouring villages, no decree for enhancement can be given.

Where the provisions of S. 31 (*a*) of the Bengal Tenancy Act are not extended, the principles of the prevailing rate cannot be applied.

[P. 810, C. 2.]

(b) Bengal Tenancy Amendment Act (1 of 1907), S. 31 (a)—(Per *Coxe, J.*)—Finding that majority pay Rs. 4 and more does not amount to prevailing rate—For application to a district S. 31 (a) must be specifically extended.

Per *Coxe, J.*—Where the great majority of the *raiyats* are found to pay at the rate of Rs. 4 and over in the neighbouring villages.

Held, that Rs. 4 and over is not a rate at all, much less a prevailing rate, unless the artificial construction contained in S. 31 (*a*) is placed on that expression.

It is not the intention of the Legislature that S. 31 (*a*) should apply in a district to which it is not formally extended, however reasonable the provisions of that section are. [P. 811, C. 1.]

Satish Chandra Ghose and *Anilendra Nath Ray Chowdhury*—for Appellant.

Jogesh Chandra Roy and *Akhoy Kumar Banerjee*—for Respondent.

Sharfuddin, J.—This is an appeal from the judgment of the District Judge of Muzufferpur dated the 17th June, 1911. The plaintiff is the landlord and as such he sued the defendant, who is an occupancy *raiyat* of *Mouza* Bishunpur, Chandpur *Lakhiraj*, for enhancement of rent, on the ground that the rate at which the defendant paid rent was below the prevailing rate paid by *raiyats* for similar lands in neighbouring villages and also on the ground of a rise of price of staple crops. The Munsif gave a decree at the rate of Rs. 5 per *bigha* for the years in suit and declared Rs. 5 per *bigha* for future years as the prevailing rate. On appeal, the learned District Judge held that the rent could not be doubly enhanced, both on the ground of a prevailing rate and also on the ground of a rise of prices, and that the prevailing rate should be fixed at Rs. 4 per *bigha*. He gave a decree for the years in suit at the then existing rate. The defendant appeals to this Court and we are now asked to decide the correctness of the judgment of the District Judge.

The points taken are that the lower Appellate Court was in error in thinking that the average rate of the neighbouring villages is the prevailing rate and that as no one prevailing rate was found, the suit should have been dismissed.

The finding of the lower Appellate Court is that there is really no prevailing rate in the neighbouring villages. It appears that in one village the rate varies from Re. 1 to Rs. 116 per *bigha*. It is further found that there are 511 tenants in three neighbouring villages, and of these 437 pay rent at the rate of Rs. 4 per *bigha* and over. This cannot be held to be the prevailing rate. The learned District Judge admits that the provisions of S. 31 (*a*) of the Bengal Tenancy Act have not been extended to Muzufferpur. At the same time he was led, in order to do justice, practically to apply the same principles to the present case. We have to administer the law and we cannot in the circumstances of the present case hold that any one prevailing rate has been ascertained and found and, therefore, no decree for enhancement can be given in this case.

The appeal is decreed and costs to abide the result. The lower Appellate Court having come to no decision on the question of enhancement on the ground of

rise in prices of staple crops, the case is remanded for disposal after an inquiry whether the landlord is entitled to enhancement on this ground.

This judgment governs the other appeal No. 3348 of 1911.

Coxe, J.—I agree. The finding of the District Judge is that the great majority of the *raiyats* pay at the rate of Rs. 4 and over and, therefore, the prevailing rate of these villages cannot be said to be less than Rs. 4. In my opinion Rs. 4 and over is not a rate at all, much less a prevailing rate, unless the artificial construction contained in S. 31 (*a*) is placed on that expression.

The fact seems to be that the provisions of that section are so reasonable that the learned District Judge was naturally inclined to apply it in his district, even although it was not formally extended; but as it has not been extended, we must assume that it is not the intention of the Legislature that the section should apply. The question, however, of extending it to the district might very well be considered.

V.B./R.K.

Appeals allowed.

A. I. R. 1916 Calcutta 811

JENKINS, C. J., MOOKERJEE AND HOLMWOOD, JJ.

Panchumoni Dassi and *another* – Objectors—Appellants.

v.

Chandra Kumar Ghose and *others*—Applicants—Respondents.

Letters Patent Appeal No. 1 of 1913, decided on 12th July, 1915, against the Judgment of Coxe, J., disagreeing with Roy, J., dated 16th July, 1913, in Appeal No. 324 of 1911.

(a) Probate—Difference of opinion in Division Bench—Appeal under Letters Patent, Clause 15 is maintainable.

In a probate case an appeal under Clause 15 of the Letters Patent is maintainable when the Judges of a Division Bench originally hearing the appeal differ in their opinion. [P. 811, C. 2.]

(b) Will—Proof of signature—Comparison of signature with 7 or 8 years' previous signature—Propriety of—Reversing of finding of fact by trial Judge dangerous.

In order to decide whether a will was executed or not, it is a dangerous ground to proceed on the estimate of the signature as derived from a comparison with other admitted signatures written seven or eight years before the signature on the will and to reverse on that ground the appreciation of fact by the trial Judge. [P. 811, C. 2.]

Sarat Chunder Bysak and *Bepin Chandra Bose*—for Appellants.

Probodh Chandra Chatterjee—for Respondents.

Jenkins, C. J.—This appeal comes before us under Clause 15 of the Letters Patent by reason of the difference of opinion between the two learned Judges of the High Court, who on the first instance heard the original appeal.

It has been suggested that no appeal lies to us under the Letters Patent. But we have overruled that objection and we think that it is perfectly clear that an appeal does lie under Clause 15 of the Letters Patent. Any other conclusion would lead to a very anomalous result.

Having said so much in favour of the appellants, I think there is nothing more to be said in their favour in this case. It is a pure question of fact as to whether the will was executed or not. Mr. Richardson, as he then was, the District Judge of Alipur, decided in favour of the will and he did not do so lightly and without thought, because at the very outset of his judgment he made it clear that there were circumstances which made it clear, in his opinion incumbent, that the evidence should be examined with more than usual care. He certainly did not fail in carrying out that obligation. His judgment is a very careful judgment, in which he gave specific reasons for accepting the oral evidence that had been adduced in favour of the will. On appeal to this Court, the same view was taken by Mr. Justice Coxe, Mr. Justice Harinath Roy, however, thought that the case had not been rightly decided. In that he was very greatly influenced by his inspection of the signatures on the will and his estimate of these signatures as derived from a comparison with other admitted signatures, written seven or eight years before the signature on the will. This is at all times a dangerous ground on which to proceed and to reverse the appreciation of fact by the trial Judge. In this case it seems to me that there really was very little that justified the learned Judge's conclusion. First, he seems to think that the learned District Judge was not fully able to appreciate all that

caligraphy suggested to him. But it is well known to us that the learned District Judge, as he then was, was very familiar with Bengali writing and there can be no doubt that he carefully did study these signatures, and I find that both my learned colleagues, who are certainly in a position to pronounce a very valuable opinion, so far from agreeing with Mr. Justice Harinath Roy, take the opposite view and think that there are remarkable and significant characteristics in the signatures on the will and the admitted signatures which go to prove the identity of the authorship. I have looked at the signatures and I am unable to form any conclusion which would lend any support to Mr. Justice Harinath Roy's view.

This is how the whole matter stands. Two learned Judges including the trial Judge were satisfied on the facts that the will had been proved. One learned Judge, however, from an examination of the handwriting principally, thinks otherwise.

Something has been said to us as to the provisions of the will. I must confess that the provisions seem to me not unnatural. Having regard to all the circumstances of the case, *e.g.*, the propriety and the desire of people in the position of the testator to keep the immovable property in the family, I think there is nothing improbable in the provisions of the will.

In my opinion we ought to dismiss this appeal. But we will say nothing as to costs.

Mookerjee, J.—I agree.

Holmwood, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 812

N. R. CHATTERJEA AND GREAVES, JJ.

Badarennessa Chowdhurani — Appellant.

v.

Alam Gazi and *others*—Respondents.

Appeal No. 77 of 1914, decided on 26th February, 1915, from the Order of Dist. Judge, Tipperah, dated 29th November, 1913.

(a) Co-sharer — Co-sharer obtaining rent decree for his share is like an ordinary creditor —He cannot sell non-transferable occupancy holding in execution.

An occupancy holding which is not saleable by custom or usage cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent, and in this respect a co-sharer landlord is in the same position as an ordinary executing creditor. 26 Cal. 727 and 42 Cal. 172 (F. B.), ref. to. [P. 812, C. 2.]

A co-sharer landlord is not entitled to sell the whole or part of the occupancy-holding of the *raiyat* in execution of a decree obtained by him against the *raiyat*. [P. 813, C. 2.]

(b) Occupancy holding—Execution sale—If objection raised before sale sale of occupancy holding can be set aside.

A *raiyat* is entitled to have a sale of his holding in execution of a money-decree set aside after it takes place, and the holding cannot be sold in execution of such a decree where the *raiyat* objects to the sale before it takes place. 42 Cal. 172. (F. B.). foll. [P. 813, C. 1.]

(c) Civil Procedure Code (5 of 1908), S. 60—Non-transferable occupancy holding is not saleable.

A non-transferable occupancy holding is not a saleable property. [P. 813, C. 1.]

(d) Occupancy holding—Transfer—Decision in 42 Cal. 172 applies in voluntary sale of part or whole of occupancy holding.

The principle deducible from the decision in *Dayamoyi* v. *Ananda Mohun Roy Chowdhury*, 42 Cal. 172 (F. B.), is applicable to an involuntary transfer of the whole as well as of a part of the holding. 34 Cal. 199, dist. 13 I.C. 192, not foll. [P. 813, C. 2.]

Birendra Chandra Das—for Appellant.

Upendra Kumar Roy—for Respondents.

Judgment.—This appeal arises out of an application for execution of a decree obtained by a co-sharer landlord for his share of the rent of an occupancy holding. The judgment-debtor, the *raiyat*, raised an objection that as the holding was not transferable by custom or local usage, it could not be sold in execution of the decree obtained by the co-sharer landlord.

The Courts below have given effect to the objection, and have disallowed the application for execution. The decree-holder has appealed to this Court.

Now it has been held in a number of cases that an occupancy holding which is not saleable by custom or usage, cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent, and that in this respect a co-sharer landlord is in the same position as an ordinary execution creditor. See *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (1), *Sadagar Sirkar* v. *Krishna Chandra Nath* (2) and *Jarip* v.

(1) (1899) 26 Cal. 727.
(2) (1899) 26 Cal. 937.

Ram Kumar De (3). And the recent Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhury* (4) have laid down that an involuntary transfer, *i. e.*, a sale in execution of a money-decree of the whole or part of an occupancy holding, apart from custom or local usage, is operative against the *raiyat*, where the *raiyat* with knowledge fails or omits to have the sale set aside. It is true the questions whether a *raiyat* is entitled to have the sale set aside, or has the right to object to the sale before it takes place, were not in terms decided by the Full Bench. But if the *raiyat* has no right to object to the sale of an occupancy holding in execution of a money-decree before it takes place or has no right to have the sale (after it takes place) set aside, in other words, where the sale is valid, the sale would be operative against him, and it would be immaterial whether he had knowledge of the sale or omitted or failed to have it set aside. The sale however, though invalid, may be operative against the *raiyat* if he with knowledge thereof omits or fails to have it set aside. The question, therefore, of the omission or failure to set aside the sale with knowledge thereof becomes material only where the sale is invalid, and the *raiyat* has a right to object to it. We are accordingly of opinion that the Full Bench decision by implication holds that the *raiyat* is entitled to have a sale of the holding in execution of a money-decree set aside after it takes place, and that the holding cannot be sold in execution of such a decree where the *raiyat* objects to the sale before it takes place. This view is in accordance with that taken in the cases cited above, and it is to be observed that the Full Bench laid down what had been established by the weight of modern authority.

No doubt, under S. 60 of the Civil Procedure Code, all saleable property belonging to the judgment-debtor, or over which he has a disposing power which he may exercise for his own benefit, is liable to sale in execution of a decree. But a non-transferable occupancy holding is not saleable property, and the Full Bench decision does not hold that the *raiyat* has a disposing power over the holding. All that it holds is that a voluntary transfer is operative against him.

It is next contended that the decree-holder being a co-sharer landlord to the extent of a 10-annas share is entitled to sell a 10-annas share of the holding. But apart from other considerations, the principle deducible from the Full Bench decision is applicable to an involuntary transfer of the whole as well as of a *part* of the holding.

There are certain observations in the case of *Dwarkanath Pal* v. *Tarini Sankar Ray* (5) to the effect that it is not necessary that the consent of the landlord should be obtained prior to the sale, and that the sale is valid, if the landlord subsequently to the sale recognises the purchaser and receives rent from him. But in that case, the defendants with full knowledge of the execution proceedings and the sale had failed to raise the objection at the time of the sale that the holding was not transferable, and the question was raised after the sale had been confirmed, and after the purchase had been recognised by the landlord.

In the case of *Shukuruddin* v. *Rani Hemangini Debi* (6), referred to in the judgment of the Court below, it appears that this Court maintained an order passed by the Court below granting the decree-holder's application for sale of an occupancy holding to the extent of a 15½-annas share, the co sharer landlords to that extent having consented to the sale. In doing so, however, the learned Judges said that "the non-consenting landlords may give their consent after the sale. In any case the decree-holder takes the risk, and in the present state of the law the purchaser will purchase at his peril. We do not think it necessary to interfere." The decision can no longer be followed having regard to the view taken by the Full Bench.

We are accordingly of opinion that the appellant is not entitled to sell the whole or part of the occupancy holding in execution of the decree obtained by him.

The appeal is dismissed, but we make no order as to costs.

V.B./R.K.

Appeal dismissed.

(3) (1899) 3 C. W. N. 747.
(4) (1915) 42 Cal. 172=27 I. C. 61 (F. B.).
(5) (1907) 34 Cal. 199.
(6) (1912) 13 I. C. 192.

A. I. R. 1916 Calcutta 814

FLETCHER AND TEUNON, JJ.

Fakir Chandra Gain – Decree-holder—Appellant.

v.

Giribala Dassya—Respondent.

Appeal No. 74 of 1914, decided on 15th February, 1915, from the Order of Dist. Judge, Bankura, dated 1st December, 1913.

Civil P. C. (5 of 1908), S. 47 and O. 21, R. 58—Execution of decree against legal representative of deceased judgment-debtor—Attachment of property—Decision as to property if assets of deceased—Appeal maintainable—Proceedings come under S. 47.

An appeal lies from a decision in execution of a decree against the legal representative of a deceased judgment-debtor as to whether the property attached in execution forms part of the assets of deceased, as the proceedings come under S. 47 of the Civil Procedure Code, 1908, and not under O. 21, R. 58 of the Code.

Bejoy Coomar Bhattacharya—for Appellant.

Hirendra Nath Ganguly—for Respondent.

Fletcher, J.—This is an appeal against a judgment of the learned District Judge of Bankura reversing the decision of the Munsif of the first Court of Bishenpore. There were certain proceedings in execution. The decree-holder is the appellant before us and the respondent is the widow and the legal representative of the judgment-debtor. In execution of the decree, the appellant before us attached a certain property that stood in the name of the respondent, on the allegation that it formed part of the assets of her deceased husband. The learned Munsif held that it did so. On appeal, the learned District Judge reversed the finding of the Munsif, holding that the property was not a portion of the estate of the deceased judgment-debtor. The only point that has been raised in this appeal is as to whether an appeal lay to the District Judge from the decision of the Munsif, that is, whether the proceedings before the Court were taken under O. 21, R. 58, Code of Civil Procedure, or they came under S. 47 of the Code itself. It is not possible to reconcile the various decisions in this Court; but we are bound by those decisions as they stand. This case cannot be distinguished from the Full Bench case of *Punchanun Bundopadhya* v. *Rabia Bibi* (1). It is quite true that that case was observed upon in the judgment delivered by another Full Bench of this Court in the case of *Kartic Chandra Ghose* v. *Ashutosh Dhara* (2). There, the facts were the converse of what they were in the case of *Punchanun Bundopadhya* v. *Rabia Bibi* (1). But, as is pointed out by the Full Bench in the case of *Kartic Chandra Ghosh* v. *Ashutosh Dhara* (2), the Benches of this Court are bound by the decision in the case of *Punchanun Bundopadhya* v. *Rabia Bibi* (1), until the same is overruled by a Special Bench. That being so, we are bound by the decision in that case. There have been two later cases in this Court, one being the case of *Ajo Koer* v. *Gorak Nath* (3) and the other being the case of *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi* (4). The case of *Ajo Koer* v. *Gorak Nath* (3) is substantially the same as the case before us and the learned Judges in that case followed, as they were bound to follow, the decision in *Punchanun Bundopadhya* v. *Rabia Bibi* (1). The case of *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi* (4) is difficult to distinguish from the case of *Punchanun Bundopadhya* v. *Rabia Bibi* (1), although the learned Judges who decided that case appear to have found reasons satisfactory to themselves which would differentiate the case from that reported in 20 C. L. J. All that is necessary for us to state in the present case is that we are bound by the decision of the Full Bench in the case of *Punchanun Bundopadhya* v. *Rabia Bibi* (1). The present appeal, therefore, fails and must be dismissed with costs, one gold *mohur*.

Teunon, J.—I agree.

V.B./R.K.

Appeal dismissed.

(1) (1890) 17 Cal. 711.
(2) (1912) 39 Cal. 298=12 I. C. 163.
(3) A. I. R. (1915) Cal. 275=27 I. C. 321.
(4) A. I. R. (1915) Cal. 327=27 I. C. 328=42 Cal. 440.

A. I. R. 1916 Calcutta 815

WALMSLEY, J.

Janab Ali Mia and *others*—Defendants—Appellants.

v.

Nazamaddin Pradhania and *others*—Plaintiffs—Respondents.

Second Appeal No. 216 of 1913, decided on 22nd April, 1915, from the Decree of Sub-Judge, Tipperah, dated 3rd October, 1912.

(a) Mahomedan Law—Marriage—Prohibition of marriage between natural son and foster daughter of his mother is absolute.

Under Muhammadan Law the prohibition regarding marriage attaching to a woman's natural son and her foster-daughter is absolute, and not conditional upon the birth of the one and the suckling of the other occurring within any limited period. [P. 816, C. 1.]

It is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers by fosterage. [P. 815, C. 2.]

(b) Mahomadan Law—Marriage—Validity—Suit—Suit challenging validity of marriage of minor girl, guardian abusing his power, is tenable shortly after marriage—Principle of *factum valet* does not apply.

Where the paternal relations of a girl brought a suit questioning the validity of the girl's marriage within four months of the marriage, and it appeared that the guardian of the girl had been abusing his position as guardian :

Held, that there was no error in granting the plaintiffs' prayer and allowing the plaintiffs to question the validity of the marriage. [P. 816, C. 1.]

The principle of *factum valet* does not render good in law a marriage which ought not in law to have been celebrated. 22 Mad. 398 (P.C.), ref. [P. 816, C. 1.]

Gobind Chandra Dey Roy—for Appellants.

Sarat Chandra Bysack and *Jatindra Mohan Ghose*—for Respondents.

Judgment.—The principal question in this appeal relates to the Muhammadan Law of fosterage. The necessary facts are as follows. The defendant No. 3, Newaz Ali, had a son born to him named Janab Ali, defendant No. 1. A few years later, Newaz Ali's wife, the mother of Janab Ali, took charge of Zohara Banu, defendant No. 2, and suckled her. Zohara Banu was then an infant in arms : the lower Courts have not found exactly what her age was when Newaz Ali's wife began to suckle her, but they have found that she had not been weaned and that she was suckled by the woman, which I regard as a finding that she was certainly less than two years and a half : Subsequently Newaz Ali, as certificated guardian of Zohara Banu, gave her in marriage to his son, Janab Ali. The lower Courts have held that such a marriage was unlawful, because by the law of fosterage the two children were prohibited from marrying.

The appellant, Newaz Ali, contends that the lower Appellate Court has misunderstood the authorities. The text-books on which both sides rely are Sir Roland Wilson's Digest of Anglo-Muhammadan Law, Article 37, Baillie's Digest of Muhammadan Law and Grady's Edition of Hamilton's Hedaya.

The difficulty arises from a clause in the explanation to Article 37 in Sir Roland Wilson's book *viz.*, the clause, " or the suckling of one and the birth of the other as the case may be."

Where the relation established by fosterage is between two children who are both strangers to the foster mother, it may be that the prohibition attaches only if the two foster children partake of the same supply of milk, that is, if they are suckled within the same period of two years from the date when the flow of milk began, and, but for the clause which I have quoted, the explanation would seem to refer to this class of relation by fosterage. The clause, however, suggests by the words " birth of one" that it refers to the relation between the woman's natural child and her foster child. If the words do mean that prohibition between the natural child and the foster child does not attach when there has been a certain interval between the birth of the natural child and the suckling of the foster child then, I think, with all respect to the learned author, he goes beyond the text-books which he quotes. In the Hedaya there is this passage :

" Prohibition is attached to the milk of the man (that is to say, to the milk of which he is the cause), if, for example, a woman nurse a female child, the latter is prohibited to her husband and to his father and son, because the husband through whom the woman's breasts have been filled with milk is as a father to the child."

Again

"it is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers."

Baillie is equally clear :

" To the suckling, both his foster parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited,

so that if his nurse should have already borne... a child to the same or to another man whether before the nursing or after it or should have nursed another infant...the whole would be brothers and sisters to the first suckling."

In view of these passages I must hold that the prohibition attaching to a woman's natural son and foster-daughter is absolute, and not conditional upon the birth of the one and the suckling of the other occurring within any limited period. That being so, there could not be a lawful marriage between Janab Ali and Zohara Banu.

It is also urged that the learned Subordinate Judge has erred in allowing the plaintiffs to question the validity of the marriage, because their motive is to escape from the liability to pay rent, and not to safeguard the welfare of Zohara Banu. It is found, however, that the plaintiffs are the girl's paternal relatives: they brought the suit within the four months of the marriage; and the learned Munsif refers to various circumstances which suggest that Newas Ali is abusing his position as guardian. Under these circumstances I cannot hold that there is any error in granting the plaintiffs' prayer.

The last suggestion is that as the marriage has been celebrated, and probably consummated, '*factum valet*', but that principle does not render good in law a marriage which ought not in law to have been celebrated. [See the case of *Sri Balusu Gurulingaswami* v. *Sri Ramalakshmamma* (1)].

The appeal fails and it is dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1899) 22 Mad. 398=21 All. 460=26 I. A. 113 (P. C.).

A. I. R. 1916 Calcutta 816

JENKINS, C. J. AND HOLMWOOD, J.

Kusadhaj Bhakta—Principal Defendant—Appellant.

v.

Broja Mohan Bhakta—Plaintiff—Respondent.

Second Appeal No. 1933 of 1914, decided on 21st July, 1915, against the Decree of Sub-Judge, 3rd Court, Midnapore, dated 7th April, 1914.

(a) Decree—Setting aside—Decree in terms of contract between parties—Mistake, valid ground to set aside.

A contract of the parties is nonetheless a contract because, there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake, so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract. [P 317, C. 1.]

(b) Decree — Setting aside — Compromise decree—Suit to set aside not maintainable.

A suit to set aside a decree obtained after consent and giving accurate expression to the Court's intention, is not maintainable. [P. 317, C 1.]

(c) Decree—Setting aside—Divergence between judgment and decree—Remedy, amendment of decree—Suit to set aside not maintainable.

Per *Holmwood, J.*—Where there is any divergence between the decree and the judgment, the matter is for amendment of the decree and not for a fresh suit to set aside the decree. [P. 317, C. 1.]

(d) Decree—Setting aside—Suit to set aside decree on ground of fraud maintainable.

Obiter dictum:—(Per *Jenkins, C. J.*)—A decree can be set aside on the ground of fraud, if of the required character. [P. 317, C. 2.]

Bepin Behari Ghose, Satindra Nath Roy and *Manmatha Nath Paul*—for Appellant.

Jyotish Chandra Hazra—for Respondent.

Jenkins, C. J.—This appeal arises out of a suit to set aside a decree in a previous suit, on the ground that the Judge in passing the decree in that previous suit made a mistake. As an authority for this suit and its competence we have been referred to the decision in the case of *Jogeswar Atha* v. *Ganga Bishnu Ghattack* (1). It may be that a superficial examination of that decision gives an appearance of authority for the proposition which the respondent advances before us and apparently has advanced with success in both the lower Courts.

Already it has become noticeable that there has been a crop of cases in this Presidency in which it has been sought to set aside previous decrees on the ground of fraud. The readiness to find fraud encourages this class of litigation and the new departure has been a misfortune. If we encourage the idea that the alleged mistake of a Judge is to furnish a disappointed litigant with a fresh starting point for keeping his opponent in Court, then the misfortune would be gravely increased to the public detriment. There must be some end to litigation. I have said there may appear to be some authority for this suit in the case I have

(1) (1904) 8 C.W.N. 473.

mentioned. But it is apparent from the judgment in that case that there was no intention of proceeding beyond the English authority. No instance has been brought to our notice when a suit to set aside or rectify a decree in a previous suit has succeeded on the ground that the Judge was mistaken though his decree accurately expressed his intention. The only case to which reference was made in the case of *Jogeswar Atha* v. *Ganga Bishun Ghattack* (1) was a decision of an English Court, where the decree was one passed not after contest but on agreement between the parties. But that class of case is governed by a principle that has no application here. It is well settled that a contract of the parties is nonetheless a contract because there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract. I am unable to draw from those decisions of which *Haddersfield Banking Company Limited* v. *Henry Lister and Son Limited* (2) are typical the conclusion that a decree after contest and giving accurate expression to the Court's intention can be set aside. There is no analogy between the two cases. In the one the decree is set aside merely because the agreement on which it was founded was set aside. In the other case this consideration has no application. It is not as if the litigant is without remedy. Our Code provides ample means without a fresh suit whereby the litigant can obtain the correction of error. If a fresh suit can be started on the ground placed before us here, then I can see no end to litigation. In holding as I do that this suit does not lie, I am making no new departure. I am merely following previous decisions of this Court and in particular the decision of Sir Comer Petharam in *Mahomed Golab* v. *Mahomed Sulliman* (3), the decision of a Division Bench in the case of *Sadho Misser* v. *Golab Singh* (4) and finally, the decision of a third Division Bench in the case of *Bhonda Singh* v. *Dowlat Roy* (5).

It is not suggested in this case that there was any fraud. Had that been so then the matter would have been different, for it is recognized that a decree can be set aside on the ground of fraud if of the required character.

In my opinion the decree under appeal is erroneous and should be set aside and the suit dismissed with costs throughout.

Holmwood, J.—I entirely agree with what has fallen from the learned Chief Justice. I desire to add that I do not think it matters whether the decree accurately expresses the intention of the judgment, as if there is any divergence between the decree and the judgment, as has been thrown out at one part of the argument before us, then this is a matter for amendment. As long as the Court has jurisdiction and authority to decide a matter, as it has decided it, it cannot be re opened by a suit.

I desire to emphasise all that has fallen from the Chief Justice with regard to the disastrous consequences which will follow by opening any fresh door of litigation, such as appears to be indicated in this case.

V.B./R. K.

Appeal allowed; *Suit dismissed*.

(2) (1895) 2 Ch. D. 273=64 L. J. Ch. 523=12 R. 331=72 L. T. 703=43 W. R. 567.
(3) (1894) 21 Cal. 612.
(4) (1899) 3 C. W. N. 375.
(5) (1912) 14 I. C. 93.

A. I. R. 1916 Calcutta 817

FLETCHER AND TEUNON, JJ.

Ganda Singh—Plaintiff—Appellant.

v.

Chuni Lal Shaha—Defendant—Respondent.

Second Appeal No. 2189 of 1912, decided on 17th February, 1915, against the Decree of Sub-Judge, Second Court, Burdwan, dated 20th May, 1912.

Tort—In case of injury by horse known to be vicious negligence need not be proved.

The defendant knowingly kept a horse which was a vicious animal. The horse injured the plaintiff and he sued for damages.

Held, that the defendant must be held liable notwithstanding that he was not guilty of negligence, as negligence was not necessary to support a suit of this nature. [P. 818, C. 1.]

Surendra Chandra Sen—for Appellant.

D. N. Bagchi—for Respondent.

Fletcher, J.—This is an appeal from a judgment of the learned Subordinate Judge of Burdwan reversing the decision of the Munsif. The suit was brought by the plaintiff, who is the appellant before

us to recover Rs. 200 as damages for the injuries he suffered by reason of his having been bitten by a mischievous animal, to wit, a horse belonging to the defendant. The Munsif decreed the suit and awarded to the plaintiff Rs. 200 as damages. On appeal to the lower Appellate Court, the learned Subordinate Judge reversed that decision.

The first point is whether this was a vicious animal, and whether the defendant had knowledge of the propensities of the animal. The learned Subordinate Judge found that, on the admitted facts of the case, the horse had bitten three people on previous occasions, namely, twice a groom and, on one occasion, an outsider. Against this evidence, the learned Subordinate Judge held that that did not establish the fact that the animal was a vicious animal. That is a finding altogether contrary to the whole body of the evidence. On the admissions of the defendant, it is quite clear that this animal, in fact, was a vicious animal and the learned Subordinate Judge ought to have so found on the evidence before him. The findings he has made are wholly unwarranted by the evidence.

The next point is "did this horse bite the plaintiff?" The learned Subordinate Judge agreeing with the Munsif has found that it did, in fact, bite the plaintiff. But he has come to the conclusion that the defendant was not guilty of negligence. That is not necessary to support a suit of this nature. If the horse was a vicious animal, and if that fact was known to the defendant and knowing this he kept the horse, and if it injured the plaintiff then the defendant must be held liable, notwithstanding that he has not been guilty of negligence. Negligence is not a necessary ingredient of a suit of this nature. Therefore, the finding of the Subordinate Judge that the plaintiff was bitten by the defendant's horse is *prima facie* sufficient to entitle the plaintiff to damages.

Then the learned Subordinate Judge makes a finding that the plaintiff has been guilty of contributory negligence. What he means is difficult to gather, but I suppose what he means is that the case comes under the maxim *volenti non fit injuria*, that the plaintiff deliberately placed himself in this position in trying to rescue his horse and, therefore, was bitten by the defendant's horse. There is nothing to show that the plaintiff so placed himself or that he was aware that the horse of the defendant was a vicious animal and that he incurred these injuries in his attempt to rescue his own horse well knowing that, if he did so, he would probably receive these injuries from the defendant's vicious horse. There is nothing to support any such finding and there is nothing to suggest that the plaintiff did, in fact, know that the defendant's horse was vicious. On the findings of fact, the learned Subordinate Judge ought to have, in my opinion, come to the same conclusion as the learned Munsif. We ought, therefore, to set aside the decree passed by the learned Subordinate Judge and restore the decree passed by the Munsif. The appeal will, therefore, be allowed, the decree of the lower Appellate Court will be set aside and that of the Court of first instance restored. The defendant must pay to the plaintiff his costs both in this Court and in the Courts below.

Teunon, J.—I agree.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 818

MOOKERJEE AND ROE, JJ.

India General S. N. & Ry Co. and *another*—Defendants—Petitioners.

v.

Lal Mohan Saha and *others*—Plaintiffs—Opposite Parties.

Civil Rule No. 689 of 1914, decided on 9th June, 1915, against the decision of Sm. C. C. Judge, Dacca, dated 25th March, 1914.

Civil P. C. (5 of 1908), O. 29, Rr. 1 and 2—Suit against companies—Suit not properly framed—Amendment of plaint—Services of notice after amendment in manner provided by R. 2 necessary.

In a suit against the Indian General Navigation and Railway Company and the River Steam Navigation Company for the recovery of damages on account of short delivery of goods committed to their care for transmission by them as public carriers, the plaintiff described the defendants in the plaint as the India General Navigation and Railway Company and the River Steam Navigation Company by their joint agent Mr. A. E. Rogers. When the case came on for trial, it was represented to the Court on behalf of Mr. Rogers that he had retired from the service of the Companies mentioned and had

in fact left the country. The plaintiff thereupon applied to the Court for leave to omit the name of Mr. Rogers from the plaint. This application was granted and the suit was decreed *ex parte* as if it had been instituted properly against the two Companies:

Held, (1) that the plaint as originally framed was in contravention of R. 1 of O. 29, as the suit should have been framed against the two Companies, described by their proper names; [P. 819, C. 2.]

(2) that, as no question of limitation arose, the amendment of the plaint might stand, but the plaintiffs were bound to serve notices of the suit in the manner provided in R. 2 of O. 29 after the amendment had been made and the suit properly constituted. [P. 819, C. 2.]

Manmatha Nath Mukherjee—for Petitioners.

Prokas Chandra Majumdar—for Opposite Parties.

Judgment.—This Rule was issued on the application of two of the defendants in the suit tried by the Court below. The plaintiffs opposite party instituted this suit against the India General Navigation and Railway Company and the River Steam Navigation Company for the recovery of damages on account of short delivery of goods committed to their care for transmission by them as public carriers. The third defendant, who was the consignor of the goods, was joined as a matter of form and no claim was made against him. The plaintiffs described the principal defendants as the India General Navigation and Railway Company and the River Steam Navigation Company by their joint agent Mr. A. E. Rogers. Mr. Rogers entered appearance and pleaded that the suit was not maintainable against him. When the case came on for trial, it was represented to the Court on behalf of Mr. Rogers that he had retired from the service of the Companies mentioned and had in fact left the country. The plaintiffs thereupon applied to the Court for leave to omit the name of Mr. Rogers from the plaint. This application was granted and the suit was decreed *ex parte*, as if it had been instituted properly against the two Companies. We are now invited to set aside this decree on the ground that the suit as brought was framed in contravention of R. 1, O. 29 of the Code of Civil Procedure; and that if the application for amendment of the plaint was properly granted, the two Companies should have been served in accordance with R. 2 of O. 29. In support of this view reliance has been placed upon the cases of *Ram Dass Sein* v. *Cecil Stephenson* (1), *Nubeen Chunder Paul* v. *Cecil Stephenson* (2) and *Campbell* v. *Jackson* (3).

There is no room for controversy that the plaint as originally framed was in contravention of R. 1 of O. 29. But on behalf of the opposite party, an ingenious argument has been put forward that the suit was in essence brought against the two Companies and that the plaintiffs mentioned the name of Mr. Rogers as the person upon whom the process was to be served. There is obviously no foundation for this theory. The suit was substantially against Mr. Rogers although he was sued in his capacity as joint agent of the two Companies mentioned. The suit, however, should have been framed as one against two Companies, described by their proper names, as is clear from the decisions mentioned. There is plainly no excuse for the mistaken course deliberately adopted by the plaintiffs. Even a casual examination of the forms of pleadings appended to the Code of Civil Procedure makes it manifest that the suit was not properly framed; this form is identical with what was contained in S. 26 of the Code of Civil Procedure of 1859. In the circumstances of this case, as no question of limitation arises even if the suit be taken to have been instituted against the two companies on the date when the plaint was allowed to be amended, we are of opinion that the amendment may stand. But the plaintiffs were bound to serve notices of the suit in the manner provided in R. 2 of O. 29 after the amendment had been made and the suit properly constituted. There is, moreover, nothing to show that Mr. Rogers was, in respect of each of the two Companies, a person entitled to receive notice under the provisions of that rule. It is needless, however, to deal with this aspect of the case in detail, because Mr. Rogers, it is conceded, is no longer connected with either Company.

The result is that this Rule is made absolute and the decree of the Small Cause Court Judge set aside. The case will be remitted to the Court below in order that the plaintiffs may proceed in

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(1) (1868) 10 W. R. 366.
(2) (1871) 15 W. R. 534.
(3) (1886) 12 Cal. 41.

accordance with law to serve the defendants, and then to have the suit tried afresh. We may add that a question has been raised before us as to the effect of the death of one of the plaintiffs during the pendency of the suit in the Court below; this will be determined by the Small Cause Court Judge when he takes up the case for final disposal. The petitioners are entitled to their costs in the Court. We assess the hearing-fee at two gold *mohurs*.

V.B./R.K.

Rule made absolute; Case remanded.

A I. R. 1916 Calcutta 820

MOOKERJEE AND RICHARDSON, JJ.

Kali Krishna Baiswas and *others* – Appellants.

v.

Ram Chandra Baidya and *others*— Respondents.

Second Appeal No. 2213 of 1912, decided on 18th February, 1915, against the Decree of Dist. Judge, Backergunj, dated 18th May, 1912.

(a) Bengal Tenancy Act (8 of 1885), S. 153— Appeal lies on decision of question of *Bhowli* or *Nagdi* rent.

The question of *Bowli* or *Nagdi* rent is one the decision whereon may be challenged by way of appeal under S. 153 of the Bengal Tenancy Act 9 C. W. N. 122, ref. [P. 820, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), S. 40— Scope of S. 40—No suit lies on question of commutation of rent—S. 40 presumes that the tenant is occupancy *raiyat*.

The propriety of commutation of rent of a holding or of the amount fixed cannot be called in question in a Civil Court. [P. 821, C. 1.]

A proceeding under S. 40 of the Bengal Tenancy Act is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy *raiyat*. [P. 821, C. 1.]

(c) Bengal Tenancy Act (8 of 1885), S. 40— Decision about status of tenant in proceedings under S. 40 can be challenged in Civil Suit.

A decision in a dispute as to the status of the tenant decided by the Revenue Authorities in a commutation proceeding under S. 40 is not final and conclusive between the parties, the Civil Court has jurisdiction to go over it 3 C. W. N. 311, dist. [P. 821, C. 1.]

Surendra Nath Guha – for Appellants.
Gunada Charan Sen—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent. According to the plaintiffs, the defendants hold as under-*raiyats* under a *kabuliyat* executed on the 1st November, 1903. The plaintiffs claim rent at the annual rate of Rs. 30, which is stated in the contract as the price of the paddy payable by the tenant to his landlord. The defendants contend that they are occupancy *raiyats* and that by a commutation order made under S. 40 of the Bengal Tenancy Act, they are liable to pay rent only at the rate of Rs. 13-6-6 a year. The Court of first instance decreed the claim in full. On appeal the contention of the defendants has been allowed to prevail. The plaintiffs have now appealed to this Court.

A preliminary objection has been taken on behalf of the respondents that the appeal is incompetent under S. 153 of the Bengal Tenancy Act as the amount claimed in the suit is less than Rs. 100. In our opinion, there is no foundation for this contention. The decree under appeal has decided the question of the amount of rent annually payable, namely, is it Rs. 30 a year as claimed by the plaintiffs or Rs. 13-6-6 a year as alleged by the defendants. This clearly is a question the decision whereon may be challenged by way of appeal under S. 153, Bengal Tenancy Act. The view we take is supported by the case of *Apurba Krishna Roy* v. *Ashutosh Dutt* (1).

As regards the merits, it is plain that the view taken by the Court of first instance must be upheld. It has not been seriously contested that the defendants are under-*raiyats* according to the terms of the *kabuliyat* by which the tenancy was created. But it has been argued that the order under S. 40 is conclusive between the parties and debars the plaintiffs from asserting that the defendants are not occupancy *raiyats*. In support of this view, reliance has been placed upon the case of *Lalla Saligram Singh* v. *Mohunt Ramgir* (2). That case is clearly distinguishable. There an application for commutation of rent had been dismissed by the Revenue Authorities concerned. The applicant then instituted a suit in the Civil Court for declaration of his status and also for an order to compel the Revenue Authorities to make an order for commutation under S. 40. It was ruled that a suit could not be maintained for this purpose. The

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(1) (1905) 9 C. W. N. 122.
(2) (1899) 3 C. W. N. 311.

Court pointed out that the Legislature had given a judicial discretion in this matter to the Revenue Court and to the Revenue Court alone, and did not allow its decision to be hampered either in advance or afterwards by any decision come to by the Civil Court. This view is clearly in accord with the provisions of Clause (6) of S. 40 of the Bengal Tenancy Act. It may be conceded that the propriety of commutation or of the amount fixed cannot be called in question in a Civil Court. But it is plain that a proceeding under S. 40 is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy *raiyat*. The Legislature could never have intended that a dispute as to the status of the tenant should be finally decided by the Revenue Authorities in a commutation proceeding under S. 40 and should thereafter be conclusive between the parties in the Civil Court. In the case before us, as it has been established that the defendants are under *raiyats*, no order for commutation could have been made under S. 40. The order made by the Revenue Court was consequently without jurisdiction, the essential foundation for the exercise of jurisdiction, namely, that the tenant whose rent was sought to be commuted was an occupancy *raiyat*, is proved to have been non-existent. If the commutation order is out of the way, there is no room for controversy ttha the plaintiffs are entitled to realise rent at the rate mentioned in the plaint.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs in all the Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 821

MOOKERJEE AND BEACHCROFT, JJ.

Ganpat Mahton and *others*—Defendants—Appellants.

v.

Rishal Singh and *others*—Plaintiffs—Respondents.

Appeal No. 300 of 1911, decided on 17th June, 1914. from the Original Decree of Sub-Judge, Monghyr, dated 27th June, 1911.

(a) Bengal Tenancy Act (8 of 1885), S. 120 (2) (a) —"Any other evidence that may be produced" does not include evidence contained in an agreement between landlord and tenant.

The expression "any other evidence that may be produced" in sub-S. (2) (*a*) to S. 120 of the Bengal Tenancy Act does not include evidence contained in an agreement or compromise between a landlord and a tenant. [P. 823, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), Ss. 116 and 120 (2) (a)—*Kabuliyat* executed after 2nd March, 1883—Recital is not admissible to prove *zerait*.

The recital in a *kabuliyat* executed by a tenant after the 2nd March 1883 that the land is *zerait*, cannot be treated as evidence of its alleged *zerait*, character. Case law referred.

[P. 823, C. 2.]

(c) Bengal Tenancy Act (8 of 1885), S. 116, Sch. III, Art. 1 (a)—Operation of Art. 1 (a) is not excluded by S. 116 in case of *zerait* land.

Obiter.—A suit for ejectment of a non-occupancy *raiyat* of a *zerait* land must be instituted within 6 months after the expiry of the term of his lease, as the operation of Article 1 (a) of Schedule III of the Bengal Tenancy Act is not excluded by S. 116 in the case of *zerait* lands.

[P. 824, C. 1.]

Mohini Mohan Chatterjee and *Probodh Chandra Dutt* for *Surendra Kumar Bose* for Appellant.

Umakali Mukerjee and *Kulwant Sahay* for Respondents.

Judgment.—This is an appeal by the defendants in a suit ror ejectment and arrears of rent. The plaintiffs are landlords, and their case is that the defendants executed a *kabuliyat* in their favour for a term of seven years, and came into occupation of the disputed lands on the 19th September, 1902. The term expired on the 4th June, 1909. The *kabuliyat* states expressly that on the expiry of the term the tenants would give up the lands, but they did not vacate the lands and the present action was consequently commenced on the 16th September, 1910. The plaintiffs assert that the lands are their *zerait* and that the defendants have not acquired the status either of occupancy or non-occupancy *raiyats* under the provisions of the Bengal Tenancy Act. The defendants allege, on the other hand, that they were in occupation from before the execution of the *kabuliyat*, that the lands are not *zerait* and that they are in fact occupancy *raiyats* as recorded in the Settlement proceedings. The Court below has held that the lands are *zerait* lands and that the plaintiffs are entitled to eject the defendants. On the present appeal it has been argued that there is no evidence to show, at any rate no reliable evidence to prove, that the lands are *zerait* as alleged by the plaintiffs.

The evidence has been placed before us and it appears that the only evidence to show that the lands are *zerait* is the recital in the *kabuliyat* of the 19th September, 1902. It has been argued on behalf of the defendants-appellants that this recital is not admissible in proof of the allegation that the lands are *zerait*; and in support of this view reliance has been placed upon the cases of *Nilmoni Chuckerbutti* v. *Bykant Nath Eera* (1), *Sher Bahadur Sahu* v. *Mackenzie* (2), *Masudan Singh* v. *Goodar Nath Pandey* (3) and *Ajodhya Prosad Singh* v. *Ram Golam Singh* (4). On the other hand attention has been invited to the decision in *Bhagtu Singh* v. *Raghu Nath Sahai* (5), where, it is said, a different view was taken. The question raised must be determined primarily on a construction of the statutory provisions on the subject.

Sub-S. (3) of S. 120 of the Bengal Tenancy Act, read with sub-Ss.(1) and (2), lays down the tests to determine the question, whether a particular land is the proprietor's private land. According to Clause (*a*) of sub-S. (1), land which is proved to have been cultivated as *zerait* by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of the Bengal Tenancy Act is the proprietor's private land. There is no evidence of this description in the case before us. According to Clause (*b*) of sub-S. (1), cultivated land which is recognised by village usage as the proprietor's *zerait* is also the proprietor's private lands. There is no evidence of this description in the present case. Finally, according to sub-S. (2) of S. 120, when a question arises whether any land, other than land of the description mentioned in Clauses (*a*) and (*b*) of sub-S. (1), is *zerait* the presumption is that the land is not *zerait*, but to determine the question regard shall be had to (*a*) local custom, (*b*) to the question whether the land was before the 2nd March, 1883 specifically let as the proprietor's private land, and (*c*) to any other evidence that may be produced. It will be observed that this sub-section refers to evidence of three descriptions: *first* local custom; *secondly*, letting of the land specifically as the proprietor's private land before 2nd March, 1883; and *thirdly*, any other evidence that may be produced. In the case before us, there is no evidence of local usage or of letting before the 2nd March, 1883; the only evidence of letting which has been produced is the *kabuliyat* of the 19th September, 1902. The question is, whether regard can be had to this evidence as included in the comprehensive description "any other evidence that may be produced." Upon this point there has been some divergence of judicial opinion.

In the case of *Nilmoni Chuckerbutti* v. *Bykant Nath Bera* (1) the view was adopted that the expression "any other evidence that may be produced" means any other evidence tending to show the assertion of any title on the part of the proprietor and communicated to the tenant before the 2nd March, 1883. The particular evidence produced in that case was an entry made in a settlement record in 1885 and 1886, to the effect that the disputed land was the proprietor's private land. The Court held that this evidence was inadmissible, because it was evidence of an event which had happened after the 2nd March, 1883. This interpretation seems open to the criticism that it unduly restricts the generality of the expression "any other evidence that may be produced;" but, as will presently appear, it is not necessary for our present purpose to consider whether this extreme view gives effect to the true intention of the Legislature. The question was raised again in the case of *Sher Bahadur Sahu* v. *Mackenzie* (2), where reliance was placed upon a statement made in a *kabuliyat* executed after the 2nd March, 1883. The Court held that the evidence was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced," but for the reason that ....when the Legislature expressly made evidence of letting before the 2nd March, 1883 admissible in proof of the character of the land, they must have intended to exclude evidence of letting after the 2nd March, 1883. The Court held in substance that it would not be right to impute to the Legislature the intention that they specifically made mention of

(1) (1890) 17 Cal. 466.
(2) (1903) 7 C. W. N. 400.
(3) (1905) 1 C. L. J. 456.
(4) (1909) 4 I. C. 529.
(5) (1909) 1 I. C. 571.

evidence of letting before the 2nd March, 1883 and then included evidence of letting after the 2nd March, 1883 in the general expression "any other evidence that may be produced." Had this been the intention the sub-section might have been differently framed, and it might have been laid down that regard shall be had to "local custom and any other evidence that may be produced." The view taken in the case of *Sher Bahadur Sahu* v. *Mackenzie* (2) does seem reasonable, and, if we adopt it, there is no room for controversy that the recital in the *kabuliyat* of the 19th September, 1902, cannot be treated as evidence of the alleged *zerait* character of the disputed lands. The same question was again mooted in the case of *Masudan Singh* v. *Goodar Nath Pandey* (3). One member of the Court did not commit himself finally to an opinion upon the matter, but expressed a doubt whether the case of *Nilmoni Chuckerbutti* v. *Bykant Nath Bera* (1) gave effect to the true intention of the Legislature. The other member of the Court held that the evidence contained in an agreement executed after the 2nd March, 1883, was not admissible in view of S. 178 of the Bengal Tenancy Act, Clause (4) of sub-S. 3 whereof provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall prevent a *raiyat* from acquiring, in accordance with the Act, an occupancy right in land. The view taken was that if the recital in an agreement between the landlord and the tenant made after the passing of the Bengal Tenancy Act was admitted in evidence to prove that the land was the proprietor's private land, in which no occupancy right would be acquired by the tenant, the provisions of Clause (*a*) of sub-S. (3) of S. 178 would be practically defeated. The matter came under consideration again in the case of *Ajodhya Proshad Singh* v. *Ram Golam Singh* (4) where the view taken in *Nilmoni Chuckerbtti* v. *Bykant Nath Bera* (1) was practically adopted, though for the purposes of that case the more restricted view taken in *Sher Bahadur Sahu* v. *Mackenzie* (2) would have been sufficient to support the conclusion of the Court. Finally, in the case of *Bhagtu Singh* v. *Raghu Nath Sahu* (5) the earlier cases were distinguished, and it was held that evidence, which was relevant under the provisions of the Indian Evidence Act, could be admitted *quantum valeat*, although it related to a transaction subsequent to the 2nd March, 1883. Since the decision of these cases, the Legislature have added sub-S. (2) (*a*) to S. 120. That sub-section is in these terms:

"Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue Officer shall not record any land as a proprietor's private land, unless it is proved to be such by satisfactory evidence of the nature described in sub-S. 1 or sub-S. 2."

The intention of the Legislature, as indicated in the new sub-section, obviously is to exclude from sub-S. (2) evidence contained in an agreement or compromise between the landlord and the tenant. This clearly confirms the view taken in the case of *Sher Bahadur Sahu* v. *Mackenzie* (2) and shows that the expression "any other evidence that may be produced" does not include an agreement or a compromise between the landlord and the tenant. We hold, accordingly, that the recital in the *kabuliyat* of the 19th September, 1902 cannot rightly be treated as evidence of the alleged *zerait* character of the disputed lands. We may add, however, that even if the view taken in *Bhagtu Singh* v. *Raghu Nath Sahai* (5) were adopted, we feel no doubt whatsoever that the recital by itself would not justify the inference that the lands were *zerait*. We must further remember that the defendants have been recorded as settled *raiyat*. They start with a presumption in their favour. We have also the important fact that the defendants were found to be settled *raiyats* in a proceeding for commutation of rent under S. 40 of the Bengal Tenancy Act. We have finally the presumption mentioned in sub-S. (2) of S. 120, that the lands are not the proprietor's private lands. The burden lies very heavily upon the plaintiffs to establish their allegation of *zerait*, and is unquestionably not discharged by the recital in the *kabuliyat* of the 19th September. 1902, even if such recital were deemed admissible as evidence for this purpose. The inference is irresistible that the plaintiffs have wholly failed to establish that the disputed lands are *zerait*.

There would have been a grave difficulty in the way of the success of the

plaintiffs, even if they had established that the lands were *zerait*. Article (1) (*a*) of Schedule III of the Bengal Tenancy Act provides that a suit to eject a non-occupancy *raiyat* on the ground of the expiration of the term of his lease shall be brought within six months from the expiration of the term. This Article replaces S. 45 of the Bengal Tenancy Act which originally found a place in Chapter VI. S. 116 excluded the operation of S. 45 in the case of a proprietor's private lands, when such lands were held under leases for a term of years or under leases from year to year. S. 45 laid down a two fold condition, namely, *first*, that six months before the expiry of the term a notice must be served upon the non-occupancy *raiyat* *secondly*, that the suit for ejectment must be instituted within six months after the expiry of the term. This provision, was, by virtue of S. 116, inapplicable to *zerait* land when such lands were held under leases for a term of years or under leases from year to year. S. 45 has now been repealed and has been replaced by Article (1) (*a*) of Schedule III. There can be no question that the defendants, even if they had been tenants of *zerait* lands, would be non-occupancy *raiyats* though by virtue of S. 116, the special provisions of Chapter VI might not have applied to them. But the operation of Article (1) (*a*) of Schedule III is not excluded by S. 116 in the case of *zerait* lands. Consequently, if the lands were proved to be *zerait*, the plaintiffs would be bound to institute this suit within six months from the 4th June, 1909; but it was not commenced till the 16th September, 1910. The suit is consequently clearly barred by limitation.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The claim for ejectment is dismissed. As the plaint contained a claim for the rent of the year 1316, we make a decree in favour of the plaintiffs for Rs. 600 in respect of the rent and cesses for that year, without prejudice to the right of either party to prove the proper amount of rent, for subsequent years, in any suit that may be brought hereafter. The arrears decreed will carry interest at 12½ per cent. per annum from the 4th June, 1909 to the date of suit, and at 6 per cent. per annum from date of suit to this date. The total amount thus determined will be set off against the costs allowed to the defendants. The defendants will have full costs both here and in the Court below.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 824

WOODROFFE AND COXE, JJ.

Eastern Mortgage and *Agency Co., Ltd.* —Plaintiffs—Appellants.

v.

Premananda Saha and *others*—Respondents.

Appeals Nos. 314 and 315 of 1914 and Civil Rules Nos. 702 and 703 of 1914, decided on 6th August, 1914, from the Original Orders of Sub-Judge, First Court, Dacca, dated 6th June, 1914.

(a) Civil P. C. (5 of 1908), S. 104—Order refusing to remove Receiver is not appealable.

An order refusing an application for the removal of a Receiver is not appealable. [P. 824, C. 1.]

(b) Receiver—Discharge of—Two Receivers appointed to act jointly—Retirement of one does not put an end to order of appointment—Civil P. C. (1908), O. 40.

Where two persons are appointed Receivers by the Court, one for the mortgagors and the other for the mortgagees, by the retirement of one of them the order appointing the Receivers does not come to an end. [P. 825, C 1 & 2.]

C. R. Das, Provas Chandra Mitra and *Ambica Peda Chaudhuri*—for Appellants.

Langford James, Gopal Chandra Das and *Satis Chandra Chowdhury*—for Respondents.

Woodroffe, J. I am of opinion that the preliminary objection that no appeal lies in this matter succeeds. This is not a case of an application for appointment of a Receiver or of a refusal to appoint a Receiver. In substance it is one for the removal of a Receiver who has already been appointed. Therefore, I think that no appeal lies. But as the case has been argued at some length I shall deal with some other points which have been raised.

The Court was of opinion that in the interest of the estate two Receivers should be appointed so that the interest of both the mortgagor and the mortgagee might be represented. Each of the parties was allowed to nominate. The plaintiffs nominated Mr. Tweedie and the defendants nominated Premananda Saha who is a Court officer,

a *sheristadar*. Our attention has been drawn to the decision in *Mohini Mohan Patra* v. *Ram Narain Patra* (1), in which an opinion was expressed that it was not expedient to appoint a Court officer as a Receiver. But we are not concerned here with that question for we have not to consider an application for the appointment of any Court officer as a Receiver, but we have to determine whether any appeal lies upon an application to remove a person who is a Court officer from being a Receiver.

It appears clearly that the order for appointment of the Receiver was not by consent. It also appears that for some time the joint Receivers worked together without any (at any rate overt) quarrels. Later disputes arose between them which appear to have been due to several causes, some of which have been drawn to our attention by Mr. James. One cause of ill-feeling appears to have arisen out of the question as to whether or not Mr. Tweedie should retain for himself what is described as a personal *nazar* or whether it should be credited to the estate. Babu Premananda Saha very properly thought that this *nazar* should be credited to the estate.

Another point to be noted in this connection is that Mr. Tweedie while leaving India had purported to appoint a substitute to act for him and the Judge did not, and I think rightly, accept Mr. Tweedie's substitute. On Mr. Tweedie's return he found that his substitute had not been appointed and that his co-Receiver had received the commissions for the work done, as was right seeing that the work had been done by Babu Premananda Saha alone. Following on these disputes in which the right appears to have been with Babu Premananda Saha, an application was made by Mr. Tweedie with a view to get his co-Receiver removed on the ground, amongst others, that he was ignorant of *zemindari* business. Mr. Tweedie also stated that if his wishes were not given effect to he would himself retire. This he subsequently did.

It has been contended before us by learned Counsel on behalf of the appellant that on the retirement of Mr. Tweedie, the order appointing the Receivers came to an end. For such a proposition no authority of any kind has been cited. It would be indeed dangerous to hold that if two persons are appointed as Receivers and one were (to give an example) suddenly to die that then the estate would be without a Receiver and without the protection for which a Receiver is in fact appointed.

Moreover, our attention has been drawn to an order passed by the Subordinate Judge on the 4th July, 1914, which states that Mr. Tweedie was a Receiver until the date when his resignation was accepted. It further directs that the sole Receiver Premananda should submit accounts for the period subsequent to that and until the appointment of another joint Receiver. The appellants appear to have refused to nominate any person to represent them as a Receiver in the place of Mr. Tweedie who had retired.

It has also been objected that even if these contentions with which we have dealt, are not made out, the objection which has been raised against the continuance of the *sheristadar* as Receiver has not been investigated. These objections appear to me rather to have come from Mr. Tweedie for the personal reasons stated than from the company in whose name he purports to act. But it is quite clear, and this is made out in the 19th paragraph of the affidavit of Premananda, that the objection which was put forward in the name of the company was fully considered by the Court as also was the written answer of Premananda which was put up before the Judge.

On these grounds I hold that there is no appeal or a case before us for revision. The appeals therefore, fail and are dismissed with costs. We assess the hearing fee at five gold *mohurs* in each case.

The Rules are discharged.

Coxe, J.—I agree.

V.B./R.K.

Appeals dismissed; *Rules discharged.*

(1) (1911) 12 I. C. 780.

A. I. R. 1916 Calcutta 825

FLETCHER AND TEUNON, JJ.

Kailash Mai and *others*—Plaintiffs—Appellants.

v.

Dwarika Nath Majhi and *others*—Defendants—Respondents.

Appeal No. 778 of 1915, decided on 17th July, 1915, against the Appellate Decree of Dist. Judge, Bankura, dated 7th January, 1915.

(a) Civil Procedure Code (5 of 1908), O. 1, R. 3—Suit by tenant of *Ghatwali* land against *ghatwal*—Secretary of State is not necessary party.

In a suit by a tenant against his landlord, who is a *ghatwal*, for declaration of occupancy rights in a *ghatwali* land and for recovery of its possession, the Secretary of State is not a necessary party, though he may be a proper party and, therefore, the suit cannot be dismissed for the non-joinder of the Secretary of State.

[P. 826, C. 2.]

(b) Land tenure—*Ghatwal* has interest in *ghatwali* land.

Semble.—A *ghatwal* is not a mere servant of Government, but has an interest in the *ghatwali* land held by him. [P. 826, C. 2.]

Bepin Behari Ghose and *Bankim Chandra Mukerjee*—for Appellants.

Rishendra Nath Sarkar—for Respondents.

Facts.—The appeal arises out of a suit for declaration of occupancy rights and for recovery of possession of certain lands against his *ghatwal* landlord in which the plaintiff claimed to have an occupancy right. The *ghatwal* landlord had dispossessed the plaintiff from the lands in suit. The Subordinate Judge on the evidence gave the plaintiff a decree. On appeal, the District Judge dismissed the suit, on the ground of the Secretary of State not having been made a party to the suit.

Fletcher, J.—This is an appeal from the decision of the learned District Judge of Bankura, dated 7th January, 1915, after remand from this Court. I was one of the Judges responsible for the order of remand and it may be that the remand order might have been expressed in more clear terms, so that the learned Judge of the lower Appellate Court might not have fallen into an error. As a matter of fact, I think, if the order be read as a whole, there is no doubt—and it is not suggested that there is any—that there is ambiguity in the order of remand; and the only person who has fallen into a doubt as to the meaning of the order of remand seems to be the learned District Judge. What the order meant is this: That it was outside the authority of the learned District Judge to send the case back to the Court of first instance directing the Judge there to add the Secretary of State as a party to the suit and the order of remand directed the learned Judge of the lower Appellate Court to re-hear the appeal without adding the Secretary of State as a party to the suit and that, when re-hearing the appeal, if the learned Judge came to the conclusion that the Secretary of State was a necessary party to the suit, he was not precluded from dismissing the plaintiffs' suit on the ground of the absence of a necessary party, the plaintiffs having expressly stated that they did not intend in any case to have the Secretary of State added as a party. The case went back to the learned District Judge and it is practically admitted on both sides that the learned Judge has not disposed of the case properly. The learned Judge has come to the conclusion that the Secretary of State is a necessary party. That is hardly attempted to be supported by the learned Government Pleader in this Court. Although he may be described as a proper party, there is no reason why this litigation should not take place and be determined between the two contending parties, whatever their rights may be in the absence of the Secretary of State. The Secretary of State will not be affected by that determination if he comes to resume the lands or if he dismisses the present *ghatwal*. Anything that may be decided between the present *ghatwal* and the plaintiffs will not in any way prejudice or affect the rights of the Secretary of State. What the rights of the *ghatwal* in the lands are, it is not necessary in the present case to determine. It may be pointed out that, on the former occasion, when the case was before the learned District Judge, he came to the conclusion that the *ghatwal* was not a mere servant but that he had, in fact, an interest in the land. So far as the cases show, that seems to be in accordance with the current of authority as to the rights of the *ghatwals* in most of the Districts in Bengal. Of course we need not say anything which would fetter the hands of the learned Judge. All we need not say in this case is that, although the Secretary of State might have been a proper party to the suit and the present defendant could not have objected if he had been there as a co-defendant, it is a very different thing to say that he is a necessary party and the suit cannot be decided in his absence. There is no reason, whatever the rights of the parties may be, why these rights should not be ascertained by the learned District Judge in the absence of the Secretary of State. The decree of the learned District Judge must, therefore, be be set aside and the case must go back him to re-hear the appeal on the merits. Costs of this hearing will abide the result of the re-hearing before the lower Appellate Court.

Teunon, J.—I agree.

V.B./R.K.

Appeal allowed; Case remanded.

A. I. R. 1916 Calcutta 827

N R. CHATTERJEA AND MULLICK, JJ.

Ananda Mohan Saha and *another*—Defendants—Appellants.

v.

Gobinda Chandra Ray Choudhury and *others*—Plaintiffs—Respondents.

Appeals Nos. 780 and 894 of 1912, decided on 2nd September, 1915, from the Appellate Decrees of Dist. Judge, Tipperah, dated 3rd January, 1912.

(a) Transfer of Property Act (4 of 1882), S. 108, Cl. (j)—Tenancies from year to year of homestead land created before passing of Act are not transferable.

Previous to the Transfer of Property Act tenancies from year to year of homestead lands were not transferable except by custom; therefore, such tenancies existing from before the passing of the Transfer of Property Act do not become transferable under S. 108, Clause (*j*) of the Act. [P. 829, C. 1. & P. 828, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 108 (*j*)—Tenancy from year to year of homestead land created before (1882),—Transferability—Burden of proof.

In a suit for ejectment of the transferee from the tanant of a tenancy from year to year of homestead lands existing from before the passing of the Transfer of Property Act the onus is upon the transferee-defendant to prove the custom of transferability. [P. 829, C. 1.]

Rash Behary Ghosh and *Gobinda Chandra Dey* and *Jotindra Mohan Ghose*—for Appellant.

Chakrabartty, Dwarka Nath Chakravarty and *Gopal Chandra Das*——for Respondents.

Judgment.—These appeals arise out of suits for ejectment of the defendants from certain homestead lands in the town of Brahmanberia. The suits were decreed by the Court of first instance, and the decrees were confirmed on appeal by the lower Appellate Court. The defendants Nos. 2 and 3 have appealed to this Court.

The plaintiffs alleged that they acquired a right to the lands in suit by purchase from one Kamini Kumar Das who had obtained two *mokurari* leases from one Channu Mia and others, the owners of the ⅓rd share of the *Taluks* Manik Bibi and Asadulla Bibi Somera within which the lands were situate. The defendants denied that the lands appertained to the *Taluks* Manik Bibi and Asadulla Bibi Somera as alleged by the plaintiffs, and asserted that they appertained to the ⅔rds share of *Taluk* Asadulla Bibi Somera owned by Haidar Ali and others, the lands of which share are found to be distinctly demarcated from the ⅓rd share and to form a separate estate. They further pleaded that the persons who granted the *mokurari* leases were not the sole owners of the *taluks* to which the lands were alleged by the plaintiffs to appertain. Those questions, however, have been decided by the Courts below in favour of the plaintiffs and we agree with the Courts below on these points.

The defendant Ananda Mohan Saha purchased the lands in dispute in suits Nos. 141 and 143 in his own name and took leases in the other two cases in the *benami* of the defendant Bepin from the former tenants. The defence substantially was that the former tenants had permanent and transferable rights to these lands, and that in any case a 15 days' notice to quit was not sufficient in law to determine the tenancies. Some other pleas were taken in defence, but they were overruled and the findings on these points have not been challenged in appeal.

The questions for consideration in these appeals are, *first*, whether the tenancies were permanent, *second*, even if not permanent, whether they are transferable, *third*, even if they are transferable, whether a 15 days' notice to quit is sufficient in law to determine the tenancies, and *lastly*, whether disclaimer of title amounts to waiver of notice.

The *first* question should be dealt with in each of the cases separately. In Appeal No. 780 (Suit No. 141) the land was purchased by Ananda from one Chandra Mohon, the defendant No. 2, in 1904. The land was described as a *raiyati jote* appertaining to *Taluk* Asadulla Bibi Somera (without mentioning the name of the landlord) and bearing a rent of Rs. 1-12-0. The Court of first instance after a full discussion of the evidence found that the land did not appertain to any *jama* of Re. 1-12-0, nor was it held under Haidar Ali and others, the owners of ⅔rds share of *Taluk* Asadulla as stated by the defendants, but appertained to a *jama* of Rs. 2-12-0 held under *Taluk* Manik Bibi, and that although the tenancy had been the subject of inheritance from father to son, it was not proved that it was held at an uniform rent or that it had been the subject of transfers, or that there were any substantial structures on the land, there being only a tin-shed on the land before the purchase by Ananda. Ananda erected two other tin-sheds and a *pucca* room after his

purchase in 1904, but this was not to the knowledge of the plaintiffs' lessors. The defendant is said to have obtained permission to erect the structures on the land from Haidar Ali, the owner of the $\frac{2}{3}$rds share of the *taluks*, which had nothing to do with the $\frac{1}{3}$rd share of the *taluks* to which the lands really appertain. The Court of Appeal below, though it did not discuss the questions fully, agreed with the conclusions arrived at by the Court of first instance on the points. The learned Judge, it is true, refers to the fact of the origin of the tenancy not being known, as if it was against the permanency of the tenancy, but having regard to the other facts found by the Courts below, we are unable to hold that the Courts below were wrong in holding that the tenancy of Chandra Nath was not a permanent one.

In Appeal No. 894 (Suit No. 142) the land was held by one Sohagi for about 30 years, and Ananda obtained an *ijara* lease for 100 years from her in the name of the defendant No. 4, Bepin. The Court of first instance held that it was practically a sale, there being no rent reserved and no mention of any reversion of the land to her at any time. It was said that one Chandrakala, the paternal aunt of Sohagi, made a gift of the land to her in 1901. But it has been found against the defendants. It has also been found that there are no circumstances justifying the presumption that the tenancy was a permanent one.

In Appeal No. 896 (Suit No. 144) also, the land was taken in *ijara* lease for 100 years from the heirs of one Ram Prosad. The holding is described as *raiyati basat bhita*, no rent is reserved and no reversion is mentioned. The grantors of the *pattah* abandoned the homesteads immediately after the grant making no provision for the landlord's rent, and as in the last case the *pattah* is virtually a deed of conveyance. The holding was inherited by the heirs of Ram Prosad, but no other circumstance has been found which may lead to a presumption of permanency.

In Appeal No. 895 (Suit No. 143) the land was held by Ram Prosad and was purchased from his son and nephew in 1907 by the defendant Ananda Mohan. The *kobala* states that it was a *mourasi mokurari jama* standing in the name of Ram Prosad bearing a rent of 14 annas payable to one Chandra Nath Saha. Some rent-receipts were filed to show that Ram Prosad held the land as a *mokurari jama*. The rent receipts were missing from the record, and secondly, evidence was adduced with regard to these receipts. The receipts were filed only from the year 1295 and none of them granted by the *malik* Channu Mia and others. The Munsif discussed these receipts and the collection papers and disbelieved them. He further found that there was a *mandir* on the land but it was a dilapidated structure and there was no satisfactory evidence that the tenants built the *mandir*, and came to the conclusion that the tenancy had not been proved to be a permanent one.

The Munsif found on a detailed consideration of the evidence that the defendants failed to prove that the tenancies were permanent. The learned District Judge did not discuss the evidence fully, but agreed with the findings arrived at by the Munsif. The judgment being one of affirmance, we are not disposed to remand the case. The defendants, it is to be observed, not only denied the title of the plaintiffs and their lessors (the true owners), but set up tenancies under Haidar Ali and others who are found to have no connection with the lands, and actually produced false receipts to show payment of rent to them.

The tenancies not being permanent, the *next* question is whether they are transferable. If the tenancies are governed by the Transfer of Property Act, then there is no doubt that the interest of the lessee can be transferred absolutely or by way of sub-lease as laid down by S. 108, Clause (*j*) of that Act. The tenancies, however, were created before the passing of the Transfer of Property Act. S. 2, Clause (*c*) of that Act lays down that nothing in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force or any relief in respect of such right or liability. We think that in the present cases, the legal relation between the plaintiffs' lessors and the defendants' vendors was constituted before the passing of the Transfer of Property Act. The provisions of that Act, therefore, do not apply to the present case, and S. 108, Clause (*j*) of the Act does not affect the rights and obligations of the parties. See *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1) and *Hiramoti Dassya* v. *Annoda Prosad Ghosh* (2). The tenancies in the present cases were tenancies from year to year before

(1) (1905) 32 Cal. 1023.
(2) (1908) 7 C. L. J. 553.

the passing of the Act and it is contended on behalf of the appellant that they are tenancies from year to year subsequent to the passing of the Act. In the first of the two cases cited above the tenancy was also from year to year, and in the second it was a non-permanent tenure and, therefore, appears to have been from year to year. It was held in those cases that the provisions of the Transfer of Property Act did not apply. That being so, the rights of the lessee have to be determined with reference to the law as it stood before the passing of the Transfer of Property Act. Now, previous to the Transfer of Property Act tenancies from year to year of homestead lands were not transferable except by custom. In the case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1) cited above Maclean, C. J., observed (Mitra, J., concurring).

"That the incident of non-transferability was common to ordinary tenancies of agricultural lands and tenancies from year to year of homestead land before the passing of the Transfer of Property Act was held in *Hari Nath Karmakar* v. *Raj Chandra Karmakar* (3), and we have taken the same view in Second Appeals Nos. 339, 448, 449 and 450 of 1903 decided on the 3rd April, 1905. The party alleging transferability had to prove a custom to that effect."

The same view was taken in *Hanuman Prasad Singh* v. *Deo Charan Singh* (4) and *Hiramoti Dassya* v. *Annoda Prasad Ghosh* (2) referred to above.

The tenancies, therefore, were not transferable except by custom. The Court of first instance found that the custom of transferability was not proved. The learned District Judge, holding that the onus was upon the plaintiffs to prove a custom of non-transferability, found that the plaintiffs failed to prove a custom that such tenancies are not transferable. The learned Judge is obviously wrong, as the onus is upon the defendants who set up the custom of transferability to prove that it existed and it is found by the Munsif that the evidence on both sides negatived the existence of such custom before 1882 in respect of homestead land. It is unnecessary, therefore, to remand the cases for a finding on the point by the lower Appellate Court.

It is contended that in two of the cases there were no transfers by way of sales, the defendants in those two cases having obtained *ijara* leases, and that there was nothing in the law previous to the Transfer of Property Act to show that a tenant could not sub-let. But assuming that homestead lands held from year to year could be transferred by way of sub-letting before the passing of the Transfer of Property Act, we think the so-called leases are really sales of the lease-hold interest. The *ijaras*, we have seen, are stated to be for one hundred years for a large amount of consideration, no rent is reserved and there is no mention of reversion of the land to the grantors at any time. There is no provision for payment of rent to the landlord. It may be said that a term being mentioned there was no absolute transfer of the tenant's interest. But the Munsif has found (and the finding has not been displaced on appeal) not only that the so-called *ijara* leases are really sales out and out from the terms of the documents, but that the tenants have abandoned the lands without arranging for payment of rent and no rent has been paid by the tenants (grantors of the *ijaras*) ever since the *ijaras*. Upon the facts found and looking at the substance of the transactions, we are of opinion that the *ijaras* were a mere device, that they were really assignments, and that in any case there has been abandonment of the lands by the tenants.

We are accordingly of opinion that the defendants did not acquire any right under the conveyances in two of the cases or under the so-called *ijara* leases in the two others.

That being so, they are liable to be ejected as trespassers and in this view it is unnecessary to consider the question raised on behalf of the appellants, *viz.*, whether a 15 days' notice to quit is sufficient, or the question whether a disclaimer of title amounts to waiver of notice raised on behalf of the respondents.

The result is that the appeals are dismissed with costs.

V.B./R.K.

Appeals dismissed.

(3) (1898) 2 C. W. N. 122.
(4) (1908) 7 C. L. J. 309.

A. I. R. 1916 Calcutta 829
Full Bench

JENKINS, C. J., MOOKERJEE AND HOLMWOOD, JJ.

Hemendra Nath Roy—Defendant—Appellant.

v.

Upendra Narain Roy and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 1 of 1914, decided on 26th August, 1915, against the

Judgment of N. R. Chatterjea, J., dated 27th March, 1914.

(a) Digwari Tenure—Civil Court has no jurisdiction to reinstate a dismissed Ghatwal—But it can grant a declaration of his being preferential claimant to one wrongly appointed—Specific Relief Act (1877), S. 42.

A Civil Court has no jurisdiction to reinstate a Ghatwal who has been dismissed by the Executive Government as unfit for the discharge of his duties. But where a Commissioner decides against a claimant not in the exercise of his discretion, but upon an erroneous view of the relative title of his contestant, a Civil Court is competent to grant to the claimant relief by way of a declaratory decree under S. 42 of the Specific Relief Act, so that he may approach the Executive Government and seek their decision on the question of the appointment of a successor to the office of Digwar.

[P. 833 C. 2 & P. 837, C. 1.]

(b) Practice—Pleadings—Relief—Plaintiff will be entitled to specific relief under general prayer based on pleadings—But he cannot get different relief unless it is supported by pleadings.

If a bill (plaint) contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert the specific relief prayed and, under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will consistently with the rules of the Court maintain that relief.

[P. 833, C. 2 & P. 837, C. 2.]

(c) Digwari Tenure—(Per *Jenkins, C. J.*)—At Ghat Bharra Digwari is an office—Succession to it of an heir depends on approval of Government.

Per *Jenkins, C. J.*—At Ghat Bharra the Digwari position is that of an office remunerated by the enjoyment of land and on the death of a Digwar holding office there is a general usage to appoint his heir in his place as the successor to his office but his claim and tenure of office are dependent on the approval of the Government.

[P. 832, C. 2.]

(d) Practice—Arguments—(Per *Mookerjee, J.*) —Arguments based on analogy are not applicable where statute is concerned.

Per *Mookerjee*, J —An argument from analogy may arise where a principle of law is involved, but where Courts are dealing with the positive enactment of a Statute, reasons founded upon analogy are scarcely applicable. [P. 834, C. 1.]

(e) Jurisdiction—Civil—Object or motive of party is immaterial—Relief must be granted unless jurisdiction is barred by any other enactment.

A Civil Court is not concerned with the object or motive of a party who comes into Court in assertion of his alleged right and he should not be refused declaration merely because he seeks it with a view to influence the opinion of the Revenue Authorities, unless the declaration sought can be based only on the investigation of a question which is by Statute or otherwise expressly excluded from the cognizance of the Civil Court. [P. 837, C. 1 & 2.]

(f) Digwari Tenure—Dismissal from office of Digwar worked forfeiture of lands attached to office—On dismissal remedy was by appeal—Held that it was not grant of land burdened with service but grant of office carrying with it lands attached—Held further office was not hereditary as matter of right.

The Digwars of Ghat Bharra always enjoyed certain lands attached to it and when a person was dismissed from the office of Digwar he was forthwith deprived of the lands. When dismissed, the Digwar was at liberty to appeal from the decision of the Magistrate to the superior authorities: [P. 835, C. 2.]

Held, that under the circumstances the presumption was that there was not a grant of lands burdened with a certain service but the grant of an office the performance of whose duties was remunerated by the use of lands.

[P. 835, C. 2.]

Held, further, that the office was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties of the office and to remunerate himself from the usufruct of the lands attached thereto. [P. 835, C. 2 & P. 836, C. 1.]

Rash Behari Ghose, Joges Chunder De, Jotish Chandra Sarkar and *Sris Chunder De*—for Appellant.

Dwaraka Nath Chakerbutty, Karunamoy Bose, Lalit Mohan Ghose, Jotish Chunder Hazra and *Sarat Chandra De* for Respondents.

Jenkins, C. J.—The plaintiff, Upendra Narain Roy, has brought this suit to establish his claim to lands in Ghat Bharra in the District of Bankura as held in Digwari *chakran* right. The defendants are his rival claimant, Hemendra Nath Roy, the Secretary of State for India in Council, and the Raja of Panchakote, the *zemindar*. There are also certain *pro forma* defendants of whom some are the plaintiff's brothers, and one is Darpanarain Roy, who is admittedly one of the two Digwars of Ghat Bharra.

The Subordinate Judge has passed a decree in the plaintiff's favour and has directed that the plaintiff do recover possession of the land in suit, and effect has been given to this direction. From this decree an appeal to the High Court was preferred. It was heard by Fletcher and N. R. Chatterjea, JJ. They were divided in opinion and so the view of Chatterjea, J., who was for confirming the decree of the Subordinate Judge, prevailed.

From this judgment the present appeal has been preferred under Clause 15 of the Letters Patent by Hemendra Nath Roy, who has been supported by the Raja of Panchakote, a respondent in this appeal. No one else has appeared except the plaintiff who has supported the decree in his favour.

There are two Digwars in Ghaut Bharra. The defendant Darpanarain is one and his

position is not contested. The whole dispute is as to the other Digwar. It is common ground that the office of Digwar and enjoyment of the land go together, and this combination may be due either to a grant of land burdened with the service of the office or a grant of the office remunerated by enjoyment of the land.

Whichever of these two it may be, we know that the office was held and the property enjoyed by Kartic Roy, the defendant Hemendra's father, and seven generations of ancestors before him, and it is common ground that it was so enjoyed in a regular course of succession. Kartic, however, was dismissed in 1855 and Rasik Lal Upadhya, a stranger to the family, was appointed in his place. But he in turn was dismissed on the 14th April, 1856 and Raja Ram Rai was appointed to the office. In 1861 Raja Ram Rai became incapable of performing the duties of the post and his nephew and heir presumptive, Mohendra, the plaintiff's father, was appointed.

In the meantime the dismissed Kartic had rendered good service and so on the 18th of August, 1869 a promise was made that when any Sardari or Sadiali post became vacant, it should be offered to him in the first instance. In 1870 Mohendra was dismissed. In 1871 Kartic was confirmed in the vacancy caused by this dismissal and it was directed that possession should be given him of the Ghatwali lands.

This dismissal, however, was cancelled by order of the Lieutenant-Governor who reinstated Mohendra in the service and on the 19th June, 1872 an order was made on the Sub-Inspector of Gangajalghati directing him to continue as before to get the work done by Mohendra and give him possession of the lands. From a report dated the 14th August, 1872 it appears this was done.

On the 19th July, 1904 the Magistrate made an order dismissing a number of Ghatwals, including Mohendra. The following month this dismissal was cancelled and Mohendra was reinstated.

In August 1907 Mohendra preferred a petition to the Magistrate praying for six months' leave on the score of ill-health and asking that his son Upendra, the plaintiff, should be appointed in his place in an acting capacity for six months. This was approved.

On the 9th October, 1907 Mohendra died and his son Upendra asked to be appointed. The order was

"Upendra Rai will continue to act in place of his dead father Mohendra Narain Rai, Sardar of Bharra, until further orders."

I may here state that though Upendra has brothers, they do not dispute the superiority of his sole claim to the office.

In the meantime Kartic had died in 1908 leaving him surviving his widow Karunamayi and his son, the defendant Hemendra. Karunamayi, on Mohendra's death, applied for the appointment of her minor son Hemendra as Sardar Ghatwal of Pergana Mahisara. The Deputy Collector reported that in his opinion the application should be rejected and

"that the present acting man Upendra Nath Rai (be) appointed in place of his deceased father specially when he appears to have been doing good work all along."

On the 16th of June, 1908 the Magistrate-Collector made an order in which he said he thought Upendra should be affirmed. On the 14th August, 1908 Mr. Maddox, the Officiating Commissioner, set aside the Magistrate's order, and directed that Hemendra, the minor son of Kartic, be appointed (as Sardar Ghatwal, and until he came of age a deputy must be appointed) in his place. This opinion was based principally on Mr. Maddox's reading of a decision reported as *Jogendra Nath Singh* v. *Kali Charan Roy* (1).

Upendra appealed to the Board of Revenue on the 21st September, 1908, but the Board resolved that it had no jurisdiction. Thereupon Upendra appealed to the Lieutenant-Governor and in reply he was informed that the remedy for any grievance which he might have lay in the Civil Court. So this suit was instituted by Upendra in accordance with the reply given him by the Government.

Whether we have here to deal with an office remunerated by the possession of land or land burdened with the service of an office is practically immaterial in the view I take.

But such materials as there are on the record, in my opinion, support the conclusion that we have here an office remunerated by the possession of land. Most of the information we possess relates to the period subsequent to Kartic's appointment, but it does appear that one of his predecessors was dismissed. Since that time there have been the repeated instances of appointment and dismissal which I have already mentioned, and what has given them the greater significance is that the corresponding

(1) (1905) 9 C. W. N. 663.

possession of the land has apparently followed as a matter of course.

The oral evidence on this point is interesting. Thus Upendra says

"From 1856 up to the time of my dismissal we have held the post of Sardar Digwar aud held possession of the properties appertaining to the office. No person was appointed in my father's place and our possession did not cease."

Later he deposes.

"When a new Sardar is appointed, he has to take possession through the Police. When I was appointed acting Sardar, I did not apply to be put in possession. The possession was then with us."

And according to him, it is the Magistrate who appoints and dismisses. Darpanarain declares that he took possession through the Police on his appointment, and that when a Sardar is appointed permanently or in an officiating post, he has to take possession through the Police.

Benimadhab, the Police Sub-Inspector at Gangajalghat, says that the Magistrates dismiss for misconduct or default in the performance of their duties and that the Police give possession to the person who is appointed. Rakhal Chandra Chattopadhya deposes to this power of dismissal.

Prasanna Kumar Rai, who looks after Hemendra's affairs, declares that the Magistrate appoints and dismisses and that he had never seen any Digwar or Sardar hold possession of the lands of his office after dismissal.

This view is borne out by the documentary evidence. The earliest document is the report submitted in 1799 by Kanji, Tahsildar of Chakla Pachet, but his covering letter shows that his sources of information were limited. The report throws no appreciable light on the question now under discussion, and it is probable that the distinction it involves was not present to his mind. But for what it may be worth, we find him stating that the Digwars enjoy their *jagir* villages without payment of rent in lieu of their wages.

The order of the 23rd May, 1847 is much more explicit, and the *parwana* there reproduced states that Ghatwali lands are held merely for remuneration for labours of their services and that they are not entitled to make a permanent settlement of the lands to any one by giving up their rights thereto, that they can grant only a *patta* of *jote* right for the period of their incumbancy.

Another document to which reference may usefully be made is Exhibit D, an attested copy of Isamnabisi or list of Ghatwals dated in the year 1849. It is expressed to be an Isamnabisi of Ghatwals who got their allowance in cash or got *jagiri* lands therefor. It refers to the subject-matter of the present litigation and one of the columns is headed.

"whether the Sardar gets pay in cash or holds *chakran* lands."

In another column we find the following statement:

"In the year 1221 Aditya Rai was appointed in place of Madan Rai who was dismissed. Gohur Mohan Rai was appointed on the 25th Bhadra, 1238 in place of his deceased father Anand Rai. Jagat Sarkar was appointed in place of his deceased brother Ananda Sarkar on the 26th Bhadra, 1235.

The conclusion then to which I come is that the Digwari position was that of an office remunerated by the enjoyment of land. So the next point for determination is, whether this office was hereditary or not, no *sanud* is forthcoming, but the history of this office establishes a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office. Whether the office thus became hereditary in the strict sense of the term may be open to discussion, for even in the case of life grants, it is a common practice that they should be renewed to the heir of the grantee, so that there may be by usage an appearance of descent, and it must always be a matter of some doubt at what point the principle and practice of identification can be properly regarded as establishing heritability. Here the usage of the heir taking his predecessor's place can be traced back to the 17th century and so long a usage cannot be disregarded as an exponent of the Digwari right. On the contrary, I think we may safely ascribe to it the force of law subject to the qualification that the heir's claim and tenure of office is dependend on the approval of the Government. Mr. Maddox's determination recognises this, for he clearly thought that he was passing judgment on conflicting legal claims, and it is difficult to reconcile the Government's reply with any other view. In fact when analysed the contest would seems to be whether Mr. Maddox's legal pronouncement was correct or not, for if Mr. Maddox had not decided as he did, Upendra would not have been disturbed.

The Magistrate did approve Upendra's succession on his father's death, but this, as I have shown, was cancelled by the Commissioner with the result that the Board of Revenue resolved it had no

jurisdiction and Government referred to the Civil Court. When the facts of the case are grasped this attitude of the Government is free from difficulty, for the Commissioner's determination was not limited to Upendra's conduct or fitness of office, but proceeded on that Officer's view of the rival of legal claims. The Commissioner's decision is based on *Jogendra Nath Singh* v. *Kali Charan Roy* (1) but that case has absolutely no application to the circumstances of this case: it dealt with a proposition that has no relevance here and determined no point that arises here. Apart from a personal promise in favour of Kartic, Hemendra Nath's only claim would be as the heir of Kartic, but after his dismissal 60 years ago, he can no longer be regarded with reason as a stock of descent. The last incumbent was Mohendra and Upendra Nath is his heir. Still it does not appear to me that we can uphold the unconditional decree that has been passed, for that disregards the qualification that the Government's approval is necessary, and we can do no more than express our conclusion that Mohendra was the incumbent of the office at his death, having been appointed thereto in succession to Raja Ram Rai whose heir he was, that Upendra was the heir of Mohendra, that Upendra's claim to succeed is subject to the approval of the Government, and that the ground on which the Commissioner cancelled the Magistrate's sanction was erroneous in law.

We cannot, therefore affirm the decree as it stands, so that we have to see whether it is open to us to pass a decree which will embody what is essential in this conclusion. The plaint is not happily framed, but in view of all the circumstances of the case, I think we can make a declaratory decree defining the plaintiff's position, though it may be it is not really necessary, for having regard to the Government's reply referring the plaintiff to the Civil Courts, they would probably be prepared to give or withhold its approval in accordance with the view we have expressed, seeing that it invited recourse to the Civil Court. For the appellant, it is objected that we cannot make a declaratory decree on a plaint framed as the present is, and we have been referred to the decision in *Walihan* v. *Jogeshwar Narayan* (2). But that decision does not appear to me to govern the present case which is peculiar in its circumstances. The prayers in the plaint are not limited to a claim for possession but seek declaration, and though the form in which these declarations are sought do not comply strictly with the provisions of S. 42 of the Specific Relief Act, the prayers, more especially in view of O. 7, R. 7, are, I think, sufficiently comprehensive to permit the decree I think should be passed.

In dealing with this matter on broad lines we shall be acting in accordance with what has been done by their Lordships of the Privy Council in more than one case, when, to use an expression employed on one occasion, it was necessary out of a wreckage of procedure to construct the material for a just decision.

The principle adopted by their Lordships in *Cockerell* v. *Dickens* (3) is this:

> "The rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert the specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill, consistently with the rules of the Court, maintain that reliefs."

And the same position was maintained in *Durga Prosad Sureka* v. *Bhajan Lal Lohea* (4) and *Gopi Narain Khanna* v. *Bansidhar* (5).

We must, therefore, modify the decree of the lower Court by substituting for the same a declaration that according to usage on the death of a Digwar of Ghaut Bharra holding office, his heir may be appointed in his place, if the Government approve, that Mohendra Narain Rai held the office of Digwar at his death and that the plaintiff is the heir of Mohendra Narain Rai. This Court cannot give relief either by appointing him to the office he seeks or delivering him possession of the land appertaining thereto. That relief must be sought elsewhere, and possibly for this purpose the declaration may be of service.

In the circumstances of this case, each party should bear his own costs throughout.

Mookerjee, J.—This is an appeal by the first defendant in a suit commenced by the plaintiff-respondent for recovery of possession of land on declaration of title thereto as Digwar of Ghaut Bharra in the District of Bankura. The suit was decreed by the Trial Court. Upon appeal to this Court,

(2) (1908) 35 Cal. 189=35 I. A. 38 (P. C.).

(3) (1837-41) 2 M. I. A. 353=3 Moo. (P. C.) 98=1 Mont. D. & D. 45.

(4) (1904) 31 Cal, 614=31 I. A. 122 (P. C.).

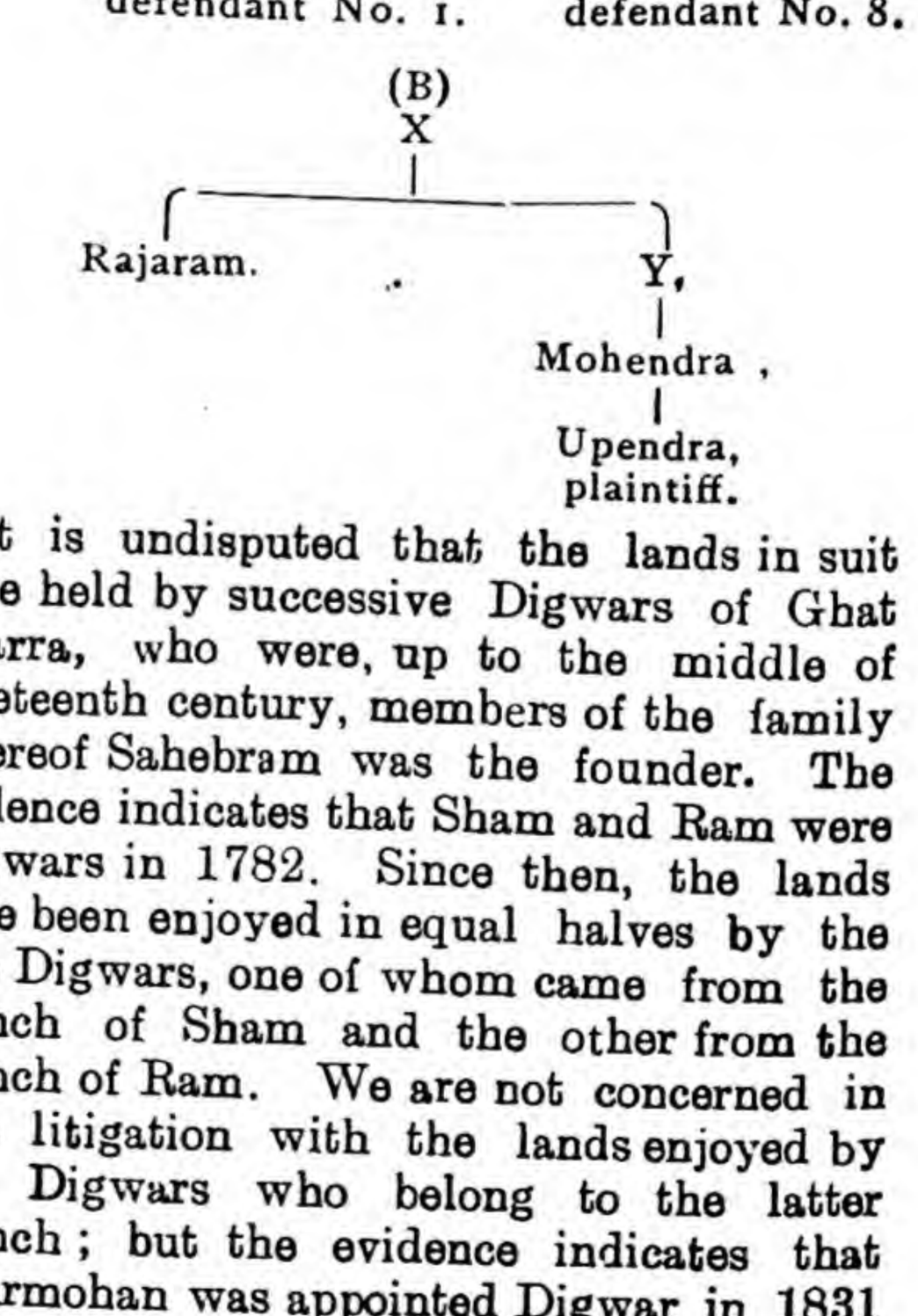
(5) (1905) 27 All. 325=32 I. A. 123 (P. C.).

the Judges of the Division Bench were equally divided in opinion. Fletcher, J., was of opinion that the decree of the Subordinate Judge should be reversed and the suit dismissed. N. R. Chatterjea, J., was of opinion, on the other hand, that the decree should be confirmed. Consequently, the decree of the Subordinate Judge stood confirmed under sub-S. 2 of S. 98 of the Code of Civil Procedure, 1908. On the present appeal, under Clause 15 of the Letters Patent, the decision of the Subordinate Judge has been assailed, principally on the ground that the plaintiff cannot claim as of right to succeed to the office of Digwar and that as the Executive Government have refused to appoint him as Digwar, the Civil Court has no jurisdiction to review the order of the Executive.

It is desirable at the outset to state that no useful purpose is likely to be served by a reference to the provisions of Regulation XXIX of 1814, which are applicable to Birbum Ghatwals; nor can any analogy be safely drawn from the decisions in *Nilmoni Singh Deo* v. *Bakranath Singh* (6) and *Jogendra Nath Singh* v. *Kali Charan Roy* (1) which are mentioned in the judgments of the Division Bench. As was observed by their Lordships of the Judicial Committee in the case of *Ramchunder Dutt* v. *Jugeshchunder Dutt* (7), the argument from analogy may arise where a principle of law is involved, but where Courts are dealing with the positive enactment of a Statute, reasons founded upon analogy are scarcely applicable. This observation is peculiary weighty where the rights of the parties litigant depend in a great measure upon the nature of the particular tenure or the terms of the particular grant. The problem for investigation consequently is, what is the nature of the tenure, what are the terms of the grant in this case as indicated by its antecedent history. In the determination of this question, we must bear in mind the clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands. This fundamental distinction was emphasized by Jackson, J. in *Kooldeep Narain Singh* v. *Mahadeo Singh* (8) and has since then been recognised and approved by the Judicial Committee in *Forbes* v. *Meer Mahomed Tuquear* (9), *Lilanand Singh* v. *Manoranjan Singh* (10) and *Venkata Narasimha Appa Rao Bahadur* v. *Sobanadri Appa Rao Bahadur* (11).

In the investigation of the nature of the title, under which the lands in dispute have been held by successive occupants thereof, reference to the following genealogical tables will be found convenient:—

(A)



(B)

It is undisputed that the lands in suit were held by successive Digwars of Ghat Bharra, who were, up to the middle of nineteenth century, members of the family whereof Sahebram was the founder. The evidence indicates that Sham and Ram were Digwars in 1782. Since then, the lands have been enjoyed in equal halves by the two Digwars, one of whom came from the branch of Sham and the other from the branch of Ram. We are not concerned in this litigation with the lands enjoyed by the Digwars who belong to the latter branch; but the evidence indicates that Gourmohan was appointed Digwar in 1831 and that Darpanarayan succeeded him in 1865. When we turn to the history of the

(6) (1883) 9 Cal. 187=9 I. A. 104 (P. C.).
(7) (1874) 12 B. L. R. 229=19 W. R. 353 (P. C.).
(8) (1866) 6 W. R. 199=B. L. R. Sup. Vol. 559.
(9) (1869-70) 13 M.I.A. 438=5 B..L.R. 529 (P. C.).
(10) (1874) 13 B. L. R. 124=I. A. Sup. Vol. 181.
(11) (1906) 29 Mad. 52=33 I. A. 46 (P. C.).

other branch, we find that Madan, who was Digwar in 1808, was dismissed in 1814 and was succeeded by Adwaita, who in his turn, was dismissed in 1850. Kartic was appointed Digwar on the 28th March, 1851 after the dismissal of his father, and was himself dismissed on the 10th May, 1855, as the authorities were not satisfied with the manner in which he discharged his Police duties. On the dismissal of Kartic, a stranger to the family, named Rasik Lal Upadhya, was appointed *Ghatwal*, but his tenure of office was very brief, as he himself was dismissed on the 14th February, 1856. On the dismissal of Rasik, Rajaram, the grand-uncle of the plaintiff, who belonged to a different family was appointed Digwar on 14th April, 1856. He was succeeded in 1861 by Mohendra, the father of the plaintiff. During the incumbency of Mohendra, Kartic, in 1869, made a successful attempt to get back the office when Mohendra, was suspended. On the 13th October, 1870 Mohendra and Darpanarayan were both dismissed, as their conduct was deemed unsatisfactory, and the opinion was expressed that it was improper to keep such men in Government service. Kartic was re-appointed Digwar in place of Mohendra on the 11th January, 1861, and one Khetternath was, at the same time, appointed in place of Darpanarayan. But, on the 30th May, 1872, Mohendra and Darpanarayan were both reinstated by the Lieutenant-Governor in supersession of the order of the Commissioner who had confirmed the order of dismissal made by the Magistrate. This terminated the brief restoration of Kartic to the office which had been held by his ancestors for seven generations, but he obtained what may be described as a promise of reappointment on a future vacancy. Kartic, however, died in 1900 leaving an infant son, Hemendra, the first defendant in this litigation. On the 19th July, 1904, Mohendra was dismissed again by the Magistrate along with a number of other persons similarly situated. On the 6th August, 1904 this order was revoked and Mohendra and Darpanarayan were conditionally restored. The evidence points to the conclusion that they were allowed to continue in office and enjoy the lands, though the condition imposed does not appear to have been fulfilled. On the 20th August, 1907 Mohendra obtained leave of absence on the ground of illness and his son Upendra was appointed to act for him; but Mohendra never returned to his work, as he died on the 9th October, 1907. Upendra was thereupon directed to act until further orders. At this stage, an attempt was made by the guardian of Hemendra to secure the office and the lands for him, if possible. The Magistrate, however, on the 16th June, 1908 appointed Upendra as Digwar on the strength of a report, dated 27th April, 1908 submitted by the Deputy Magistrate. But, on appeal to the Commissioner, the order of the Magistrate was reversed on the 11th August, 1908 and Hemendra, the infant son of Kartic, was appointed Digwar. Upendra preferred an appeal to the Board of Revenue, which was dismissed on 21st September, 1908. He then appealed to the Lieutenant-Governor; but on the 29th March, 1909 he was informed that the remedy for any grievance which he might have, lay in the Civil Court. The result was the institution of this suit by him on the 16th August, 1909.

From the facts thus briefly narrated, two points emerge as perfectly clear, namely, *first*, that the disputed lands have always been enjoyed by the Digwar of Ghant Bharra and *secondly*, that when a person has been dismissed from the office of Digwar, he has been forthwith deprived of the lands. There is, indeed, no trace in the evidence that there ever was an assertion by a dismissed Digwar that he was not liable to be deprived of the lands. As regards to dismissal itself, the Digwar was at liberty to appeal from the decision of the Magistrate to the superior authorities; but no one has ever suggested that if the Executive Government ultimately confirmed the order of dismissal, the Digwar had still a right to continue in possession of the lands. These circumstances, in my opinion, justify the inference that we have here, not a grant of lands burdened with a certain service, but the grant of an office, the performance of whose duties is remunerated by the use of lands. The land and the office went together; but the office was the primary concern, the occupation of the land was subsidiary thereto. I think the inference is also legitimate that we have here a case, not of property held by a man to himself and to his heirs, but of property held by a man to himself as holder of an office and his successors in that office. The office itself was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties

of the office and to remunerate himself from the usufruct of the lands attached thereto.

The theory that the office was hereditary in character is inconsistent with incontrovertible facts disclosed in the evidence. Successive Digwars were dismissed by the Executive Government on the ground that they were not fitted to hold the office without any question or demur. In 1855 the office was granted to a stranger to the family of Kartic, and when the new Digwar was in his turn removed, a few months later, another person, Rajaram, who was a stranger to both the families, was appointed; it was then expressly stated as a point in his favour that he was not connected with Kartic. The view that the Digwar was liable to be removed for failure to discharge his duties satisfactorily and that on his removal the Executive Government was free to appoint a qualified stranger as successor, is borne out by the documentary and oral evidence on the record.

The earliest document, namely, the report of Kanji Tahsildar, dated the 9th July, 1799, though based on meagre materials, makes it reasonably clear, that the Digwars enjoyed the villages without payment of rent in lieu of their wages. Evidence of a more recent date is consistent with this position; for instance, the order on Adwaita and Gourmohan dated the 23rd May, 1847 states explicitly that the Digwars held lands merely for remuneration for the labours of their services, and are consequently competent to create only such subordinate rights as do not continue beyond the period of their incumbency. The list of Ghatwals framed in 1849 makes it equally clear that the Digwars when they did not get their allowance in cash held the lands only in lieu of such allowance; and this was applicable to the Digwari now in suit. The same view is supported by subsequent reports and orders made on the occasion of dismissal of successive Digwars and the appointment of their successors, and this is confirmed by the statement of the plaintiff himself as to the nature of the tenure of the Digwari office made in an agreement between himself and his brother on the 1st April, 1908. The position consequently is that the disputed lands appertain to the office of Digwar of Ghat Bharra, that the office itself is not hereditary as a matter of right, that the holder of the office is liable to be removed for failure to discharge his duties to the satisfaction of the Executive Government, that on the removal of a Digwar his successor acquires a valid title to the office only if appointed thereto by the Executive Government, and that although on two occasions strangers have been appointed to the office, during many generations the heir to the last holder has taken the office and the lands with the approval of the Executive Government. Tested in the light of these conclusions, what is the position of the plaintiff? He has not been appointed Digwar by the Executive Government, and he had not, consequently, a valid and enforcible title to that office at the time of the institution of the suit. He is plainly not entitled to a decree for possession of the lands annexed to that office, and the decree of the Subordinate Judge cannot, to this extent, be possibly confirmed. But it does not follow that the plaintiff is not entitled to any relief in the suit as framed, and here we must take into account the very special circumstances which have preceded its institution. The plaintiff, on the death of his father, was appointed Digwar by the Magistrate. But the order of the Magistrate was reversed on appeal by the Commissioner. The decision of the Commissioner was largely based on a misapplication of the judgment of this Court in the case of *Jogendra Nath Singh* v. *Kali Charan Roy* (1). That decision, it has not been seriously disputed before us by either party, has no possible application to this case. There the Court found that the particular tenure was not merely heritable but was also permanent, and that a tenure of this description could not be determined or resumed by the *zemindar* or the Government on the ground that the services were no longer necessary or had been dispensed with. It was further held that in the case of a tenure of this description where, during the life-time of the Ghatwal, his son, who was appointed his deputy, was dismissed, the dismissal of the son did not amount to a dismissal of the father, and that after the father's death, the son was entitled to succeed, although during his father's life-time he had been dismissed while acting as a deputy of his father. It is obvious that these principles have no application to a case where, as here, the tenure is not heritable as of right and the lands are annexed to an office which also has not a hereditary character impressed upon it. The position then is that the Commissioner refused to approve the

appointment of the plaintiff as Digwara, not because the Commissioner considered him unsuitable for the office, but because the Commissioner took an erroneous view of the relative rights of the plaintiff and his opponent, the determination of the Commissioner was in essence based upon an erroneous adjudication of a question of title. This explains why the Board of Revenue stated that the Board had no jurisdiction and why the Executive Government held that the remedy for any grievance which the plaintiff might have lay in the Civil Court. It need not be denied that, as was recognized in *Debee Narain Singh* v. *Sree Kishen Sein* (12) and *Secretary of State* v. *Poran Singh* (13), the Civil Courts have no jurisdiction to reinstate a *Ghatwal* who has been dismissed by the Executive Government as unfit for the discharge of his duties. But the position is obviously different where the Commissioner decides against a claimant, not in the exercise of his discretion, but upon an erroneous view of the relative title of his contestant: *Lall Dharee Roy* v. *Brojo Lall Singh* (14). I am of opinion, accordingly, that it is competent to this Court to grant to the plaintiff relief by way of a declaratory decree under S. 42 of the Specific Relief Act, so that the plaintiff may approach the Executive Government and seek their decision on the question of the appointment of a successor to the office of Digwar of Ghat Bharra. A similar view has been taken in Bombay in connection with what are known as Vatans, and it has been ruled that if the plaintiff has the right and if the Court has jurisdiction to give him relief by declaring it, he is entitled to a decree; the Court is not concerned with the object or motive of the party who comes into Court in assertion of his alleged right and he should not be refused declaration merely because he seeks it with a view to influence the opinion of the Revenue Authorities: *Ramchandra Dabholkar* v. *Anant Sat Shenvi* (15), *Govind Sitaram* v. *Bapuji Mahadeo* (16), *Kando Narain* v. *Apaji Sadasiv* (17) and *Rahimkhan* v. *Dudamiya* (18), but the position is different when the declaration sought can be based only on the investigation of a question which is by Statute or otherwise expressly excluded from the cognizance of the Civil Court: *Khando Narayan* v. *Apaji Sadashiv* (19), *Chinto* v. *Lakshmibai* (20): *Balkrishna* v. *Balaji* (21), *Raoji* v. *Genu* (22); and *Jivaji Sambaji Kambli* v. *Fakir Sabaji Kambli* (23). The view I take is supported by the decision of the Judicial Committee in *Sadut Ali Khan* v. *Khajeh Abdul Gunney* (24), which recognised the principle that before the Court grants relief in a declaratory suit, the Court must see that the declaration of right may be the foundation of relief to be got somewhere. This condition it appears to me is sufficiently answered in the present case. I arrive at this conclusion without hesitation or embarrassment in view of the letter of the Government of Bengal, dated 29th March, 1909.

The only other question for consideration is, whether a declaration should be granted in the suit as framed. Here, I think, the Court should be guided by well-settled principles now embodied in R. 7 of O. 7 of the Code of 1908. The principle is best stated in the words of Lord Erskine in *Hiren* v. *Mill* (25). The rule is that if the bill contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer; but he cannot desert the specific relief prayed and, under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will consistently with the rules of the Court maintain that relief. This formulation of the rule, it may be parenthetically observed, is attributed *per incuriam*, to Lord Eldon, by Baron Parke, in *Cockerell* v. *Dickens* (3). In the application of this salutary rule, the test is whether the defendant will be taken by surprise [*Stevens* v. *Guppy* (26)]; and there can be no surprise if the deficient relief not specifically claimed, but supplied as the Courts think just, is consistent with the relief specifically claimed as

(12) (1864) 1 W. R. 321.
(13) (1880) 5 Cal. 740.
(14) (1868) 10 W. R. 401.
(15) (1884) 8 Bom. 25.
(16) (1894) 18 Bom. 516.
(17) (1909) 11 Bom. L. R. 1342 *foote-note*.
(18) (1910) 34 Bom. 101=4 I. C. 833.
(19) (1877-78) 2 Bom. 370.
(20) (1877-78) 2 Bom. 375.
(21) (1885) 9 Bom. 25.
(22) (1898) 22 Bom. 344.
(23) (1912) 36 Bom. 420=15 I. C. 840.
(24) (1873) 11 B. L. R. 203=19 W. R. 171 (P.C.).
(25) (1806) 13 Ves. 114=33 E. R. 237.
(26) (1826) 3 Russel 171=6 L. J. (N.S.), Ch. 164=27 R. R. 59.

well as with the case raised by the pleadings: *Cargill* v. *Bower* (27). This rule has been repeatedly recognised and approved by the Judicial Committee: *Cockrell* v. *Dickens* (3), *Durga Prosad Sureka* v. *Bhajan Lal* (4) and *Gopi Narain Khanna* v. *Bansidar* (5). The decision in *Walian* v. *Jogeshwar Narayan* (2) is not really opposed to this view, and only illustrates the position that to entitle a plaintiff to judgment under the claim for general relief, different from that specifically claimed, the allegations relied upon must not only be such as to afford a ground for the relief claimed but they must have been introduced for the purpose of showing a right to relief and not for the mere purpose of corroborating the plaintiff's right to the specific relief claimed. In the case before us, the nature of the title under which the disputed property is held has been investigated after a protracted trial and there is no room for suggestion that the defendant will be taken by surprise if a declaratory decree is made in favour of the plaintiff. I hold accordingly that this is a case where a declaratory decree may properly be made, and I agree with the Chief Justice that this appeal should be allowed and the decree of the lower Court modified by the substitution of a declaration in the terms framed by him.

Holmwood, J.—I have nothing to add to the judgments which have just been delivered and with which I agree.

V.B./R.K.

Appeal allowed.

(27) (1878) 10 Ch. D. 502=47 L. J. Ch. 649=38 L. T. 779.

A. I. R. 1916 Calcutta 838

FLETCHER, J.

Assaram and *others*—Plaintiffs.

v.

Kesri Chand and *others*—Defendants.

Original Civil Suit No. 5416 of 1911, decided on 28th May, 1912.

(a) Negotiable Instruments Act (26 of 1881), S. 5—Nature of *shahjog hundi* stated—It is bill of exchange payable to certain persons—Transferee of *shahjog hundi* takes it subject to equities—Acceptor is to be satisfied that bearer is a respectable holder—According to definition of bill of exchange drawer and drawee should not be same person—Where it is so holder may in accordance with English law treat it as promissory note or bill of exchange at his option—Attested *shahjog hundi* comes under S. 6 of Stamp Act and is chargeable to duty—Attested *shahjog hundi* can be used as bond or promissory note.

A *shahjog hundi* is only payable to the respectable holder and is not equivalent to a *hundi* payable to bearer. It is not a bill of exchange or cheque payable to order. It is a bill of exchange which is not, at any rate in the full sense, a negotiable instrument, it is a bill of exchange payable to a certain person. [P 839, C. 1 & 2.]

A transferee of *shahjog hundis* takes *hundis* subject to equities, although there may be, according to the custom of the markets, some means of protection of the acceptor who after due inquiry satisfies himself that the person presenting the document for payment is a respectable holder. [P. 839, C. 2.]

The definition of a bill of exchange in the Negotiable Instruments Act does not contemplate that the drawer is to be the same person as the drawee. On principle, however, in accordance with the English Law on the subject, where in a bill the drawer and the drawee are the same persons, then the holder may treat the instrument at his option either as a bill of exchange or as a promissory note. [P. 839, C. 2 & P. 840, C. 1.]

An attested *shahjog hundi* comes under S. 6 of the Indian Stamp Act and is chargeable under two headings in the Schedule. [P. 840, C. 1.]

An attested *shahjog hundi* can be sued on either as a promissory note or as a bond and may be admitted to evidence as a bond subject to the penalties under the Stamp Act. [P. 840, C. 2.]

(b) Civil P. C. (5 of 1908), S. 115—Order discharging rule under S. 115 is not appealable.

Per *Jenkins, C. J.* and *Woodroffe, J.*, on appeal—No appeal lies against an order discharging a Rule under S. 115 of the Civil Procedure Code. [P. 840, C. 2.]

Judgment.—This is a Rule obtained by the defendant in a Small Cause Court suit calling upon the plaintiff to show cause why the decree passed by that Court in a suit between the plaintiff and the defendant should not be set aside. The point is one of some nicety. The facts are as follows:—The plaintiff on the 7th March, 1911 brought a suit in the Small Cause Court against the defendant to recover a sum of Rs. 806, being the amount of principal and interest due by the defendant to the plaintiff on two *hundis* for Rs. 400 each executed by the defendant in favour of the plaintiff at Calcutta for valuable consideration payable after 562 days and 573 days respectively after the execution. The defence in the written statement of the defendant who has been called the added defendant, is that the *hundis* were not admissible in evidence. The case came on for trial before the learned Second Judge. The learned Second Judge decreed the suit in favour of the plaintiff and on an application to

the Full Court for an order for new trial the judgment of the Trial Judge was upheld, on the ground that the documents had been properly admitted in evidence. The point arises in this way. The defendant drew these two *hundis*, in suit. The *hundis* are what are called *shahjog hundis*, that is, they are payable to the respectable holder. That apparently is a custom that exists amongst the Indian merchants, and the acceptor does not get a discharge unless he takes the trouble to satisfy himself that the person presenting the document for payment is either known in the bazaar or identified to him. Now the point has been raised, and the Rule was granted on this footing, that these two documents were negotiable instruments, and were therefore not admissible in evidence under S. 35 of the Indian Stamp Act. S. 35 provides, that a document not being a document chargeable with a duty of one-anna or a bill of exchange or promissory note, shall, subject to the payment of penalties, be admitted in evidence. Now the point that has been raised in this case is that these two documents were bills of exchange within the meaning of the Negotiable Instruments Act. S. 2, sub-S. 5 (*b*) of the Stamp Act provides that a "bond" includes any instrument attested by a witness not payable to bearer whereby a person obliges himself to pay money to another. Now the *first* point that I have to decide is, is a *shahjog hundi* payable to order or to bearer? It has been expressly decided by the High Court of Allahabad in *Lalla Mal* v. *Kesho Das* (1) that a *shahjog hundi* is only payable to the respectable holder and is not equivalent to *hundi* payable to bearer. That seems to dispose of the case in so far as it is said to be a negotiable instrument payable to bearer. The *next* point is, is this *hundi* a *hundi* or a bill of exchange payable to order? Of course, these *hundis* drawn according to Indian customs are matters of considerable difficulty to understand. But the High Court of Bombay in a case *Ganesdas Ramnarayan* v. *Lachminarayan* (2), which was a reference by the Presidency Small Cause Court at Bombay, decided that a *shahjog hundi* is not a bill of exchange or cheque payable to order. Then one is left with the *hundi* as being a *hundi* not payable to order or to bearer. That is, it is a bill of exchange which is not at any rate in the full sense a negotiable instrument; it is a bill of exchange payable to a certain person. That means that the transferee of *shahjog hundis*, so far as I can see on the authorities, takes *hundis* subject to equities, although there may be, according to the custom of the markets, some means of protection of the acceptor who after due enquiry satisfies himself that the person presenting the document for payment is a respectable holder. When we have got to that stage, we have got to see whether the learned Second Judge was right when he admitted this document subject to the payment of the penalty chargeable on a bond under S. 35, sub-S. (*a*) to the Indian Stamp Act. "Bond," as I have already said, from the definition includes any instrument attested by a witness not payable to order or to bearer whereby a person obliges himself to pay money to another. It appears to me from the authorities that I have cited in Allahabad and Bombay that this document is not payable to order or to bearer. Therefore the question is, does this document create an obligation by the defendant to pay the plaintiff the sum of money mentioned in the *hundi*? So far as the attestation goes, it is not denied that the signature was in fact attested by a person who saw the document executed. Now the question whether an attestation sometime after the execution of the document was a proper attestation, in my opinion, is one of fact which the learned Second Judge was entitled to decide on the evidence. This document was a document attested by a witness. The next point is, does it create an obligation to pay? This *hundi* is drawn by the firm of Kesri Chand-Sugan Chand, the defendants, on themselves. By the definition in the Negotiable Instruments Act a bill of exchange is an instrument in writing containing an unconditional order signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. It is quite obvious that the section of the Negotiable Instruments Act contemplates that there shall be two persons, the drawer and the drawee. It does not contemplate

(1) (1904) 26 All. 493.
(2) (1894) 18 Bom. 570.

that the drawer is to be the same person as the drawee. That is in accordance with the law which had been laid down previously to the codification of the law relating to negotiable instruments in England. It appears that prior to the Bills of Exchange Act, 1882, 45 and 46 Vic., C. 61, the law was laid down in *Peto* v. *Reynolds* (3) and Parke, B. then said :

"I cannot, however, help observing that there is no case in which it has ever been decided that an instrument could be a bill of exchange where there was not a drawer and a drawee."

In the 5th section of the Bills of Exchange Act, 1882, the law has now been codified, but it expresses the law as it had been laid down prior to the Statute, namely, that where in a bill the drawer and the drawee are the same persons, then the holder may treat the instrument at his option either as a bill of exchange or as a promissory note. That seems to me to be the law from the decisions that have been cited. The Indian Statute has not apparently made any similar provisions for the case of a bill of exchange having the same person as both the drawer and the drawee. On principle the law must be the same ; that is, that the holder has the right to treat the document either as a bill of exchange or as a promissory note. That, therefore, brings us to this, that the holder in this case has the right to treat the document as an attested promissory note. An attested promissory note, it cannot be doubted, does create an obligation to pay the sum mentioned in the promissory note, because by the very nature of the document the promissory note does contain an obligation to pay. If that be so, in this case there are two promissory notes to pay Rs. 400 each. Those two documents seem to me to come under S. 6 of the Indian Stamp Act, that is, documents chargeable under two headings in the Schedule, and the law provides that they shall be chargeable only with the higher of such duties. As a matter of fact the *hundis* being drawn for a period of more than one year, the stamp duty on a bond and a *hundi* of this nature is exactly the same. But the point is, was the learned Second Judge right in admitting these documents in evidence as bonds? In my opinion he was. I think this document could have been sued on either as a promissory note or as a bond containing the obligation to pay, attested by one witness and not being payable to order or to bearer. That being so, in my opinion, the learned Second Judge was correct in admitting these two documents in evidence subject to the penalties being paid as creating an obligation to pay in favour of the plaintiff. The present Rule fails and must be dismissed with costs.

V.B./R.K.

Rule discharged.

[An appeal against this order came up for hearing before Jenkins, C. J. and Woodroffe, J. on the 3rd September, 1912, and was dismissed on the ground that no appeal lay against an order discharging a Rule under S. 115, Civil Procedure Code.—*Ed.*]

(3) (1854) 9 Ex. 410=96 R. R. 772.

A. I. R. 1916 Calcutta 840

MOOKERJEE AND NEWBOULD, JJ.

Krista Chandra Chowdhury and *another* —Plaintiffs—Appellants.

v.

Ratan Ram Pal and *others* —Defendants —Respondents.

Appeals Nos. 2021 and 3306 of 1914, decided on 6th August, 1915, from the Appellate Decrees of Addl. Dist. Judge, Sylhet, dated 14th April, 1914.

Hindu Law—Minor—Guardian—Power—Alienation for necessity or even benefit is valid—It applies to sale also—What is benefit of minor stated.

An alienation by the manager of a Hindu infant's estate is justifiable not only when made owing to the necessities of the minor, but also when any benefit is caused to the estate by the alienation. [P. 841, C. 2.]

The rule is applicable not only to mortgages but also to sales. 18 W. R. 81*n*., expl.; Beng. S. D. A. 1856 and 26 Cal. 820, ref. to. [P. 841, C. 2.]

But mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular alienation is "for the benefit of the estate" within the meaning of the rule, as cases of speculative development of estates of minors are hardly intended to be included within its scope. [P. 842, C. 1.]

A. Rasul and *Gopal Chandra Das* — for Appellants.

Dwarka Nath Chuckerbutty and *Kali Kinkar Chuckerbutty*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for recovery of possession of a share of an estate on declaration of title by purchase. The share in

dispute admittedly belonged originally to one Harendra Chandra Chakravarty, who attained his majority on the 21st September, 1908. During his minority, there was a scramble for the acquisition of this share by two sets of persons, who may be called the Pals and the Chowdhurys. On the 19th March, 1907, the Chowdhurys took a conveyance from the infant. On the 15th April, 1907, the Pals took another conveyance of the same share from Sarat Chandra Chakravarty, the father of the infant, who was the *de facto* guardian and manager of his properties. On the 18th December, 1909, the Chowdhurys took a second conveyance from Harendra with a view to fortify their title, which was obviously open to attack as based on a conveyance executed by an infant. On the 1st August, 1912, the Chowdhurys commenced this action for declaration of title and recovery of possession, as the Pals had, on the 15th April, 1912, instituted a suit for rent on the assumption that they had acquired a valid title by their purchase. The Court of first instance made a conditional decree in favour of the Chowdhurys for recovery of possession upon payment of Rs. 700 to the Pals, which represented the consideration paid by the latter to the vendor. On appeal, the District Judge has reversed this decision and has dismissed the suit. He has held that the conveyance by the guardian of the infant, executed on the 15th April, 1907, is binding upon the latter and that there was consequently no subsisting title left in him capable of transfer to the Chowdhurys under the conveyance of the 18th December, 1909. The District Judge has further found that as the share in dispute was infinitesimal and constituted an inconvenient and expensive property, the sale by the guardian, was the act of a prudent person. On the present appeal the decree of the District Judge has been assailed, substantially on the ground that the sale by the guardian was not necessary and cannot be held operative against the infant merely because it was beneficial to him. In our opinion, this contention cannot be sustained.

The power of the manager of an infant heir was defined by the Judicial Committee in the well-known case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1). Knight Bruce, L. J. observed that the power of the manager for an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. It is plain that in this passage a distinction is drawn between a case of need and a case of benefit of the estate. The actual pressure on the estate, the danger to be averted, refer to a case of need, and the benefit to be conferred upon the estate in the particular instance is thus differentiated from the other category mentioned. This view has been adopted and applied by the Indian Courts ever since the decision of the Judicial Committee was pronounced on the 26th July, 1856. In the decision of a Full Bench of the Sudder Court in the case of *Gooprasad Jena* v. *Mudden Mohan Soor* (2), where the judgment was pronounced on the 11th December 1856, apparently before the decision of the Judicial Committee reached this country, the same view was independently taken, and it was held that the benefit of the minor creating necessity was a test by which the legality of the transaction must be tried; the rule is that a party filling a fiduciary character, like that of a guardian, is authorised to perform any act which is manifestly for the infant's benefit. A similar view was adopted in *Mohanund Mondul* v. *Nafur Mondul* (3), where Maclean, C. J., and Banerji, J., held that a *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property. In that case the Court further declined to accept the contention that the rule laid down by the Judicial Committee was restricted to cases of mortgage or other forms of partial alienation and was not intended to apply to cases of sale.

Our attention has, however, been drawn to a passage from the standard treatise on the Law of Minors by Sir Ernest Trevelyan, 4th Edition, page 154, where that learned

(1) (1872) 18 W. R. 81*n*=6 M.I.A. 373 (P.C.).

(2) (1856) Beng. S. D. A. 980.

(3) (1899) 26 Cal. 820.

author states that there is no case where the sale of a minor's property has been upheld, except on the ground of its being justified by the necessities of the minor or his estate. The accuracy of this statement need not be disputed. But this does not show that the rule is restricted in its application to cases of necessity alone ; the absence of judicial authority may be due to the circumstance that the point has not been regarded as open to serious argument. But it must be remembered that mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is "for the benefit of the estate" within the meaning of the rule, which could hardly have been intended to include cases of speculative development of estate of minors, *Radha Pershad Singh* v. *Musammat Talook Raj Kooer* (4), *Kahiur Singh* v. *Roop Singh* (5) and *Ganap* v. *Subbi* (6). In the case before us there is no room for controversy, that the alienation was for the benefit of the estate and was such as a prudent owner of the estate might have made. In these circumstances it follows that the transaction was binding upon the estate of the infant and that it was not open to him, after he had attained his majority, to create a valid title by his conveyance in favour of the Chowdhurys on the 18th December, 1909.

We have finally been invited to make some provision in the decree for recovery of the purchase-money paid by the Chowdhurys to Harendra on the 19th March, 1907. But there are two insuperable difficulties in the way of the appellants. In the *first* place, there was no such claim made against Harendra in either of the Courts below, and, as he is not represented in this Court, it would not be right to make a decree against him on the ground suggested. In the *second* place, the money is alleged to have been paid to Harendra while he was still an infant. If a claim were now put forward against Harendra for recovery of such sum, defences might be available to him which have not been investigated in this case. Whatever remedy the Chowdhurys may have against Harendra, must, consequently, be enforced in a suit properly framed for the purpose.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

In view of our decision in this appeal, the other appeal (Second Appeal No. 3306 of 1914) also will stand dismissed with costs.

V.B./R.K.

Appeals dismissed.

(4) (1873) 20 W. R. 38.
(5) (1871) 3 N. W. P. H. C. R. 4.
(6) (1908) 32 Bom. 577.

A. I. R. 1916 Calcutta 842

JENKINS, C. J. AND HOLMWOOD, J.

Lalu Dome and *another*—Plaintiffs—Appellants.

v.

Bejoy Chand Mahatap—Defendant—Respondent.

Appeal No. 3144 of 1912, from the Appellate Decree of Dist-Judge, Bankura, dated 2nd August, 1912.

(a) Bengal Village Chaukidari Act (6 of 1870), S. 1—Applicability of—Act applies to *simanadari* lands *Thana* Indas, Bankura District.

Act VI of 1870 B. C. applies to *simanadari* lands in *thana* Indas, Bankura District, assigned for the maintenance of *simanadars* who performed those duties which are described in S. 1 of the Act. [P. 843, C. 1.]

(b) Bengal Village Chaukidari Act (6 of 1870), S. 1—Duties of *Simanadars*—Bengal District Gazetteer for Bankura may be referred to.

The Bengal District Gazetteer for Bankura may be referred to by Court for the purpose of seeing what the duties of *simanadars* are, that is to say, whether their duties correspond with those of which description is given in S. 1 of the Chaukidari Act (VI of 1870 B. C.). [P. 843, C. 1.]

Baidya Nath Dutt and *Bhupendra Kumar Ghose*—for Appellants.

Basant Coomar Bose, *Shoroshi Charan Mitra*, *Bepin Behari Ghose* and *Satyendra Nath Roy*—for Respondents.

Judgment—Two points arise in this appeal. One is as to the location and identity of the parcels. On that there has been a finding of fact by the lower Appellate Court on an issue sent down, which is conclusive against the present appellants and there is no ground on which we can interfere.

It is contended, however, that the land in suit is *simanadari* land and not *chaukidari chakran* land, and, therefore, it is said Act VI of 1870, B. C., does not apply. The learned Vakils who appear before us agreed on this, that if the Act

does not apply then the appellants are entitled to succeed, and if the Act applies then the appellants must fail. Now, the words "*chaukidari chakran* lands," by the express provisions of the Act, mean "lands which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the Police and in respect to which such officer may be at the time of the passing of this Act liable to render service to a *zemindar*."

Whether this land was *simanadari* or *chaukidari chakran* was left undecided by the lower Appellate Court. This, we think, is to be regretted.

But we have the authority of the Bengal District Gazetteer for Bankura that "in *Thanas* Indas and Kotalpur, there are a body of men called *simanadars*, who perform the duties of *chaukidars*. They have grants of lands in lieu of wages; but in some instance these service lands have been resumed under Act VI of 1870."

We are entitled to use this book of reference for the purpose of seeing what the duties of *simanadars* are, that is to say, whether their duties correspond with those of which description is given in S. 1 of the Chaukidari Chakran Land Act. What is stated in the Gazetteer shows that in *Thana* Indas, which is the *thana* with which we are concerned in this case, the *simanadars* perform those duties which are described in S. 1 of the Act. If they perform those duties it does not matter in the slightest what they may be called. The definition requires that the duties should be of a particular character. That being so, we must hold that Act VI of 1870 applies. It perhaps may seem a hard case on the appellants before us, but there is no escape from it. Certainly there is no escape from it in the suggestion of occupancy right. It is made for the first time in this Court.

We must, therefore, dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 843
Full Bench

JENKINS, C. J., AND MOOKERJEE AND HOLMWOOD, JJ.

Upendra Nath Bose—Defendant—Appellant.

v.

Bindeshri Prosad—Plaintiff—Respondent.

Letters Patent Appeal No. 18 of 1914, decided on 19th August, 1915, against the Decree of Mullick, J., dated 20th August, 1914.

(a) Letters Patent (Cal.), Cl. 15—Meaning of word "Judgment" in Cl. 15 stated.

The word "judgment" is used in Clause 15 of the Letters Patent in the sense of a "a sentence of the law pronounced by Court" and not of the reasons which have led to that pronouncement. [P. 848, C. 2 & P. 853, C. 2.]

(b) Letters Patent (Cal.), Cl. 15—Appeal under Cl. 15 is against the whole decree—All points to test correctness of decree are open for consideration—Court is slow to disturb concurrent findings of fact.

An appeal under Clause 15 of the Letters Patent must be deemed to have been preferred against a decree, and all the points necessary to be investigated for the determination of the correctness of that decree are open for consideration, although the Court of Appeal would be slow to take, upon a question of fact, a view contrary to the concurrent opinion of two Courts. [P. 848, C. 2 & P. 853, C. 1.]

(c) Civil P. C. (5 of 1908), S. 100—Whether particular necessity is legal or not is question of law.

Where a deed by a limited owner with qualified powers of alienation is called in question, the test is, whether the purpose for which the alienation is made is proper in the circumstances of the case. The doctrine of legal necessity is but a particular phase of the law. [P. 850, C. 2 & P. 855, C. 2.]

(d) Hindu Law — Alienation—Widow—Consent—Reversioner's consent only implies that it is for lawful necessity—Held further attestation is no proof of consent or even knowledge of contents of deed.

The sanction by expectant reversioners of an alienation of property by a Hindu woman affords evidence that the alienation was made under circumstances which rendered it lawful and valid. [P. 851, C. 1 & P. 856, C. 1.]

A mere attestation of a deed does not necessarily import consent to an alienation effected thereby, nor even a knowledge of the contents thereof. [P. 851, C. 1 & P. 858, C. 2.]

(e) Hindu Law—Family arrangement—Limited owner can effect a perfectly valid family settlement—Settlement of doubtful claim is valid and binding.

The validity of a family settlement is not affected by the circumstance that the grantor of a lease of some of the family property was a limited owner in possession with qualified powers of alienation. [P. 857, C. 1.]

A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore, or resile from. [P. 856, C. 1.]

(f) Deeds—Construction—Deeds in India must be liberally construed—Real meaning and not the form should be considered.

Deeds and contracts of the people of this country must be liberally construed; the form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. [P. 856, C. 1.]

(g) Compromise—Meaning of—Consideration in such case is settlement of dispute not the sacrifice of right but abandonment of claim.

A compromise is an agreement to put an end to disputes and to terminate or avoid litigation and in such a case, the consideration which each party receives is the settlement of the dispute. The real consideration is not the sacrifice of a right, but the abandonment of a claim.

[P. 857, C. 1.]

(h) Registration Act (16 of 1908), Ss. 17 (4) (d) and 49—(Per *Jenkins, C.J.*)—Compromise decree dismissing a claim is admissible without registration.

Per *Jenkins, C. J.*—A decree dismissing a suit based on a compromise filed on the petitions of both the parties is admissible in evidence without registration. [P. 850, C. 1.]

Rash Behari Ghose and *Baranashiboshi Mookerjee*—for Appellant.

Sarat Chunder Bysack and *Chandrasekhar Prosad Singh*—for Respondent.

Stephen, J.—The plaintiff in this case, who is the same as the plaintiff in the suit under appeal in R. A. No. 372, sues to have a *mokurari* lease, granted by *Mussammat* Lochan Koer on the 29th August, 1893 of an eight-annas share in Mouzas Partappore, Chergerwa, Ralshi and Gajhanda, declared not to be binding on him, and also for possession and mesne profits. The suit has been decreed in the lower Court with mesne profits. The following facts are admitted. The plaintiff is the son of Lochan Koer, the wife of Deo Nath, the daughter of Jaikaran, the son of Mahadeo. The defendants are the assignees of Uma Shankar, the son of Gouri Baijnath, the son of Dayanath, the son of Mahadeo. As stated in Appeal No. 372 of 1910, Lochan died on the 5th May, 1906, her predecessors having died before her, and Gouri Baijnath died in 1883 in similar circumstances.

On the 15th May, 1893, Uma Shankar sued Lochan for the possession of certain property, the suit being No. 62 of 1893. On the 20th August, Lochan executed the *mokurari* in suit in order to settle Uma Shankar's claim, the plaintiff being an attesting witness to the document, and on the 13th November in the same year the suit was accordingly dismissed. On the 6th August, 1894, Uma again sued Lochan with whom he joined the plaintiff in a suit numbered 193 of 1894. This suit was dismissed on a compromise on the 18th February 1895, on petitions by Uma Shankar, Lochan and the plaintiff.

The two main questions to be decided are whether the *mokurari* is binding as an alienation or otherwise on the plaintiff; and whether the plaintiff can be allowed to deny its binding force as far as he is concerned. To decide the *first* point we must first consider the contents of the *mokurari patta*, and the circumstances under which it was made: and the latter is more conveniently considered first. In 1893 Lochan seems to have considered herself to be entitled to the enjoyment of a Hindu widow's estate in Jaikaran's property, and to have been in possession of it since Jasoda's death in 1873. Her possession was fortified by a succession certificate granted in 1874, which all the parties concerned seem to have regarded to some extent as a document of title. But it must be observed that both Gouri Baijnath and his son Uma Shankar had opposed the grant of that certificate to her, as the former had opposed a similar grant to Jasoda. Uma Shankar brought his suit No. 62 of 1893 on the 11th May, joining two other defendants, strangers to Lochan. The cause of action was that he and his father were members of a Mitakshara family, and that the latter, for the purpose of supplying the requisites of a life of debauchery, alienated some of the family property which came into the hands of the defendants, who received it by a series of transfers that did not in fact affect his interest. The suit was valued at Rs. 400. It was not suggested that there was any connection between the property in suit and the estate of Jaikaran. The *patta* of the 28th August was admittedly given with the object of getting rid of this suit, though possibly with other objects as well. It commences by reciting that Deonath Rai and Jaikaran were separate in mess and business; it then describes Lochan's succession to Jaikaran's property, and her wish to help Uma Shankar. It specifically states that in the suit he has no point in his favour and has no interest in the estate of Jaikaran; and then there follows a grant of a *mokurari* with a nominal payment of Re. 1 reserved to the grantor. A question has been raised as to whether in terms the *patta* affects to transfer more than Lochan's limited interest. I hold that it does, as the *mokurari* is twice described as perpetual and descendible to children, generation after generation, and purports to bind her heirs, by which the heirs of Jaikaran may reasonably be supposed to be indicated. The *patta* is

signed by Lochan, and her signature is attested by the plaintiff.

The materials on which we can form any opinion as to whether or not this document was executed for necessity are very scanty. The value of the property affected is assessed in this suit at Rs. 40,000 : otherwise we seem to have no evidence on the subject. Uma Shankar's cause of action would, as the Judge says, have been very difficult to prove but Uma Shankar valued his claim at only Rs. 400, which goes to show that the execution of the deed could have been avoided. The *kabuliyat* corresponding to the *patta* attributes the making of the grant to natural love and affection more explicitly than does the *patta*. My chief ground, however, for disbelieving in the necessity of this grant is to be found in Uma Shankar's subsequent conduct. He had admitted in the *kabuliyat* that he had no right in respect of Jaikaran's estate and had undertaken to bring no more unfounded suits, and had accepted a *patta* with corresponding statements. Yet in August 1894 we find him bringing his Suit No. 193 of 1894 against Lochan and the plaintiff, founded on the assertion that Jaikaran held his property jointly with Gouri Baijnath, his father, and claiming property held by Lochan by reason of a breach of a previous settlement made on that basis. In the next February this suit was dismissed on the terms that the defendants should pay their own costs, the plaintiff making a complete acknowledgment that this suit was groundless and hopeless and admitting that the two branches of the family were separate. The obvious bad faith of this second suit makes it impossible to suppose that the first suit was brought in good faith. Lochan may have found it convenient to give the *mokurari* to quiet a false claim, but I know of no reason for saying that it was legally necessary that she should, and there is every reason for saying it was not.

I hold, therefore, that the *patta* in suit was not executed for necessity.

I also hold that it was not validated by the attestation of the plaintiff. In the *first* place, attestation is not necessarily the same as consent. In the *second*, the bad faith of Uma Shankar goes some way to rebut the presumption of the consent of a reversioner, and when that reversioner is a very young man and the attestation is the only indication of consent, it may be held to be rebutted. I have doubts as to whether the plaintiff was an adult at the time of this deed. The facts as relating to his minority set out in Appeal No. 372 do not indicate majority here even to the extent they did there; on the other hand it is for the plaintiff to prove infancy, and it is perhaps the safest course to follow the lower Court in holding that he has not done so. In view of the other holdings, however, this is immaterial.

I must next consider the question whether the plaintiff can be allowed to deny the binding force of his mother's alienation, assuming that he was of age on the 10th February, 1895, the date of his petition in Uma Shankar's second suit. On that day his mother confirmed the *patta* of the 20th August, 1893, in a petition which is part of the same transaction as that in which the plaintiff's petition is made. In that petition the plaintiff recites his mother's grant and,

"declares that he neither has nor shall ever have either directly or indirectly any claim and dispute with the plaintiff (*i. e.*, Uma Shankar); the plaintiff and his heirs shall all along continue in possession and enjoyment of the *mokurari* properties".

It is argued on behalf of the defendant that this is a covenant to maintain the validity of his mother's grant, and it may be observed that it refers to a grant made to Uma Shankar and his heirs "all along." I cannot see how this argument is to be resisted. The petition was made by a person *sui juris*, there is no suggestion of any fraud, concealment or undue influence. The plaintiff was, we may suppose, ignorant of business, and did not understand what he was doing. But he had plenty of legal advisers, he was acting with his parents, and it is impossible to say that he acted without consideration. It follows that the plaintiff has bound himself not to do what he is doing in bringing this suit and that consequently he cannot be allowed to succeed. This is so independently of any question of what is usually known as estoppel: and the case is merely that the plaintiff is doing something which he has bound himself not to do, and which consequently he cannot be allowed to do.

This practically decided the appeal in favour of the appellants-defendants. But one more point raised on behalf of the plaintiff must be noticed. This is that as

the decree in No. 193-194 is not registered under the Indian Registration Act of 1877, the alienation by Lochan is not proved. This, however, overlooks the real nature of the defendants' case as I conceive it, which rests on Lochan's grant of 1893 which was registered: the existence of that grant has been recognised by the decision in both suits: but the alienation exists independently of the decrees. I do not, therefore, think it necessary that we should consider the numerous authorities as to the necessity for registering judgments, to which we have been referred. It may perhaps be said that the plaintiff's personal covenant is embodied in the decree, and is at least expressed nowhere else. But then a covenant to recognise as valid in whole an alienation which is valid in part, does not seem to fall under the provisions of S. 17 of the Act.

In the view I take of the case, it is unnecessary that I should consider the points that have been raised as to limitation, and the question whether the existence of a family settlement makes any difference to what would otherwise be an alienation.

I consider, therefore, that the appeal should be allowed. My learned brother, however, is of the contrary opinion. The decree of the lower Court is, therefore, confirmed and the appeal is dismissed with costs.

Mullick, J.—I regret that I cannot agree with the decision of my learned brother. As he has so fully dealt with the facts of the case it will not be necessary for me to re-state them and I accept his findings of fact. The evidence in the present case as to age does not materially differ from that in the other two cases and for the reasons given by him I agree with my learned brother that the plaintiff was *sui juris* on the 20th of August, 1893.

If then the plaintiff was of age on that date, the next question that arises is, what was the effect of his attestation of the *mokurari patta* executed by his mother Lochan Koer. Attestation is some evidence of consent but having regard to the circumstances and the relations existing between the plaintiff and his parents, I agree with my learned brother that it is not sufficient evidence either to prove legal necessity or that that the transaction was a fair one. Any presumption that arises from such attestation has been sufficiently rebutted. The learned Subordinate Judge has shown that Uma Shankar's suit No. 62 of 1893, the withdrawal of which was the chief consideration of *mokurari patta* was not a *bona fide* suit; that Uma Shankar knew that he had no case; and that there was neither legal necessity nor good consideration. I agree with these findings. I further agree with him that the suit was barred by limitation. It is, in my opinion established that Jasoda Koer was in possession of Jaikaran's estate from 1865, the year of Jaikaran's death, to the 26th December, 1873, the date of her own death, and that Lochan Koer succeeded her and remained in uninterrupted possession till the date of the suit of 1893. Now Uma Shankar's father Gouri Baijnath died in 1885 and if limitation began to run against the Gouri Baijnath, Uma Shankar's minority at the time of Jasoda's death would be no answer. But Uma Shankar attempts to overcome this difficulty by saying that Gouri Baijnath was in possession from the 26th to the 27th December, 1873, on which day he executed a deed of release in Uma Shanker's favour that he Uma Shankar, remained in possession still sometime in 1874, when while still a minor he was dispossessed by Lochan Koer, and that he is therefore entitled to the benefit of the period of his minority. But there is no satisfactory evidence whatsoever to support the story of Gouri Baijnath's possession for a period of 24 hours and the suit of 1893 was clearly barred. In these circumstances I agree with the learned Subordinate Judge that the *mokurari patta* of August 1893 was a wholly inoperative document and that it is no bar to the plaintiff's suit.

The next question is what is the effect of the compromise petition filed by the plaintiff in Uma Shankar's suit No. 193 of 1894 on the 10th February, 1895. In my opinion it is not a covenant which binds the plaintiff. The plaintiff, though he had attained majority, was a reversioner effecting a release of his chance of succession, and such a transaction was wholly void. Nor does the principle of equitable assignments apply. In the case of *Sumsuddin Goolam Husain* v. *Abdul Husain Kalimuddin* (1) the learned Judges refused to apply this principle in

(1) (1907) 31 Bom. 165.

circumstances very similar to those now before us and they seem further to have held that apart from the release the reversioner was not bound by her covenant. In this connection it is to be observed that there is a material difference between the petition of compromise in this case which is a release and the *ekrarnamas* in Appeals Nos. 372 and 448 which are mere covenants and which we have held to be binding upon the plaintiff. A further objection to the release is that it was wholly without consideration. An examination of the merits of suit No. 193 of 1894 makes this quite clear. That suit was lodged by Uma Shankar for the following reliefs:

1. To obtain a declaration of his half-anna share in the estate of Jaikaran, on the ground that his grandfather Deonath was joint in food and property with Jaikaran and that although Gouri Baijnath, his father, had alienated his share of that property, Uma Shankar's half share had not been affected.

2. For possession of certain properties enumerated in Schedule B of the plaint in that suit, which are wholly unconnected with the villages covered by the *mokurari patta* now under consideration.

Now the Subordinate Judge has found on Uma Shankar's own admission and upon other satisfactory evidence that Deonath and Jaikaran were separate in food and property and that Uma Shankar's claim was an unscrupulous attempt to blackmail Lochan Koer. It is established beyond doubt that Uma Shankar knew that he had not got a *bona fide* claim and that this fact was also known to the plaintiff and his mother. If that was the case, then it is impossible to hold that the purchase of peace was a good consideration for the covenant. For the same reason any argument based upon a compromise by way of family arrangement must necessarily fail.

If again it is urged that the consideration for the compromise was love and affection on the part of the plaintiff towards Uma Shankar, then the reply is *firstly*, that a document executed for such consideration must be registered, and as the compromise was not registered it cannot be admitted in evidence and, *secondly*, that upon the facts it is manifest that love and affection were out of the question and the withdrawal of a dishonest suit was the only consideration for the transaction.

If then the compromise is neither binding upon nor evidence against the plaintiff, the next question that arises is as to the effect of the decree made upon that compromise on the 18th February, 1895. It has been urged that the decree operates as *res judicata*. The reply to this is that the property now in suit was not the subject-matter of suit No. 193 and that, therefore, the decree cannot operate as *res judicata* in respect of that property. Moreover, the plaintiff had then no interest in the property which was the subject-matter of that suit and any decree passed in it could not bind his chance of reversion.

It is next urged that apart from *res judicata* the decree is evidence of a covenant which binds the plaintiff. In order to deal with the objection it is necessary to examine the decree. The decree sets out in full the petitions of Uma Shankar, Lochan Koer, and Bindeshri Prosad and then runs as follows:

"This case coming on for final disposal on the 18th February, 1895, before Mr. H. Holmwood, District Judge of Gaya, in the presence of Anup Narain, Pleader for plaintiff, and Babu Upendra Chandra Mittra, Pleader for defendant No. 1, and Moulvi Varasat Hosain, Pleader for defendant No. 2, it is ordered and decreed that this suit be dismissed without costs in the terms of the compromise petition."

In my opinion the decree is inadmissible for want of registration, so far as it affects the property which was not the subject-matter of the suit in which it was made. There has been some difference of opinion upon the question of law involved, but I think the ruling of this Court in *Gurdeo Singh* v. *Chandrika Singh* (2) is binding upon us. But even if it be held that the compromise petition is embodied in the decree, which from the form of the decree and the reliefs granted by it does not appear to be the case, and that it is, therefore, admissible in evidence without registration, still it must operate either as a release or an agreement. If the former, it is void as a transfer of a chance of succession and if the latter, it is void for want of consideration.

There is next the question of limitation. Can the plaintiff succeed till he sets aside the compromise decree, and as he has not done so within three years of the decree,

(2) (1909) 36 Cal. 193=1 I. C. 913.

is his suit barred? The reply to this is that it is not necessary for the plaintiff to set aside the compromise. In the *first* place, the decree was one of dismissal and made no order for relief against him. In the *second* place, the property now in suit was not covered by the decree and in the *third* place, the decree was not registered. The plaintiff is suing as a reversioner and Article 141, Schedule 1 of the Limitation Act, governs his case. Under that Article his suit is fully within time. Finally there remains the ground of estoppel. Upon the facts it is not clear how any case of estoppel can arise. Uma Shankar was fully aware that there was no legal necessity either for the execution of the *mokurari patta* of 1893 or of the compromise petition of 1895. By his own unqualified admission he was not acting honestly and in good faith. In these circumstances he cannot take advantage of the provisions of S. 115 of the Evidence Act. The result is that disagreeing with my learned brother I would dismiss the appeal with costs.

Jenkins, C. J.—Jaikaran Lal, a Hindu governed by the Mitakshara School of Law, died in 1865, leaving him surviving his widow *Musammat* Jasoda Koer and his daughter *Musammat* Lochan Koer. *Musammat* Lochan Koer was married to Deonath Sahai, and the plaintiff Bindeshri Prosad is the sole surviving male issue of the marriage.

Bindeshri instituted this suit on the 14th April, 1909 against Upendra Nath Bose and others and he seeks a declaration that he is the sole reversionary heir of Jaikaran Lal and on the death of his grandmother *Musammat* Jasoda Koer and *Musammat* Lochan Koer he became entitled to the present possession of the entire estate left by his maternal grandfather. He seeks the further declaration that the *mokurari* lease granted by *Musammat* Lochan Koer to Uma Shankar Prosad under *patta* and *kabuliyat* dated the 20th August, 1893, in respect of 8-annas share in Mauzas Pertappore, Chergerwa, Rokshi and Gajhanda appertaining to Mahal Kother, Touzi No. 3142, District Gaya, is not binding on the inheritance of the plaintiff and is null and void and inoperative as against him. Finally he prays for possession and mesne profits.

The suit No. 100 of 1909 was heard by the second Subordinate Judge of Gaya together with suits of a similar nature and the procedure adopted by the learned Judge has occasioned a certain amount of confusion as to the evidence. But happily we have been freed from this by the mode in which the appeal has been presented by the learned Vakils who have conducted the case before us, for they have limited themselves in their respective arguments to the materials to be found in the paper-books of this appeal, so I need make no further reference to this aspect of the case. The Subordinate Judge decided in the plaintiff's favour.

Upendra Nath Bose preferred an appeal to the High Court and this was heard by Stephen and Mullick, JJ. They differed in opinion and so the appeal of the Subordinate Judge was confirmed. From this judgment of confirmation this present appeal to the High Court under Clause 15 of the Letters Patent has been preferred. It was contended at the outset for the respondent that though the learned Judges, Stephen and Mullick, JJ., differed in opinion as to the disposal of the case, there were isolated points in the case on which they were agreed. As to these it was argued there was no appeal. But this rests on a misconception of the scope of Clause 15 of the Letters Patent. The appeal sanctioned is not from any point, but from the judgment and the meaning of the word "judgment" lends no support to the respondent's contention. The Letters Patent were framed in England and from the scheme and the language of the Letters Patent, as also from the Secretary of State's accompanying despatch, it is apparent that the word is used in the sense of "a sentence of the law pronounced by Court" and not of the reasons which have led to that pronouncement. What was said in *Nundeeput Mahta* v. *Urquhart* (3) lends support to the respondent's contention, but I cannot find that it has ever been followed and Sir Richards Couch's view in *Maharanee Heeranath Kooer* v. *Baboo Burm Narain Singh* (4) is hardly in accord with it. In my opinion we must be guided by the words of Clause 15 and they do not support the respondent's contention. At the same time, I think that

(3) (1870) 13 W.R. 209.
(4) (1872) 17 W.R. 316.

we ought to have regard to the rule, which their Lordships of the Privy Council ordinarily observe of declining to interfere with concurrent findings of fact by two Courts.

I will now proceed to deal with the appeal on the merits. The *patta* and *kabuliyat* of the 20th August, 1893, which the plaintiff impugns have a history which has to be understood before the true relations of the parties can be understood and it goes back to the death of Jaikaran Lal in 1865. I have said he left a widow and daughter, he also was survived by a nephew, Gouri Baijnath, his deceased brother's son.

The position of the family will be apparent from the following tabular statement:—

MAHADEV DUTT.

Dyanat Ray.	1st wife *Musammat* Toro—Jaikaran Lal,
Gouri Baijnath Persad.	2nd wife *Musammat* Jasoda Koer,
Uma Shankar Persad.	Deonath Sahai—*Musammat* Lochan Koer
	Bindeshri, plaintiff.

After Jaikaran Lal's death two applications were made for a certificate under Act XXVII of 1860 to collect debts due to his estate.

One was preferred by *Musammat* Jasoda Koer, who claimed to be his heiress on the ground that he was separate in estate. The other was preferred by Gouri Baijnath on the allegation that he and his uncle were joint. In the Court of 1st instance Gouri Baijnath succeeded. On appeal this order was reversed and the certificate was granted to the widow, *Musammat* Jasoda Koer. The judgment of the High Court, which was pronounced on the 4th August, 1866, is reported as *Musammat Josoda Koonwar* v. *Gourie Byjonath Sohae Singh* (5). This was not conclusive of the rights of the parties and so on the 10th of September, 1866 Gouri commenced a suit against the widow to establish his right as the surviving member of a joint family.

A review too, was sought of the High Court's decision. An amicable settlement, however, was proposed which, after securing considerable benefits to *Musammat* Jasoda during her life, provided that properties representing one-third of the entire immovable property claimed by *Musammat* Jasoda and her daughter should be given by Gouri Baijnath to the daughter to be taken possession of by her after the death of *Musammat* Jasoda, the encumbrances created in the lifetime of Jaikaran Lal being paid off by Gouri Baijnath, that after the death of *Musammat* Jasoda Gouri Baijnath should be entitled to take possession of all the immovable properties except those given to Lochan and that all pending cases were to be withdrawn. *Musammat* Lochan Koer was added as a party to the suit, petitions of compromise were filed, and the suit was decided in accordance with this family arrangement. On the 26th December, 1873 *Musammat* Jasoda Koer died. According to the allegations made in the plaint in suit No. 193 of 1894 Gouri Baijnath took possession of the properties except those which were to go to *Musammat* Lochan and on the 27th December, 1873, he made a gift of them to his son Uma Shankar, the plaintiff in Suit No. 193 of 1894. Again on *Musammat* Jasoda's death there was a contest as to the grant of a succession certificate. The decision was in *Musammat* Lochan's favour and this was upheld by the High Court on the 15th May, 1874.

Gouri Baijnath died on the 9th of August, 1883.

In 1893 Suit No. 62 of 1893 was instituted by Uma Shankar against *Musammat* Lochan for a certain family tenement and it was his case that he was ready to institute another suit for the establishment of his title to, and recovery of, possession of the properties claimed by *Musammat* Lochan as the estate of Jaikaran Lal. But there was a compromise on the 2nd August, 1893, between Uma Shankar on the one side and *Musammat* Lochan Koer and Bindeshri, the present plaintiff, on the other. The terms were that Suit No. 62 of 1893 was to be withdrawn and the contemplated suit abandoned, and that *Musammat* Lochan Koer should grant Uma Shankar a permanent *mokurari* of 8-annas of *Mauza* Pertappore and other properties specified on a rental of Re. 1 over and above the Government Revenue and Road and Public Works Cess. There were other terms which need not now be specified. On the 20th August, 1893,

(5) (1866) 6 W. R. 139.

the *mokurari patta* was executed by *Musammat* Lochan Koer and attested by Bindeshri. Uma Shankar, however, on the allegation that the compromise had not been carried out commenced suit No. 193 of 1894 against *Musammat* Lochan Koer and Bindeshri Prosad for the recovery of the properties claimed by *Musammat* Lochan Koer as the estate of Jaikaran Lal. The claim was resisted and Bindeshri in his written statement, Paragraph 41, contended that the plaintiff had no right to bring the suit contrary to the compromise in the *mokurari patta* and *kabuliyat* in respect of 8-annas of *Mauza* Pertappore, that the said compromise could not be set aside by the Court and that whatever rights the plaintiff Uma Shankar had under two earlier instruments became extinct and extinguished by virtue of the compromise.

This suit was compromised on the 18th February, 1895. Evidently *Musammat* Lochan's advisers were determined that this compromise must finally end this family litigation and so a petition was presented by Uma Shankar in which he admitted all the infirmities of his claim and stated that he had proposed and the defendants had accepted as a compromise that the *mokurari*, dated 20th August, 1893, of 8 annas of *Mauza* Pertappore, etc., should stand good. He accordingly prayed for the dismissal of the suit on those terms. Petitions were also presented by *Musammat* Lochan Koer and Bindeshri. In conformity with these petitions the suit was dismissed in the terms of the compromise on the 18th February, 1895. There is, in my opinion, no foundation for the contention that this decree is inadmissible for want of registration. The compromise does not purport to convey release or otherwise deal with immovable propeyty.

On 5th May, 1906, *Musammat* Lochan Koer died. On the 14th May, 1909 the present suit was instituted against several defendants of whom Upendra Nath Bose alone has contested the plaintiff's claim before us. He is a purchaser of the property.

The following issues were framed by the Trial Judge:

1. Is the *mokurari* lease, dated 20th August, 1893, executed by Lochan in favour of Uma Shankar binding upon the plaintiff? Was it executed for any legal necessity?

2. Is the plaintiff estopped from claiming *sir* possession of the properties in suit?

3. Was the plaintiff minor at the time the *mokurari* lease was executed and the petition of compromise, dated the 10th February, filed in suit No. 193 of 1894 in the Court of the District Judge, Gaya?

4. To what amount of mesne profits, if any, is the plaintiff entitled?

5. Are the auction sale, dated 21st November, 1901, at which the defendants Nos. 1 and 2 purchased the property in suit and the *dar-mokurari* lease, dated 2nd December, 1908, granted by defendants Nos. 1 and 2 to defendants Nos. 3 and 4, binding on the plaintiff? and

6. Is the suit barred by limitation?

On the question of minority, the Subordinate Judge and both the Judges of the Division Bench are against the plaintiff and I think this concurrent finding of fact should not be disturbed. I will, therefore, deal with the case on the footing that the plaintiff was a major at the two dates indicated.

The position then, is this that the *mokurari* lease was executed by *Musammat* Lochan and attested by Bindeshri who was then a major, while Deonath Sahai, presumably Bindeshri's father, also had a hand in the affair for it was at his request that one of the witnesses attested *Musammat* Lochan's execution of the document. I agree with the Judges of the Division Bench that the *mokurari* lease on its true construction purports to be perpetual and descendible. Why then should it not be binding on Bindeshri? The form of the issues suggests that this must be answered by reference to the doctrine of legal necessity, and this idea is prominent in the judgments both of the Subordinate Judge and of the Judges of the Division Bench. But in the circumstances of this case, this is not the test to be applied. *Musammat* Lochan, it is true, had only a daughter's interest, and so her power of disposition was limited by the law regulating such dispositions. The doctrine of legal necessity would appear to be but a particular phase of that law, and the more universal test is, whether the purpose for which the alienation is made is proper in the circumstances of the case. There is, I think, sanction for this view to be found in the

leading case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (6), where it was said of a Hindu widow that

"for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of the collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper."

Similar citations might be multiplied, but it will suffice to quote the words of Lord Moulton, who in delivering the opinion of the Privy Council said,

"It has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation as affording evidence that the alienation was under circumstances which rendered it lawful and valid:"

Bijoy Gopal Mukerji v. *Girindra Nath Mukerji* (7). If Bindeshri consented, we have the consent of an expectant reversioner who has actually succeeded to the property on the determination of the particular interest.

There is, therefore, every reason for applying this test of the propriety of the transaction. But then the question is, Did Bindeshri consent? He certainly attested the *mokurari* of the 20th August, 1893, but this would not conclusively establish his consent, for it can be shown that his signature was there for some other purpose than that of giving consent. Bindeshri has given evidence in the case. In examination-in-chief the case he made was minority and that has not been believed. His cross-examination does not throw any further light on the point. The Subordinate Judge held that the attestation did not prove consent to alienation. Mullick, J., was of opinion that any presumption of consent that might arise from the attestation had been rebutted. He does not, however, explain how it was rebutted, unless he means to rely on the view he expresses that the Suit No. 62 of 1893 was not a *bona fide* suit.

Stephen, J., also held that attestation did not validate the transaction because it was not necessarily the same as consent and the presumption of consent was rebutted by Uma Shankar's bad faith. But the attestation does not stand alone. It is followed, first, by Bindeshri's resistance to Uma Shankar's claim in Suit No. 193 of 1894 on the grounds set forth in Paragraph 41 of Bindeshri's written statement, in which he insists on the compromise referred to in the *mokurari patta* and *kabuliyat* as an answer to the claim and avers that Uma Shankar's rights became extinct and extinguished by virtue of that compromise. Nor do matters rest there, for Bindeshri is party not only to the Suit No. 193 of 1894 but also to the compromise in that suit which affirmed the *mokurari patta*. All this should, in my opinion, be accepted as establishing that the lease was legitimate, and certainly one that it would be wrong to declare invalid at the instance of the present petitioners. For even if there be a doubt as to the fact or efficacy of the consent as evidenced by the attestation, there can be no question as to the subsequent consent, and "*Omnis ratihabitio retro-trahitur et mandato priori aequiparatur*" [*Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (8)]. Much has been said about the lack of good faith in the earlier suits, but I am not sure that I fully understand what was meant. It surely can hardly be said that the suit of the 10th of September, 1866 was brought in bad faith merely because in the certificate proceedings Gouri Baijnath had failed, and especially when it is borne in mind that the Court of first instance was in Gouri's favour and that the High Court decision was in some measure based on admissions made only for the purpose of those proceedings. The compromise of that gave a fresh starting point. It may or may not have been open to successful attack, but having regard to the circumstances it was one to which the principle enunciated in *Khunni Lal* v. *Gobind Krishna Narain* (9), (to cite one case out of many) was applicable, and I fail to see how it can give rise

(6) (1859-61) 8 M. I. A. 529=2 W. R. 61 (P. C.).

(7) A. I. R. (1914) P. C. 128=23 I. C. 162=41 Cal. 793 (P. C.).

(8) (1908) 30 All. 1=35 I. A. 1 (P.C.).

(9) (1911) 33 All. 356=10 I. C. 477=38 I. A. 87 (P. C.).

to any inference that the suit was not brought in good faith. Moreover, there is always a danger of referring a knowledge of principles now known to a time anterior to their establishment, and though *Appovier* v. *Rama Subba Aiyan* (10) has made obvious to us that there can be a partition of interest without a division by metes and bounds, this had not been conclusively determined on the 11th of September, 1866. So it is quite possible that when the Suit of 1866 was commenced, the petitioner may have thought not only that the facts but also the law was on his side inasmuch as there had been at that time no division by metes and bounds. Is there then any reason for thinking that there was a lack of good faith in Uma Shankar's Suit No. 62 of 1893 and his expressed determination to sue for recovery of properties claimed by *Musammat* Lochan Koer as the estate of Jaikaran Lal? In approaching this question it must be borne in mind that Uma Shankar could rest his claim on the compromise which terminated the litigation of 1866, and that was a compromise in support of which, as I have already said, it was possible to invoke the principle applied in *Khunni Lal* v. *Gobind Krishna Narain* (9).

It is true that the *mokurari* of the 28th of August, 1893, in which Suit No. 62 of 1893 terminated, contains expressions depreciatory of Uma Shankar's claim, but they must not be taken too seriously. This form of exaggeration is not an unfamiliar conveyancing device in the *mofussil*: it takes the place of a release and is balanced by the benefit secured. It is the price of the benefit. And what is true of the contents of this *mokurari patta* is as true of the still more depreciatory confessions which preface or accompany the compromise in the Suit No. 193 of 1894. It is as much a part of the *mofussil* conveyancer's art as the beaver hat or pipe of wine was of the special pleader in times gone by, and perhaps hardly deserves to be taken more seriously as a statement of actual fact. It is intended to furnish a useful controversial weapon of defence for the future rather than to be a correct description of any one's mind apart from the transaction in which it is found.

I, therefore, hold on a consideration of all the circumstances that Bindeshri is not entitled to impugn the *mokurari patta* and that it is binding on him. It follows that in my opinion the appeal should be allowed and the suit dismissed with costs throughout.

Mookerjee, J.—This is an appeal by the second defendant, in a suit commenced by the plaintiff-respondent for recovery of possession of land, on declaration that an alienation by way of permanent lease, made by his mother on the 20th August, 1893, is not binding upon the estate in his hands as the representative of his maternal grandfather. The suit was decreed by the Trial Court. Upon appeal to this Court, Stephen, J., was of opinion that the decree of the Subordinate Judge should be reversed and the suit dismissed. Mullick, J., was of opinion, on the other hand, that the decree of the primary Court should be affirmed. Consequently, that decree was confirmed under sub-S. 2 of S. 98 of the Civil Procedure Code, 1908. The second defendant who has thus been defeated in both the Courts below has preferred this appeal under Clause 15 of the Letters Patent.

A preliminary point has been raised as to the scope of the question open for examination in the present appeal. The respondent has argued, on the strength of a dictum of Norman, C. J., in *Nandeeput Mahta* v. *Urquhart* (3), that under Clause 15 of the Letters Patent, an appeal lies only in respect of that part of the judgment upon which the two Judges differ and that where both the Judges composing the Division Bench agree in their finding on a certain point, the Court of Appeal has no power to question that finding. Norman, C. J., attributes this view to Peacock, C. J., and refers to the decision in *Hazara Begum* v. *Khaja Hossein Ali* (11). The judgment of Peacock, C. J., however, does not lend any support to the conclusion of Norman, C. J.,; Peacock, C. J., merely ruled that where the contention before a Division Bench has reference to a single point only, whereon the Judges differ, it is not open to the parties in an appeal under Clause 15 of the Letters Patent to raise before the Appellate Court other points not raised before the Division Bench. We have, on the other hand,

(10) (1866-67) 11 M. I. A. 75=8 W. R. 1 (P.C.).

(11) (1869) 12 W. R. 498.

the opinion of Couch, C. J., clearly indicated in *Maharanee Heeranath Kooer* v. *Burm Narain Singh* (4), that the point on which the Judges of the Division Bench have agreed is open for consideration in the appeal under the Letters Patent, though it was added that

"on a question of fact we think we ought to be guided by the rule of the Privy Council where there have been the decisions of two Courts to the same effect."

Indeed, it is reasonably clear from the terms of Clause 15 of the Letters Patent, that the appeal is allowed, not against what is called judgment under the Code of Civil Procedure, but against what corresponds to a decree or an order. That clause allows an appeal from the judgment not being a sentence or order passed or made in any criminal trial. The term "judgment" here means not the statement given by the Judge of the grounds of his decree or order, but the sentence of the law pronounced by the Court upon the matter contained in the record (Co. Litt. 39*a*, 168*a*; 3 Blackstone's Commentaries, 395). A judgment, then, is the decision or sentence of the law given by a Court of Justice as the result of proceedings instituted therein for the redress of an injury or, as has been quaintly expressed, judgment is the determination and result of law. This is clear from Paragraph 23 of the Despatch from Sir Charles Wood which accompanied the first Letters Patent. The appeal must, consequently, be deemed to have been preferred against the decree and all the points necessary to be investigated for the determination of the question of the correctness of that decree are open for consideration although the Court as a Court of Appeal would be slow to take, upon a question of fact, a view contrary to the concurrent opinion of the trial Judge and of the two Judges of the Division Bench.

The following genealogical table will serve to elucidate the relative situation of the parties in the different stages of this protracted controversy between them.

MAHADEO.

Jaikaran.	Dayanath,
Died 15th Dec. 1865.	
Widow Jasoda Koer	
Died 26th Dec. 1873,	
Lochan Koer	Gouri Baijnath
Died 5th May, 1906.	Died 9th Aug. 1883,
Married Deonath Sahay	
Died 2nd May, 1906,	
Bindeshri Prosad,	Uma Shankar
Plaintiff	Born 8th Aug. 1870.
	Assignor of Defendant.

The property now in dispute admittedly belonged to Jaikaran; on his death, it passed to his widow Jasoda Koer, and, on the death of the latter, it devolved on Lochan Koer. On the 20th August, 1893, Lochan Koer granted a permanent lease of the property to Uma Shankar. The deed was witnessed by her son Bindeshri Prosad and also by a Pleader, Babu Suryya Kumar, who attested at the request of her husband Babu Deonath Sahai. Lochan Koer died on the 5th May, 1906, and on the 14th May, 1909 Bindeshri Prosad instituted the present suit for recovery of possession of the villages upon declaration that the lease was not binding upon the estate of his maternal grandfather, which, upon the death of his mother, had devolved upon him as reversionary heir. The second defendant, who had purchased the lease-hold interest in execution of a mortgage decree against Uma Shankar, resisted the claim on the ground that the lease was for a lawful purpose, that its propriety was unquestionable though made by a Hindu female heir with a qualified power of alienation and that it was operative against the inheritance in the hands of the reversionary heir. For the determination of the question thus raised, the circumstances antecedent to the grant of the lease must be carefully scrutinised, and for this purpose, the narrative of events requires to be carried back to the point of time when Jaikaran died on the 15th December, 1865.

Immediately on the death of Jaikaran, disputes broke out in the family, as to whether Jaikaran had died joint with or separate from Deonath. Jasoda Koer, the widow of the deceased and Gouri Baijnath, his nephew, applied on the 8th and 9th January, 1866, respectively, for a certificate under Act XXVII of 1860

for the collection of debts due to the deceased. On the 7th April, 1866, the District Judge of Gaya dismissed the application of the widow and granted a certificate to the nephew, who also obtained an order for possession in his favour under Act XIX of 1841. The widow appealed to this Court, and on the 4th August, 1866 obtained a reversal of the order of the District Judge adverse to her. The elaborate judgment of this Court pronounced on that occasion [*Musammat Josoda Koonwur* v. *Gourie Byjonath Sokae Singh* (5)] affords convincing proof that there was a substantial matter in controversy between the parties. This need not cause any surprise, if we remumber that what constitutes partition of joint properties held by an undivided Mitakshara family was at that time a matter of doubt and uncertainty, which was settled by the now classical judgment Lord Westbury in *Appovier* v. *Rama Subba Aiyan* (10) pronounced on the 17th November, 1866, and, by still later decisions of the Judicial Committee in *Rajah Suraneni Venkata Gopala Narasimha Row Bahadoor* v. *Rajah Suraneni Lakshma Venkama Row* (12), *Doorga Pershad* v. *Kundun Koowar* (13), *Ram Pershad Singh* v. *Lakpati* (14). *Balkrishen Das* v. *Ram Narain Sahu* (15) and *Parbati* v. *Naunihal Singh* (16). The nephew thus defeated could hardly be expected to remain satisfied with the result of the preliminary skirmish, and, as might have been anticipated, instituted a regular suit against Jasoda Koer for recovery of possession of the estate of Jaikaran on the 10th September, 1866 on the allegation of title by survivorship. What might thus have proved a protracted litigation, ruinous to the family, was brought to a speedy termination by the intervention of friends, relatives and legal advisers of the parties. Terms of settlement were arranged, and in order that they might be operative after the death of Jasoda Koer, Lochan Koer was added as a party defendant to the suit, and it was indeed her father-in-law Raghubar Dayal who took a prominent part in the settlement of the dispute. It is not necessary for our present purpose to set out in detail the terms of the settlement or to examine how far they were reasonable. Their general effect was that Jasoda Koer would get possession of all the movable and immovable properties, while Gouri Baijnath was to receive an annuity of Rs. 4,000 a year. Immovable properties which yielded a net profit of Rs. 10,000 a year and represented one-third of the estate, were to vest absolutely in Lochan Koer, free of encumbrances, but subject to the life-interest of Jasoda Koer; the remainder of the estate would devolve upon Gouri Baijnath upon the death of Jasoda Koer. On the 11th December, 1866, mutual deeds were executed with a view to give effect to this family arrangement, and petitions of compromise were presented to the Court; a decree by consent of parties was ultimately made on the 25th March, 1867. There are indications on the record that the terms of this compromise were carried out by both the parties at least for some years. But on the death of Jasoda Koer on the 26th December, 1873, disputes broke out again between the two branches of the family, and on the 5th January, 1874 Lochan Koer applied for a certificate under Act XXVII of 1860 for the collection of debts of the estate of her father. The application was opposed by Gouri Baijnath, but was granted on the 12th February, 1874 by the District Judge, and his order was confirmed on appeal to this Court on the 15th May, 1874; *Gouree Byjanth* v. *Lochan Koer* (17). The result was that Lochan Koer retained possession of the estate of her father contrary to the terms of the family settlement of 1867. Gouri Baijnath, who is said by his son to have thereafter led a life of depravity and extravagance, died on the 9th August, 1883, leaving as his sole heir an infant son, Uma Shankar, at that time a boy of thirteen years. In 1893 Uma Shankar, after attainment of his majority, instituted a suit against Lochan Koer for recovery of a house which had been sold in execution of a decree against his father and had been purchased by her in the name of one Mir Enayet Hossain. Uma Shankar also threatened

(12) (1869-70) 13 M. I. A. 113=3 B. L. R. 41=12 W. R. 40 (P. C.).
(13) (1873-74) 1 I. A. 55=13 B. L. R. 235=21 W. R. 214 (P. C.).
(14) (1903) 30 Cal. 231=30 I. A. 1 (P. C.).
(15) (1903) 30 Cal. 738=30 I. A. 139 (P. C.).
(16) (1909) 31 All. 412=3 I. C. 195=36 I. A. 71 (P. C.).

(17) (1874) 22 W. R. 102.

at the same time to institute another suit against Lochan Koer for recovery of the estate of Jaikaran on the basis of the family settlement of 1867. Proposals for compromise were set on foot; and it was during the pendency of the suit for recovery of the house that Lochan Koer, on the 20th August, 1893, granted to Uma Shankar the perpetual lease now in controversy, and the lease and its counterpart state explicitly that as a consideration for the grant of the lease, the lessee undertook to withdraw the suit already instituted and to refrain from the institution of groundless suits. On the 13th November, 1893, Uma Shankar withdrew from the suit for recovery of the house, which was accordingly dismissed. The compromise, however, was of very brief duration, for on the 6th August, 1894 Uma Shankar instituted a suit against Lochan Koer and her son Bindeshri Prosad for recovery of possession of the estate of Jaikaran. Lochan Koer and Bindeshri Prosad filed separate written statements on the 9th and 10th September, 1894 in which they repudiated the settlement of 1867, and relied on the perpetual lease as a complete extinction of the prior rights of Uma Shankar. This suit also was amicably settled, and on the 18th February, 1895, it was dismissed in the terms of the petition of compromise filed by Uma Shankar, Lochan Koer and Bindeshri Prosad. Uma Shankar relinquished all his claims to the estate of Jaikaran, and Bindeshri declared that he neither had nor would ever put forth, directly or indirectly, any claim to the properties included in the perpetual lease granted by his mother to Uma Shankar. This assurance proved as illusory as similar promises by other members of the family on previous occasions. Lochan Koer died on the 5th May, 1906, and Bindeshri Prosad on the 14th May, 1909 instituted the present suit for declaration that the perpetual lease was not operative after the death of his mother and did not bind the estate of his maternal grandfather which had devolved upon him as reversionary heir. From the facts narrated, it would appear at first sight that no claim could be more hopeless than an endeavour by a person to challenge a deed, created in settlement of a family dispute, attested by the claimant at the time of execution and solemnly affirmed by him subsequently in a Court of Justice. The Trial Court, however, held that the plaintiff was entitled to succeed, as the deed, executed as it was by a Hindu daughter in possession of the estate of her father, could be supported only on proof of legal necessity. That decree has been affirmed by this Court. The Judges of the Division Bench were agreed that there was no legal necessity for the lease, but they differed upon the question, whether the act of the plaintiff in the suit of 1894 disentitled him to all relief. Upon the best consideration, I have been able to give to the case, I have been driven to the conclusion that the course this litigation has taken has resulted in a failure of justice and that the relative rights of the parties have not been examined from the true standpoint.

The test in cases of this description, where a deed by a limited owner with qualified powers of alienation is called in question, is whether the purpose for which the alienation was made was proper or legitimate. This is clear from the judgment of Turner, L. J., in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (6):

"it is admitted on all hands that if there be collateral heirs of the husband, the widow cannot of her own will alien the property, *except for special purposes*. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. *To support an alienation for the last she must show necessity*. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so, if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given, *the purpose for which the alienation is made must be proper*."

Whether the particular purpose is proper or not must depend on the circumstances of the case; but it is plain that necessity is only one of the tests of propriety. This is clear from the observation of Sir James Colvile in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (18) that the concurrence of the members of the family suffices to raise a presumption

(18) (1869-70) 13 M. I. A. 209=12 W. R. 47, (P. C.).

that the transaction was a fair one and one justified by Hindu Law, of Lord Davey in *Sham Sundar Lal* v. *Achhan Kunwar* (19) that the concurrence of the kindred raises a presumption that the transaction was a fair one or one justified by Hindu Law, and of Lord Moulton in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerjee* (7) that the sanction by expectant reversioners of an alienation of property by a Hindu woman affords evidence that the alienation was made under circumstances which rendered it *lawful and valid*. The same result would be attained, if the expression "legal necessity" had not had impressed upon it a narrow sense and had not become generally associated with cases where there is actual pressure on the estate or danger thereto to be averted. Tested in the light of the broad principle that the validity of the transaction impeached depends upon the answer to the question, whether it was proper, fair and justified by Hindu Law, what is the position of the parties here? The lease was granted in settlement of a long-standing feud which had harassed the members of the family for more than one generation and seemed at the time ready to be revived on every possible occasion. It is unquestionable that the litigations of 1866 and 1867 had their origin in substantial disputes between the two branches of the family and it is equally undeniable that the settlement of 1867 was perfectly *bona fide*. In 1873, on the death of Jasoda Koer, the dispute was revived, and the former settlement, which had been accepted by Lochan Koer, was repudiated by her. Her cousin, Gouri Baijnath, had consequently, *prima facie*, a good ground of complaint against her, and it is not a matter for surprise that his son Uma Shankar should, in 1893, have endeavoured to assert his rights under the settlement of 1867. Can it then be reasonably maintained that a perpetual lease, granted to secure a compromise of such a dispute, lacks that element of fairness and propriety, which is essential for its justification as an operative act by a limited owner under the Hindu Law? A desperate attempt has been made by the plaintiff to establish that no substantial dispute existed between the two branches of the family at any stage, that the claim of Gouri Baijnath and his son was wholly unfounded and that there was no real controversy either in 1867 or in 1893 which stood in need of settlement for the benefit and protection of the estate of Jaikaran. In support of this view, reference has been made to recitals by Uma Shankar, that he had no shadow of a claim to the estate of Jaikaran. No real weight, in my opinion, should be attached to statements of this description. We may usefully call to mind the familiar words of Knight Bruce, L. J., in *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (20), that the deeds and contracts of the people of this country must be liberally construed; the form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. To the same effect is the observation of Lord Macnaghton in *Achal Ram* v. *Kazim Husain Khan* (21), where the draftsman had introduced in the recitals an obviously untrue statement, probably under the notion that it might impart some additional solemnity to the instrument. These exhibitions of the art of the conveyancer, whether mediæval or modern, cannot be permitted to mislead the Court. If Lochan Koer and her advisers had taken seriously the allegation that Uma Shankar had not the vestige of a claim to the estate of her father, it is inconceivable that she should have parted with a valuable property in his favour. We know, from the antecedent history of the family, that there had been serious disputes between the parties and whatever recitals might have been inserted in the deeds, whatever price Uma Shankar might have paid in the way of untrue conciliatory admissions, with a view to secure the compromise, the fact is incontrovertible that there was a substantial dispute between the parties which was settled by the grant of the lease. A settlement of a disputed or doubtful claim, effected in this manner, is clearly a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or resile from, on principles explained by the Judicial Committee in a long series of cases: *Rajunder Narain Rae* v. *Bijai Govind*

(19) (1899) 21 All. 71=25 I. A. 183, (P. C.).

(20) (1854-57) 6 M. I. A. 393=18 W. R. 81*n* (P. C.).

(21) (1905) 27 All. 271=32 I. A. 113=8 O. C. 155 (P. C.).

Singh (22), *Maharajah Hetnarain Singh* v. ***Baboo Modnarain*** *Singh* (23), *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu* (24), *Mantappa Nadgowda* v. *Baswuntrao Nadgowda* (25), *Greender Chunder Ghose* v. *Troyluckho Nath Ghose* (26) and ***Muhammad*** *Imam Ali Khan* v. *Husain Khan* (27). As Lord Kingsdown said in ***Trigge*** v. *Lavallee* (28), a compromise is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases, the consideration which each party receives is the settlement of the dispute, the real consideration is, not the sacrifice of a right, but the abandonment of a claim. To the same effect is the statement of Turner, L. J., in *Lucy's case* (29), that it is sufficient if the parties *bona fide* consider that there is a question to be decided between them, for otherwise no compromise will be good if it ultimately turned out that there was no doubt upon the point which was made the subject of compromise: *Callisher* v. *Bischoffhsein* (30) approved in *Miles* v. *Newzealand Alford Estate Co.* (31), *Helan Dasi* v. *Durga Das Mundal* (32), *Birbhadra Rath* v. *Kalapataru Panda* (33) and *Satya Kumar Banerji* v. *Satya Kirpal Banerji* (34). It may further be pointed out, as explained in *Williams* v. *Williams* (35), that a family arrangement may be upheld, although there are no rights actually in dispute at the time of making it, and the Courts would not be disposed to scan with much nicety the quantum of consideration; this principle is applicable not merely to cases where arrangements are made between the members of a family for the preservation of its peace, but also to cases where arrangements are made between them for the preservation of its property: *Persse* v. *Persse* (36). We are not now concerned with the question, when and how a family arrangement may be set aside on the ground of mistake, inequality of position, undue influence, coercion, fraud or other similar ground, for no such vitiating factor is alleged or proved in this case. Consequently, the decision in *Gordon* v. *Gordon* (37) and other cases of the same class [*Lawton* v. *Campion* (38), *Bentley* v. *Mackay* (39), *Moxon* v. *Payne* (40), and *Fane* v. *Fane* (41)], on which much stress was laid by the respondents, have no application. There is no room for doubt that, to use the language of Lord Westbury in *Dixon* v. *Evans* (42), there was here an honest settlement of an existing dispute, which, if not manifestly *ultra vires* of the parties, is one that a Court of Justice ought to respect and ought not to permit to be questioned. The question thus arises, whether the validity of the family settlement is affected by the circumstance that the grantor of the lease was a limited owner in possession with qualified powers of alienation. The answer must be in the negative in view of the decision of the Judicial Committee in *Khunni Lal* v. *Gobind Krishna Narain* (9). There, a Hindu became a convert to Islam. His son, who was a Hindu, predeceased him. On his death, there was litigation as to the succession between his son's daughters and his daughter's son. The parties compromised the dispute and took the estate in certain shares. The daughter's son then attacked the compromise in a suit; it was ruled that the compromise was in the nature of a family settlement and was operative. As Lord Moulton said in *Hiran Bibi* v. *Sohan Bibi* (43) a compromise of this character is, in no sense of the word, an alienation by a limited owner of the family property, but is a family settlement in which

(22) (1837-41) 2 M. I. A. 18=1 Moo. P. C. 117.
(23) (1857-59) 7 M. I. A. 311=3 W. R. 51 (P. C.).
(24) (1869-70) 13 M. I. A. 497=6 B. L. R. 202=14 W. R. 33 (P. C.)
(25) (1870-72) 14 M. I. A. 24=15 W. R. 33 (P. C.)
(26) (1893) 20 Cal. 373=21 I. A. 35 (P.C.).
(27) (1899) 26 Cal. 81=25 I. A. 161 (P.C.).
(28) (1862) 15 Moo. P. C 270=1 N. R. 454.
(29) (1853) 4 De. G. M. & G. 356=22 L. J. Ch. 732=43 E. R. 545=102 R. R. 163.
(30) (1870) 5 Q. B. 449=39 L. J. Q. B 181=18 W. R. 1127.
(31) (1886) 32 Ch. D. 266=55 L. J. Ch. 801=54 L. T. 582.
(32) (1906) 4 C. L. J. 323.
(33) (1905) 1 C. L. J. 388.
(34) (1904) 3 I. C. 247.
(35) (1867) 2 Ch. App. 294=36 L. J. Ch. 419=16 L. T. 42.
(36) (1840) 7 Cl. & Fin. 279=7 E. R. 1073=51 R. R. 22.
(37) (1821) 3 Swans. 400=19 R. R. 230=36 E. R. 910.
(38) (1854) 18 Beav. 87=23 L. J. Ch. 505.
(39) (1862) 31 Beav. 143=54 E. R. 1092=135 R. R. 135.
(40) (1873) 8 Ch. App. 881=43 L. J. Ch. 240.
(41) (1875) 20 Eq. 698.
(42) (1872) 5 H. L. 606=20 L. J. Ch. 139.
(43) A. I. R. (1914) P. C. 44=24 I. C. 309 (P. C.).

each party takes a share of the family property by virtue of the independent title which is, to that extent and by way of compromise, admitted by the other parties. [*Tarinee Churn Gangooly* v. *Watson & Co.* (44), *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (45), *Gur Nanak Prasad* v. *Jai Narain Lal* (46), *Bihari Lal* v. *Daud Hussain* (47), *Subbammal* v. *Avudaiyammal* (48) and *Bhogaraju Venkatarama Jagiraju* v. *Adapalli Seshayya* (49).] The view cannot be defended on principle that a qualified owner, like a Hindu widow, daughter or mother, is bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal, and that she cannot *bona fide* effect a settlement of the matter in controversy, even though such compromise be in the best interests of the estate. There is thus no room for reasonable doubt that the permanent lease granted by Lochan Koer was binding upon the inheritance.

We are fortified in this view by the significant circumstance that it met with the approval of the then next reversioner, who was no other than the present plaintiff. Reference may in this connection be made to the observations of Turner, L.J., in *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (6), of Sir James Colvile in *Raj Lukhee Debea* v. *Gokool Chunder Chowdhury* (18) and of Lord Davey in *Sham Sunder Lal* v. *Achhan Kunwar* (19), which will all be found quoted in the judgment of the Full Bench in *Debi Prosad Chowdhury* v. *Golap Bhagat* (50), to show that the concurrence of the reversioner raises a presumption that the alienation is made for a proper purpose. [See also the observation of Lord Moulton in *Rijoy Gopal Mukerji* v. *Girindra Nath Mukerjee* (7) and of Sir Andrew Scoble in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (8).] Reliance need not be placed on the circumstance that the plaintiff attested the document, for as pointed out by the Judicial Committee in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (18) and *Hari Kishen Bhagat* v. *Kashi Parshad Singh* (51) mere attestation of a deed does not necessarily import consent to an alienation effected thereby, nor even a knowledge of the contents thereof. But, in the present case, we have something more substantial and less equivocal embodied in the petition of the plaintiff, dated the 10th February, 1895, which was incorporated in the decree of the 18th February, 1895; we have also his deliberate assertion in his written statement in that suit. The maxim here applies that a subsequent ratification has a retrospective effect and is equivalent to a prior command; *omnis ratihabitio retro trahitur et mandato priori æquiparatur* [Co. Litt. 207-*a*; *Fleckner* v. *The Bank of the United States* (52)]. A futile effort has been made to escape from this position by the argument that the plaintiff was at the time an infant, that his petition was in essence a transfer of a *spes successiones* by a reversioner and consequently inoperative in law [*Sham Sundar Lal* v. *Achhan Kunwar* (19), *Brindaban Chunder Shaha* v. *Sureshwar Shaha Pramanik* (53) and *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (54)] and that in any event, the petition was inadmissible because it was not registered. [*Pranal Anni* v. *Lakshmi Anni* (55), *Bindesari Naik* v. *Ganga Saran Sahu* (56) and *Abdul Saheb Gandigiwad* v. *Mallikarjunappa Shivamurteya* (57).] This contention is entirely baseless; the plea of minority has been rejected as untrue by all the Judges; and the petition does not, either in form or in substance, effect a transfer of an interest in immovable property, vested or contingent, present or future; but it does record the approval of the transaction by the reversionary heir and thus affords cogent evidence of its propriety. From every possible point of view, consequently, the lease proves unassailable.

The result is that in concurrence with the Chief Justice I hold that this appeal must be allowed and the suit dismissed with costs in all the Courts.

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(44) (1869) 12 W. R. 413=3 B. L. R. A. C. 437.
(45) (1915) 27 I. C. 954.
(46) (1912) 34 All. 385=14 I. C. 814.
(47) (1913) 35 All. 240=18 I. C. 721.
(48) (1907) 30 Mad. 3.
(49) (1912) 35 Mad. 560=12 I. C. 123.
(50) (1913) 40 Cal. 721=19 I. C. 273.
(51) A.I.R. (1914) P. C. 90=27 I. C. 674=42 Cal. 876=42 I.A. 64 (P.C.).
(52) 8 Wheaton 363338=5 Law. Ed. 631.
(53) (1909) 3 I.C. 178.
(54) (1909) 32 Mad. 206=3 I.C. 476.
(55) (1899) 22 Mad. 508=26 I.A. 101 (P.C.).
(56) (1898) 20 All. 171=25 I. A. 9 (P.C.).
(57) A.I.R. (1914) Bom. 187=22 I. C. 292=38 Bom. 224.

Holmwood, J.—It is unnecessary for me to add anything to the judgments just delivered with which I am in full agreement.

V.B./R.K.

Appeal allowed ; Suit dismissed.

A. I. R. 1916 Calcutta 859 (1)

CHATTERJEE AND CHAPMAN, JJ.

Dwarka Nath Sen—Plaintiff—Petitioner.

v.

Tara Prasanna Sen and *others*—Defendants—Opposite Party.

Civil Ruls Nos. 802 and 803 of 1914, decided on 14th December, 1914, against the Order of Dist. Judge, Jessore, dated 17th July, 1914.

Civil P. C. (5 of 1908), S. 211—Order of transfer without notice to parties interested is not legal.

Where on the report of a Munsif to the District Judge that an application for re-hearing of a suit pending in his Court should be transferred to that of another local Munsif, the defendant appeared before the District Judge and objected to the transfer on the allegation that the latter Munsif was also interested in the case and the District Judge, without giving any notice to that Munsif or the plaintiff, transferred the case to some other Court at a different locality:

Held, that the order for transfer should not have been made without notice to the plaintiff, as it was a matter in which the convenience of the parties was of very great importance, and without enquiring into the defendants' allegation with regard to the Munsif. [P. 859, C. 1.]

Jogendra Chandra Ghose and *Smritish Chandra Ghose*—for Petitioner.

Brojo Lal Chackravarty—for Opposite Party.

Judgment.—These two cases arise out of two applications for re-hearing made before the first Munsif of Narail. On the 14th May, 1914, the first Munsif wrote to the District Judge of Jessore that subsequently to the trial of the original case he had come to know that a friend of his was interested in the case and that he would rather not try these cases. He also said that he understood that the 3rd Munsif was also similarly interested. He, therefore, requested that the case might be transferred to the Court of the 2nd Munsif. On the 20th of May the defendant made an application to the District Judge stating that the 2nd Munsif was also interested ; and without any notice to the plaintiff the learned District Judge passed an order transferring the case to the 3rd Court of the Munsif at Jessore. The order made is objected to, and we think rightly objected to, on two grounds. The *first* is that the petitioner before the learned District Judge was allowed to make an allegation against a judicial officer and although neither that judicial officer nor the party interested in opposing the application had any notice of the application, an order was passed for the transfer of the case ; and *secondly*, that no order ought to have been passed for transfer without notice to the plaintiff, as it was a matter in which the convenience of the parties was of very great importance. We think that both these grounds are of substance and ought to prevail. The plaintiff complains that he would be under very great inconvenience if the cases are transferred to Jessore ; that may probably be. Besides, the statements made with regard to the 2nd Munsif of Narail have not been made a subject-matter of enquiry or investigation. In any case, we think that this is a case in which the order for transfer should not have been made without notice to the plaintiff.

We set aside the order of transfer and send back the cases to the learned District Judge in order that he may dispose of them after hearing the plaintiff and also considering the objection that circumstances have changed since the last order was passed. We make no order as to costs.

V.B./R.K.

Rule made absolute.

A. I. R. 1916 Calcutta 859 (2)

WOODROFFE AND RICHARDSON, JJ.

Dwijapada Karmakar — Plaintiff — Appellant.

v.

Baileau and *others*—Defendants—Respondents.

Appeal No. 486 of 1914, decided on 31st May, 1915, from the Order of Dist. Judge, Nadia, dated 17th August, 1914.

(a) Hindu Law—Widow—Widowed mother turning Christian—She can retain guardianship of her infants provided she satisfies Court that she would bring them up in faith of her husband.

When the widowed mother of Hindu infants becomes a Christian, that will not of itself be a

ground for removing her from the guardianship of the infants, provided that she be in a position to satisfy the Court that she will be able to carry out the obligations which the law imposes upon her of bringing up her children in the faith of her husband. [P. 860, C. 1.]

(b) Hindu Law—Widow — Guardianship of infants—Order—Court should take into consideration false charge of immorality against widow, by brother of deceased husband in his application for guardianship.

The fact that a false charge of immorality was made against the mother of infants by the brother of her deceased husband in his application for guardianship of the infants, must necessarily be taken into consideration in any order which might be made by Court in regard to the guardianship, for the mother cannot be expected to live with the family who have made such a charge against her. [P. 860, C. 2.]

D. N. Bagchi—for Appellant.

Avetoom and *J. W. Chippendale*—for Respondents.

Judgment.—This is an appeal which arises out of an application for guardianship of the persons and property of two minors, Gobinda Karmakar and Monindra Chandra Karmakar. Gobinda, who is now stated to be 9 years old, is stated to be just over 7 years of age in the judgment under appeal. Monindra is now said to be 5 years of age. The application was opposed by Subasini Dasi, the mother of the two minors. The petitioner, Dwijapada Karmakar, the uncle of the minor, sought to remove the mother from the guardianship on two grounds: *first* of all, on the ground that she was a woman of bad moral character and *secondly*, that she had herself gone over to the Mission House and had made up her mind to adopt the Christian religion and also to get her sons baptised. The mother denied the allegations which were made against her moral character and those have been held not to be established in the judgment now under appeal; and there is no attempt made in this Court to controvert the findings upon this point. Though, in fact, the charge of immorality made against the mother has not been proved, the fact that this charge was made must necessarily be taken into consideration in any order which we make in this matter, for under such circumstances the mother cannot be expected to live with the family who have made this charge against her. As regards the *second* ground it appears from the record that Subasini has expressed a wish to become a Christian although as a matter of fact she has not yet been baptised. It is not at the present moment certain whether she will become a Christian or not. Even if she had already become a Christian, that would not in itself be a ground for removing her from the guardianship provided that she was in a position to satisfy the Court that she was able to carry out the obligations which the law imposed upon her of bringing up her children in the faith of her husband, whatever may be the faith she herself may adopt. A difficulty has, however, arisen in this case by reason of the fact that it does appear that in the course of these proceedings she expressed her intention to convert her two sons also to Christianity; and had that intention been persevered in, it is possible that we might have made an order different from that which we now pass; for in so changing her children's faith she would be acting contrary to the obligations which the law imposes upon her, that is to say, of bringing up the children in the Hindu faith of her deceased husband.

An undertaking has, however, been given by her Counsel, Mr. Avetoom, before us that she will not baptise the children and will bring them up as Hindus. That being so, there is, therefore, no ground at present for removing her from her position as guardian. It would in any case be a strong order for any Court to pass to take a child of 5 years of age from his mother. The point which I next consider is how best this undertaking of hers may be carried out. We have to consider in this matter the interest of the minors themselves in its several aspects. The mother has practically no means, but we have been informed that she has received an offer from a stranger to these proceedings which, if accepted by her, will enable her to give her two sons an education. That offer is to pay all the expenses of the education of the two children at the Hindu Hostel in Krishnagar, attached to the Church Missionary Society there. It has been stated to us that the boys at this Hindu Hostel are all Hindu boys and that no attendance is required by such boys at any of the Bible classes or other classes teaching the Christian religion; and that no attempt will be made to interfere in any way with their Hindu faith. It is on the understanding that the mother will educate her children under these conditions

that we make the order. At the same time we think, seeing that the mother has expressed a desire to become a Christian, and that if she does become a Christian she will not be in a position to effectively see to the education of the boys so far as their Hindu faith is concerned, we think we ought to associate with the mother, as guardian, the applicant Dwijapada Karmakar, who as such guardian will be in a position to see that the undertaking which is given by the mother that the children should be brought up in the Hindu faith is properly carried out. The order that we then make is that the mother remains the guardian of the person and property of the Children and that with her be associated as guardian the applicant Dwijapada Karmakar.

The younger boy is too young, in our opinion, to be sent to a school at once. He should, therefore, remain in custody of his mother until he is seven years old, when he also will be put into school at the Hindu Hostel in Krishnagar, but it is understood and undertaken that he will not be baptised nor other acts done to make him a Christian. The elder boy will go to the Hostel at once. Facilities must be given to both the guardians and the other relatives of the children to see the latter whenever they desire to do so subject to the rules of the Hostel. If the male guardian has any reason to complain that any of the directions or undertakings given in this order have not been carried out or that their terms are in any way infringed, it will be open to him to apply to the District Judge of Nadia who will then make such further order in the matter as he thinks fit. Subject to the rules of the Hostel the children while at the Hostel will be allowed to visit their relatives, including their uncle and others, at their houses.

We make no order as to costs of this appeal.

V.B./R.K.

Order modified.

A. I. R. 1916 Calcutta 861

MOOKERJEE AND BEACHCROFT, JJ.

Jotiram Khan—Defendant—Appellant.

v.

Jonaki Nath Ghose and *another*—Plaintiffs—Respondents.

Appeal No. 1323 of 1913, decided on 8th June, 1914, from the Appellate Decree of Dist. Judge, 24 Parganas, dated 4th January, 1913.

(a) Bengal Tenancy Amendment Act (1 of 1907). Scope of—Rights of tenant having status of non-occupancy or occupancy *raiyat* in land within limits of Calcutta prior to Act are not retrospectively affected.

The Bengal Tenancy Amendment Act (1 of 1907) does not retrospectively affect the rights of a tenant who before the commencement of the Act had the status of a non-occupancy or an occupancy *raiyat* in the land held by him within the limits of Calcutta as defined in Schedule 1 of the Calcutta Municipal Act, 1899. [P. 863, C. 1.]

(b) Interpretation of Statutes — Declaratory statute—Statute of merely declaratory character has retrospective effect—Nature of statute must be determined from its provisions.

Obiter dicta.—A statute which is properly of a merely declaratory character has a retrospective effect, but the nature of the statute must be determined from its provisions and the mere fact that the expression "it is declared" has been used is by no means conclusive as to the true character of the legislation. (1890) 24 Q. B. D. 557 and (1898) A. C. 769, foll. [P. 863, C. 1.]

(c) Bengal Tenancy Amendment Act (1 of 1907), Scope of—Act is not declaratory one—Provisions cannot be given retrospective operation.

The provisions of S. 3 of the Bengal Tenancy Amendment Act (1 of 1907) cannot be given a retrospective operation, as the Act is not a declaratory one but has effected a fundamental alteration in the law. [P. 863, C. 1 & 2.]

(d) Bengal Tenancy Act (8 of 1885), S. 44 (*c*)—Tenant, non-occupancy *raiyat* not holding under lease for a term—He cannot be ejected under S. 44 (*c*).

Under the Bengal Tenancy Act, there is no ***raiyat*** who holds from year to year, and if the tenant is a non-occupancy ***raiyat*** who does not hold under a lease for a term, he cannot be ejected under the provisions of Clause (*c*) of S. 44. [P. 864, C. 1.]

Mohini Mohan Chatterjee—for Appellant.

Tarakishore Chowdhury, *Dwarka Nath Chakravarty* and *Satish Chandra Ghatak*—for Respondents.

Judgment.—This is an appeal by the defendant in a suit for arrears of rent and for ejectment. The defendant was inducted into an agricultural holding on the 16th December, 1898 by the plaintiffs who granted him a lease for five years. The holding is situated within the present Municipal limits of Calcutta, but is beyond the jurisdiction of the Town of Calcutta as determined by the Proclamation of the Governor-General in Council, dated the 10th September, 1794, and issued under S. 159 of Stat. 33,

Geo. III, c. 52 (Rules and Orders of the High Court, edited by J. H. Hechle, p. 555). On the 9th November, 1910 the plaintiffs commenced this action, not only for the recovery of arrears of rent then due but also for ejectment of the defendant on the allegation that they had terminated his tenancy by service of a notice to quit. The suit has been decreed for both rent and ejectment. There is now no contest as to the liability of the defendant for the arrears decreed. The only question in controversy is, whether the plaintiffs are entitled to the decree for ejectment. The answer must depend on the status of the defendant.

The case for the plaintiffs is that the status of the defendant must be determined with reference to the provisions of the Transfer of Property Act and that he is consequently liable to be ejected after service of the prescribed notice to quit. The case for the defendant is that his tenancy, in its inception, was of an agricultural holding, that he acquired the status of a non-occupancy *raiyat* under the Bengal Tenancy Act, and that at the date of the commencement of this suit, he was a non-occupancy *raiyat* whose tenancy had not been terminated. The Courts below have held that the tenancy of the defendant was terminable and has been duly terminated by service of notice to quit under the Transfer of Property Act, as the provisions of the Bengal Tenancy Act had no application thereto. This view is challenged in this appeal as erroneous.

The Bengal Tenancy Act, as framed in 1885, provided in S. 1 that its provisions were not to extend to any land within the Town of Calcutta. At that time the Municipal limits of Calcutta were identical with the limits of the "Town of Calcutta" as defined by the notification of the Governor-General in Council, dated the 10th September, 1794. There was consequently no room for contention at that time that the operation of the Bengal Tenancy Act was not excluded in the case of land in the suburbs of the "Town of Calcutta." In 1888, the Calcutta Municipal Act was passed by the Bengal Legislative Council, and as a result thereof, lands which were originally comprised in the suburbs of the Town of Calcutta were brought within the jurisdiction of the Corporation of Calcutta for Municipal purposes. It was held by this Court in the case of *Biraj Mohini Dassi* v. *Gopeswar Mullick* (1) that this circumstance did not in any way affect the operation of the Bengal Tenancy Act, that the "Town of Calcutta" mentioned in S. 1 was not equivalent to "Calcutta" as defined for the purposes of the Calcutta Municipal Act, 1888, and that, notwithstanding the extension of the limits of Calcutta for municipal purposes, the Bengal Tenancy Act was applicable to lands situated outside the limits of the "Town of Calcutta," though included, for municipal purposes, within the limits of "Calcutta." Consequently, when on the 16th December, 1898 the defendant obtained his lease of the disputed land from the plaintiffs, he forthwith acquired the status of a non-occupancy *raiyat* of an agricultural holding governed by the provisions of the Bengal Tenancy Act. Subsequently, on the 22nd May, 1907, the Bengal Legislative Council passed the Bengal Tenancy Amendment Act, 1907 (Act I of 1907), and what we are called upon to consider in this appeal is the effect, if any, of this legislation on the status of the defendant. S. 3 of the Bengal Tenancy Amendment Act, 1907, is in these terms:

> "To sub-S. (3) of S. 1 of the Bengal Tenancy Act, the following explanation shall be added, namely, the words 'The Town of Calcutta' mean, subject to the exclusion or inclusion of any local area by notification under S. 637 of the Calcutta Municipal Act, 1899, the area described in Schedule I to that Act."

The effect of this explanation is to give a new definition of the expression "Town of Calcutta" for the purposes of the Bengal Tenancy Act, namely, to make it equivalent to "Calcutta" as determined from time to time, for municipal purposes, under the Calcutta Municipal Act, 1899. The disputed land, as already stated, was beyond the limits of the "Town of Calcutta" but within the limits of "Calcutta" as defined in Schedule I of the Calcutta Municipal Act, 1899. Consequently, when the Bengal Tenancy Amendment Act, 1907, came into force, the land ceased to be subject to the operation of the Bengal Tenancy Act. To take one illustration, if at any time after the Bengal Tenancy Act had ceased to be applicable, the land became vacant and the landlords settled a new tenant thereon his tenancy would not be governed by the provisions

(1) (1900) 27 Cal. 202.

of the Bengal Tenancy Act. But the question arises, whether the Bengal Tenancy Amendment Act, 1907, retrospectively affects the status of persons, who, before its commencement, had acquired rights in respect of the land; does it destroy such rights and transform a tenant, who had at that time the status of an occupancy or a non-occupancy *raiyat*, into a tenant from year to year or month to month? The Courts below have adopted the view that as the addition to sub-S. (3) of S. 1 of the Bengal Tenancy Act is called an "Explanation," there was no alteration of the law, in other words, that the legislation of 1907 was merely declaratory of the law and might legitimately be given retrospective operation. This reasoning is, in our opinion, clearly fallacious. It need not be disputed that Statutes, which are properly of a merely declaratory character, have a retrospective effect, because, if the Statute is in its nature declaratory, the argument that it must not be construed so as to take away pre-existing rights ceases to be applicable [*Attorney-General* v. *Theobald* (2).] But, as was pointed out by Halsbury, L. C., in the case of *Harding* v. *Commissioners of Stamps for Queensland* (3), the nature of the Statute must be determined from its provisions, and the mere fact, that the expression "it is declared" has been used, is by no means conclusive as to the true character of the legislation. Tested in the light of this principle, what is the position in the case before us? The addition to sub-S. (3) of S. 1 of the Bengal Tenancy Act is, no doubt, called an "explanation;" but in reality it effects a vital alteration in the law. It is worthy of note that the Bengal Tenancy Amendment Act, 1907, is described as an Act to amend the Bengal Tenancy Act, 1885; it is not even in terms a declaratory Act. It is further plain that another addition which has been made to the same sub-section of S. 1 and refers to areas comprised within a Municipality constituted under the Bengal Municipal Act, 1884, also effects a fundamental alteration in the law. In our opinion, there is no room for serious controversy that the law was materially altered by the legislation of 1907 and that the provisions of S. 3 cannot be given a retrospective operation. This view is supported to some extent by the provisions of S. 9, sub-S. (3) [see S. 19 (2) of the Bengal Tenancy Act.] We hold accordingly that the status of the defendant was not affected by the legislation of 1907, which gave a new definition of the expression "Town of Calcutta," as used in S. 1 of the Bengal Tenancy Act.

If, then, the status of the defendant was not affected by the legislation of 1907, what are his rights? Under S. 44 (*c*) of the Bengal Tenancy Act, he was, as a non-occupancy *raiyat*, liable to ejectment on the ground that the term of the lease had expired. It is plain that in Clause (*c*) the expression "the lease" refers to the registered lease under which the non-occupancy *raiyat* had been admitted to occupation of the land. The defendant was admitted to occupation of the land under a registered lease on the 16th December, 1898. The term of the lease expired on the 16th December, 1903, when the Bengal Tenancy Act was still in force in the locality. He could consequently have been ejected under the provisions of the Clause (*c*) of S. 44, which was then controlled by S. 45, since repealed. S. 45 was in these terms:

"A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy *raiyat* unless notice to quit has been served on the *raiyat* not less than six months before the expiration of the term and shall not be instituted after six months from the expiration of the term."

The landlords had thus to satisfy two conditions, if they intended to avail themselves of the provisions of sub-S. (*c*) of S. 44. They were bound to serve a notice upon the defendant, not later than the 16th June, 1903 and if he did not vacate the land, they were bound to commence a suit for ejectment against him not later than the 16th June, 1904. This they did not do. The defendant continued in occupation of the holding, and rent was thereafter admittedly received from him. The defendant was thus a non-occupancy *raiyat* on the 22nd May, 1907, when the Bengal Tenancy Amendment Act came into force; as that legislation did not affect his status, he continued to be a non-occupancy *raiyat* and was such at the date of the suit. Meanwhile S. 45 has been repealed by

(2) (1890) 24 Q. B. D. 557=62 L. T. 768=38 W. R. 527.

(3) (1898) A. C. 769=67 L. J. P. C. 144=79 L. T. 42.

the Bengal Tenancy Amendment Act, 1907. It is accordingly argued that the plaintiffs are no longer fettered by the restriction previously imposed by the section and are now entitled to proceed to eject the defendant under Clause (3) of S. 44. There is, however, an insuperable obstacle in their way. The Bengal Tenancy Amendment Act, 1907, no doubt, repealed S. 45, but it introduced, at the same time, a new Clause (1) (*a*) in Schedule III to the effect that a suit to eject a non-occupancy *raiyat* on the ground of the expiration of the term of his lease must be instituted within six months from the expiration of the term; consequently, if the defendant be still deemed to hold under the lease of the 16th December, 1898, the term of the lease expired on the 16th December, 1903, and at the date of the commencement of this suit, a period much longer than six months had expired. On the other hand, if it be contended that the defendant no longer holds under the lease of the 16th December, 1898, he cannot be ejected on the ground that the term of his lease has expired. It has finally been argued that after the expiry of the lease of the 16th December, 1898, the defendant became a tenant from year to year, and that consequently at the end of any year, he may be deemed a non-occupancy *raiyat* the term of whose lease has expired. This is entirely fallacious. Under the Bengal Tenancy Act, there is no *raiyat* who holds from year to year, and if the tenant is a non-occupancy *raiyat* who does not hold under a lease for a term, he cannot be ejected under the provisions of Clause (*c*) of S. 44. From every possible point of view, it is plain that the tenancy of the defendant has not been legally terminated by service of notice to quit, and the claim for ejectment must fail.

It has been ingeniously argued, as a last resort, that the plaintiffs are entitled to eject the defendant under Clause (*d*) of S. 44, which provides that a non-occupancy *raiyat* shall be liable to ejectment on the ground that he has failed to pay an arrear of rent. The obvious answer is, that this was not the foundation of his claim in the plaint. If such a claim had been put forward, it could have been made only in accordance with the provisions of sub-S. (1) of S. 66, and to the decree made in a suit so framed, the provisions of sub-S. (2) of S. 66 would have applied. We need not, however, deal with this aspect of the case in detail because the claim was based only on Clause (*c*) of S. 44.

The result is that this appeal is allowed, and the decree of the District Judge set aside in so far as it entitles the plaintiffs to eject the defendant. The appellant will have his costs both in this Court and in the Court of the District Judge, and each party will pay his own costs in the Court of first instance.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 864

FLETCHER AND RICHARDSON, JJ.

Gurbuksh Prosad Tewari—Defendant—Appellant.

v.

Kali Prosad Narain Singh—Plaintiff—Respondent.

Appeal No. 250 of 1911, decided on 25th June, 1914, from the Original Decree of Sub-Judge, Saran, dated 29th March, 1911.

Bengal Estates Partition Act (5 of 1897), Ss. 58, 88 and 119—No dispute about any land forming part of parent estate was raised and no order under S. 88 was passed—Suit for declaration and possession of land partitioned cannot lie—(Per *Fletcher, J.*) Party, having notice of partition and failing to object cannot be allowed to upset the partition—Held also that party keeping his own share in partition intact cannot ask for share in lands allotted to others.

Where in a partition proceeding in a Revenue Court no dispute or doubt was found to exist as to whether any land formed a portion of the parent estate and no order was made by the Collector directing the partition to proceed under S. 88 (*b*) of the Estates Partition Act, a party suing in a Civil Court for declaration of title to and possession of land, alleging that by reason of fraud practised by one of the defendants land belonging exclusively to him had been partitioned as joint land, is not a person aggrieved by an order made under S. 88 and is not entitled to maintain the suit. [P. 866, C. 2.]

Per *Fletcher, J.*—A party to a partition proceeding on a Revenue Court, having known about his rights from the time the partition papers were submitted to the Collector under S. 58 and notices inviting objections issued and never having put them forward in the partition proceedings, ought not to be subsequently permitted to raise them so as to upset the partition proceedings to which he was a party. [P. 867, C. 1.]

Whatever rights a party may have, he is not entitled to keep the lands allotted to him on the footing that the lands sued for formed a portion of the estate under partition and

bring an action to recover possession of the lands or a portion thereof awarded to the other party. [P. 866, C. 2.]

Umakali Mukerjee and *Moulvi Muhammad Mustafa Khan*—for Appellant.

Dwaraka Nath Mitter, *Rajendra Prosad* and *Sib Chandra Palit*—for Respondent.

Fletcher, J.—This is an appeal by the defendant No. 1 from the judgment of the learned Subordinate Judge of the Second Court at Saran.

The suit was brought for declaration of title to, and possession of, certain lands.

It appears that many years ago the Mahal Guthui was divided into three separate estates, but some lands remained joint between the three separate estates. The *tauzi* numbers of the three estates are now 1925, 1926 and 1927.

The plaintiffs claim to be the owners of *tauzi* No. 1926 and of 8 annas in *tauzi* No. 1925. The defendant No. 1 is the owner of a 5-annas 4-pies share out of 8-annas of *tauzi* No. 1925 and the defendants Nos. 2—5 are the owners of the remaining share in the 8-annas of *tauzi* No. 1925. The other defendants are the owners of *tauzi* No. 1927.

In January 1902 the defendant No. 1 applied under the provisions of the Estates Partition Act, 1897 (Act V of 1897 B. C.), for partition of his share in *tauzi* No. 1925. On the 30th of September, 1902, the plaintiff No. 4 filed a petition of objection before the Collector on the ground that all the owners of *tauzi* Nos. 1926 and 1927 who held land in common with the owners of *tauzi* No. 1925 had not been made parties. But as the defendant No. 1 raised no objection to their being made parties, they were added by order of the Collector in the year 1903. Accordingly on the 25th of August, 1903, the Collector issued the notices under S. 29 of the Act declaring the estate to be under partition. On the 29th of September, 1907, the following order appears on the order-sheet of the Collector:

"The papers, *viz.*, *khazra raibandi* and map prepared on the basis of survey records have already been adopted for the purposes of partition under S. 50. Checking *moharrir* has reported that there are common lands in the estate. Fix September 3rd for the division of common lands under S. 84."

The order-sheet shows that the owners of all the three estates presented petitions to the Collector as to the method in which they desired the common lands to be divided between the estate under partition and the other two estates. On the 2nd of October, 1907, the common lands were divided in the presence of the appellants for partition and some of the owners of *tauzi* Nos. 1925 and 1926. Notice was directed to issue on the absentee proprietors.

The owners of all three estates then filed objections as to the proposed method of partition. The petitions having been rejected by the Deputy Collector the plaintiffs preferred an appeal to the Collector against the rejection of their petition, alleging that the lands of the different estates between which the common lands were held were so scattered and interspersed with one another that the partition of the common lands could not proceed. The Collector dismissed the appeal on the 1st of November, 1907. The plaintiffs then appealed to the Commissioner of Revenue who confirmed the order of the Collector, and next to the Board of Revenue who also dismissed their appeal. On the 25th of May, 1908, the order-sheet shows that notices were directed to issue under S. 86 inviting objections, if any, by the 16th of June, 1908, to the proposed partition of the common lands. No objections being received the division of the common lands was approved by the Collector under S. 86 on the 30th of October, 1908.

On the 19th of November, 1908, the divided common land was directed to be included in the papers of the parent estate. Then the Deputy Collector proceeded under S. 57 with the partition of the parent estate including the divided common land. On the 15th of July, 1909, the papers were submitted to the Collector under S. 58 and notices inviting objections were issued. On the 11th of August, 1909, the plaintiffs Nos. 4 and 5 presented a petition to the Collector objecting chiefly to the proposed division of the parent estate. The only piece of land that they alleged was not in *tauzi* No. 1925 is plot No. 895 which they allege is in *tauzi* No. 1926. This plot No. 895 is not mentioned in the schedule to the plaint in this suit, so presumably the plaintiffs have no grievance in relation thereto. In reference to these objections on the 11th of September, 1909

subject to some slight modifications, the partition was confirmed by the Collector.

The Commissioner of Revenue on the 19th of May, 1910, rejected the objections put forward by the plaintiff No. 4 and on appeal to the Board of Revenue, the appeal of the plaintiff No. 4 was dismissed. The partition was finally completed on the 26th of September, 1910, that is, about 8-3/4 years after the proceedings commenced. The plaintiffs filed this suit on the 26th of April, 1910, and although according to the evidence of the plaintiff No. 4 the plaintiffs became aware of the fraud that they say had been practised on them as early as the 15th of July, 1909, they did not in the course of the partition proceedings set up this case and it was only after the partition papers had been submitted to the Commissioner for approval that they instituted the present suit.

The result is, as we are informed by the Vakil for the defendant No. 1, that he has been deprived of a substantial portion of the property allotted to him in the partition and the plaintiffs have been permitted to keep all the property allotted to them and to recover the property mentioned in the schedules in the plaint. But the plaintiffs got the property allotted to them in the partition on the footing that the lands now sued for formed a portion of the estate under partition and if they had not been so treated, the allotment to the plaintiffs in the partition would have been much smaller.

The partition proceedings were based upon the Record of Rights made under the provisions of the Bengal Tenancy Act as provided by the Estates Partition Act.

The plaintiffs' case is that the defendant No. 1 represented them at the survey and fraudulently represented what lands were in the different *tauzis* for his own benefit. The documentary evidence shows that the plaintiffs took some part in the settlement proceedings and I doubt this story about the defendant No. 1 representing the plaintiffs at the survey. The foundation of the plaintiffs' case is the *thak* maps made at the Revenue Survey in 1854. But I can see no reason to think that the *thak* maps are more reliable than the Record of Rights. True it is that some few tenants have given evidence that the plaintiffs are in possession. The evidence on the defendants' side is that the plaintiffs are colluding with the tenants. It would not, I think, be safe to rely on this evidence of possession alone. S. 119 of the Estates Partition Act enacts that no order made under Ss. 20 and 30, Chapters V, VII, VIII and IX (excepting S. 81), Chapter X, S. 107 or S. 117 shall be liable to be contested or set aside by suit in any Court: Provided, *inter alia*, that any person who is aggrieved by an order made under S. 88 may bring a suit in a Court of competent jurisdiction to modify or set aside such order.

There may be some doubt as to what the precise meaning of this section is. The decisions of this Court are that the orders made by the Revenue Authorities are only conclusive so far as they relate to the Government revenue and the details of the partition. This seems to me to be a somewhat narrow view to take of the wording of the section. The learned Subordinate Judge has held that the present suit comes within the proviso of a suit by a person who is aggrieved by an order made under S. 88. But there never was any order of the Collector under S. 88. No dispute or doubt was found to exist as to whether any land formed a portion of the parent estate and no order was made by the Collector directing the partition to proceed under S. 88 (*b*). That being so, the plaintiffs are not persons aggrieved by an order made under S. 88 and cannot sue to set aside or modify an order that never was made. The provisions of S. 89 as to compensation only apply to cases where the Collector has made an order under S. 88 (*b*).

The result I have arrived at is that whatever rights the plaintiffs may have, they are not entitled to keep the lands allotted to them on the footing that the lands now sued for formed a portion of the estate under partition and bring an action to recover possession of the land or a portion thereof awarded to the defendants. The result of allowing such a suit might be to work grave injustice to the defendants or some of them. It was stated before us that the effect of the decree of the lower Court, although it had not affected the defendants (other than the defendant No. 1) very much, had deprived the defendant No. 1 of a substantial portion of the lands allotted him by the partition by the Collector. I

am also inclined to hold that the plaintiffs, having according to their own story known about their rights since the 15th of July, 1909 and never having put them forward in the partition proceedings, ought not now to be permitted to raise them so as to upset the partition proceedings to which they were parties. I am, therefore, unable to agree with the result arrived at by the learned Judge in the Court below.

The present appeal must, therefore, be allowed and the suit dismissed. The plaintiffs must pay to the defendant No. 1 his costs both in this Court and in the Court below.

Richardson, J.—I agree. In the proceedings under the Estates Partition Act the plaintiffs never took the objection that more land had been allotted to the estate under partition than that estate was entitled to. That allotment was made under S. 84 and confirmed by the Collector under S. 86. Objections were made to the mode in which the common lands were divided, but not to the quantity allotted to the estate under partition. These objections were disposed of before the allotment was confirmed under S. 86 and the order confirming the allotment was subsequently and separately made. The plaintiffs had another opportunity at that stage to object to the quantity of land allotted to the estate under partition. Notice was issued inviting objections before the order of confirmation was made, and the order was not made until the notices were returned after being fully served. When the allotment was confirmed the partition of the whole was made under S. 57. The next step was to submit the partition so made for the sanction of the Collector under S. 58. The plaintiffs then had another opportunity to raise the questions raised in this suit. According to their own case they knew then of the fraud said to have been practised upon them in the settlement proceedings. But they did not avail themselves of that opportunity. The petition which they filed, dated the 11th August, 1909, gives no hint of the case made in this suit. The Collector made some small alterations suggested by that petition and subject to those alterations he approved the partition. It is clear that throughout these proceedings no question was raised under S. 88 and no order was passed under that section. Turning then to S. 119, the plaintiffs cannot well claim to be persons "aggrieved by an order made under S. 88." They have no right of suit, therefore, on that ground. It is suggested that they have a right of suit under proviso (*i*). But they are not persons,

"claiming a greater interest in lands which were held in common tenancy between two or more estates"

than has been allotted to them by an order under S. 84 or S. 86. There is no dispute as to their interest in the allotted lands. They are the owners of estate No. 1926 and of eight annas of estate No. 1925. The dispute is as to what particular lands were held in common tenancy, not as to the plaintiffs' interest in those lands when once the lands were determined. In view of the course taken by the plaintiffs in the partition proceedings and of the provisions of S. 119, I agree that the plaintiffs cannot now raise the question what lands were held in common tenancy.

Apart from that question it seems to me more than doubtful whether the plaintiffs ought to succeed on the merits. I do not accept the allegation that fraud was practised upon them by the defendant No. 1 in connection with the preparation of the Record of Rights. The proceedings taken for that purpose lasted from 1895 till the 23rd January, 1899, when the Record of Rights was finally published. I agree that the evidence adduced by the plaintiffs in this suit is not sufficient to rebut the presumption of correctness which attaches to that record under S. 103-B of the Tenancy Act.

I concur in the order which has been proposed.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 867

CHAPMAN AND WALMSLEY, JJ.

Gangadhar Pradhan—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 877 of 1915, decided on 17th August, 1915, against the Order of Sub-Divl. Magte., Kendrapara, dated 10th May, 1915.

(a) Criminal Procedure Code (5 of 1898), S. 200—Petition by informant impugning Police

report and asking for trial of persons accused by him should be treated as complaint—It should be referred to other Magistrate for inquiry and report.

A petition to a Magistrate by the informant impugning the Police report on his information and asking that the persons whom he accused should be put on their trial, should always be treated as a complaint and should not be referred to another Magistrate for inquiry and report. If sent to another Magistrate it must be for disposal. [P. 868, C. 2 & P. 869, C. 1.]

(b) Criminal Procedure Code (5 of 1898), S. 476—Complaint referred to Magistrate for only inquiry and report—Order by him under S. 476 is without jurisdiction.

An order under S. 476, Criminal Procedure Code, by a Magistrate to whom a complaint has been referred by another Magistrate for enquiry and report is without jurisdiction. [P. 869, C. 1.]

(c) Criminal Procedure Code (5 of 1898), S. 476—Charge by informant reported by Police to be false—Informant impugning police report and asking for trial of persons accused by him—Petition referred for inquiry and report to another Magistrate—Charge found to be false—Magistrate submitting proceeding under S. 476 for prosecution under Ss. 182, and 211 of Indian Penal Code—Informant tried and convicted under S. 211—Held although proceeding under S. 476 was without jurisdiction trial was with jurisdiction—Indian Penal Code (1860), Ss. 182 and 211.

On the Police reporting that the charge in the information laid by an informant was false, he made a petition to the Sub-Divisional Magistrate impugning the Police report and asking for the trial of the persons accused by him. That Magistrate referred the petition for enquiry and report to another Magistrate, who after holding a local investigation and examining the informant and his witnesses and the Police Officer, reported that the charge was false and submitted a proceeding under S. 476, Criminal Procedure Code, for the informant's prosecution under Ss. 182 and 211, Indian Penal Code. The Sub-Divisional Magistrate tried and convicted him under S. 211, Indian Penal Code:

Held, that although the proceeding under S. 476, Criminal Procedure Code, was without jurisdiction, yet the Sub-Divisional Magistrate derived his jurisdiction to try the charge under S. 211, Indian Penal Code, from the Police report and therefore the trial was with jurisdiction. [P. 869, C. 1.]

(d) Criminal Procedure Code (5 of 1898), S. 200—Petition by informant inpugning police report and asking for trial of persons accused by him—Disposal of petition as complaint is not necessary before prosecution under S. 211 of Indian Penal Code (1860).

There is no statutory provision that a petition to a Magistrate by the informant, impugning the Police report and asking for the trial of persons accused by him shall be finally disposed of as a complaint before the prosecution under S. 211 commences. [P. 869, C. 1.]

(e) Criminal Procedure Code (5 of 1898), S. 537—Conviction—Breach of statutory provision—No failure of justice—Breach can be remedied under S. 537.

After a conviction a breach even of a statutory provision can be remedied by the application of S. 537, Criminal Procedure Code, where no failure of justice has in fact been occasioned. [P. 869, C. 1.]

Biswanath Bose and *Dhirendra Nath Dutt*—for Petitioner.

Sultan Ahmed—for the Crown.

Judgment.—The petitioner laid an information at a Police Station to the effect that his house had been broken into at night. The Police investigated and reported that the charge was false. They requested that the petitioner be prosecuted under S. 182, Indian Penal Code. The report was received by the Sub-Divisional Magistrate. Upon the same date the Sub-Divisional Magistrate received a petition from the petitioner impugning the Police report and asking that the persons whom he accused should be put on their trial. The Sub-Divisional Magistrate referred this petition to a Sub-Deputy Magistrate for enquiry and report, intimating that, if the Sub-Deputy Magistrate agreed with the view taken of the case by the Police, he might submit a proceeding under S. 476, Code of Criminal Procedure, to the Sub-Divisional Magistrate for prosecution of the petitioner under S. 211, Indian Penal Code. The Sub-Deputy Magistrate examined the petitioner and his witnesses and held a local investigation. He also examined the Police Officer. He reported that the charge was false, and submitted a proceeding under S. 476 for the prosecution of the petitioner under Ss. 182 and 211, Indian Penal Code, to the Sub-Divisional Magistrate. The Sub-Divisional Magistrate directed that the case should be entered as false. The Sub-Divisional Magistrate thereupon tried the petitioner upon charges under Ss. 182 and 211, Indian Penal Code. The trial ended in conviction.

It has been held by this Court that a petition such as that presented by the petitioner to the Sub-Divisional Magistrate is a complaint. The latter should, therefore, either have made over the complaint to the Sub-Deputy Magistrate (not for enquiry and report but for disposal), or he should have examined the complainant himself, recorded reasons for distrusting the truth of the complaint, held the enquiry himself and then himself passed a formal order dismissing the complaint. The important points to notice are, *first*, that such a petition should

always be treated as a complaint, and, *secondly*, that the petition should not be referred to another Magistrate for enquiry and report. If sent to another Magistrate, it must be sent for disposal. The other Magistrate can then, after enquiry and making a proper order dismissing the complaint, pass an order under S. 476. The Code does not permit a Magistrate to refer a complaint to another Magistrate for enquiry and report. An order under S. 476 made by the other Magistrate in such a case would be without jurisdiction. We have been somewhat particular in setting out the above details because the law on the subject is very imperfectly understood. In most Sub-Divisions the Magisterial staff consists of a Sub-Divisional Magistrate and a Sub-Deputy Magistrate and it is not unnatural that the Sub-Divisional Magistrate, knowing that he will have to try the charges under Ss. 182 and 211 himself, should send the case in the first instance to the Sub-Deputy Magistrate for enquiry and report. The motive is not improper but the procedure does not have the sanction of the Code, and it frequently gives rise to legal difficulties.

It has been held, however, by a Full Bench of this Court in the case of *Queen-Empress* v. *Sham Lall* (1), that in such a a case the Sub-Divisional Magistrate derives his jurisdiction to try the charge under S. 211 not only from the order, if any, under S. 476 but also from the Police report. There can be no doubt, therefore, that the trial was with jurisdiction.

The Sub-Divisional Magistrate would have exercised a better discretion if he had acted in the manner which we have indicated above. But it is a matter of discretion, not of statutory provision. There is no statutory provision requiring that such a petition shall be finally disposed of as a complaint before the prosecution under S. 211 commences. Now after conviction a breach even of a statutory provision can be remedied by the application of S. 537 of the Code of Criminal Procedure, which says that, subject to the provisions of the Code, no sentence shall be reversed on revision on account of any error, omission or irregularity in the proceedings before trial, unless a failure of justice has in fact been occasioned. The words "in fact" have at the last amendment been added to the section to emphasize the reality of this requirement. We are quite unable to say that any failure of justice has in fact been occasioned in the present case.

The Rule is discharged.

V.B./R.K.

Rule discharged.

(1) (1887) 14 Cal. 707.

A. I. R. 1916 Calcutta 869

MOOKERJEE AND NEWBOULD, JJ.

Gangahari Chakrabarti— Plaintiff — Petitioner.

v.

Nabin Chandra Banikya and *another*— Defendants—Opposite Parties.

Civil Rule No. 1154 of 1914, decided on 30th April, 1915, against the decision of Munsif, Bajitpur, exercising the powers of Sm. C. C. Judge, dated 7th September, 1914.

(a) Limitation Act (9 of 1908), Sch. 1, Art. 145—Suit against depository to recover movable property not recoverable in specie—Art. 145 applies.

The limitation of 30 years from the date of deposit under Article 145 of the Limitation Act is applicable to a suit against a depository to recover movable property even when the property is not recoverable in specie. 7 C. W. N. 476 and 31 Cal. 519, foll. [P. 870, C. 1.]

(b) Limitation Act (9 of 1908), Sch. 1, Arts. 49, 115 and 145—Suit to recover gold or its price delivered to goldsmith to make ornaments—Time not specified—Limitation.

Where the plaintiff made over to a goldsmith gold ornaments to be melted and made into new ornaments, without fixing the time within which the work was to be finished, and failing to get the ornaments on repeated demands, instituted a suit for the return of the gold or its price:

Held, that the suit was governed by Article 145 of the Limitation Act, that even if Article 145 did not apply, Article 49 or Article 115 applied and that limitation began to run from the date on which the goldsmith wrongfully refused to do the work. [P. 870, C. 1 & 2.]

Gopal Chandra Das—for Petitioner.

A. K. Fazlul Huq and *Babu Jatindra Mohan Choudhury*—for Opposite Parties.

Mookerjee, J.—The question for decision in this Rule is, whether the suit is barred by limitation. The case for the plaintiff is that about eleven years ago he made over to the defendants, goldsmith by profession, gold ornaments of the weight of one *tola* in order that they might be melted and new ornaments made therewith: no time was fixed within

which the work was to be finished. The plaintiff asserts that the defendants put him off from time to time and that ultimately when on the 24th March, 1914, he pressed the defendants for the ornaments, they promised to make and deliver them within fifteen days. This period, however, expired, and yet the plaintiff, has not been able to get the ornaments. He consequently instituted this suit on the 11th May, 1914, and prayed, in the alternative, either that the defendants be directed to return to him the one *tola* of gold or that a decree for the price thereof, namely, Rs. 25, might be made against them. The Small Cause Court Judge has dismissed the suit on the ground that it is barred by limitation. In our opinion, this view cannot possibly be supported.

The case is governed either by Article 49 or 115 or 145 of the Indian Limitation Act. Article 145 provides that a suit against a depository to recover movable property deposited must be instituted within 30 years from the date of deposit. This Article, as was observed in *Kristo Kamini Dassi* v. *Administrator-General of Bengal* (1) and *Administrator-General of Bengal* v. *Kristo Kamini Dossee* (2), applies even when the property is not recoverable *in specie*. The Article does not also cease to be applicable merely because the defendant, after demand, wrongfully refuses to return the property ; such refusal does not bring into operation Articles 48 and 49 : *Narmadabai* v. *Bhavanishankar* (3) and *Gangineni Kondiah* v. *Gottipati Pedda Kondappa Naidu* (4). Consequently, Article 145 may be applied in so far as the first prayer in the plaint is concerned, namely, recovery of one *tola* of gold which, if his case is true, was made over by the plaintiff to the defendants for a specific purpose not yet carried out.

But even if Article 145 is not applied, no question of limitation arises either under Article 49 or Article 115. Article 49 provides that a suit for compensation for wrongfully detaining specified movable property may be instituted within three years from the date when the detainer's possession becomes unlawful. In this case, the detainer's possession did not become unlawful till he had wrongfully refused to apply the gold to make ornaments as he had originally agreed to do. According to the plaintiff there was no refusal till the 8th April, 1914. Consequently the suit is within time. The same result follows, if Article, 115 is applied. Under that Article, a suit for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for, may be instituted within three years from the date when the contract is broken. In this case, the contract was not broken till the 8th April, 1914; indeed, it is not the case for the defence that there was a demand by the plaintiff on an earliar occasion and a refusal on their part. In our opinion the view taken by the Small Cause Court Judge is erroneous and his decree cannot be supported.

The result is that this Rule is made absolute, the judgment and decree of the Court below set aside, and the case remanded for trial on the merits. The petitioner is entitled to the costs of this Rule. We assess the hearing-fee at one gold *mohur*.

V.B./R.K.

Rule made absolute ; Case remanded.

(1) (1903) 7 C. W. N. 476.
(2) (1904) 31 Cal. 519.
(3) (1902) 26 Bom. 430.
(4) (1910) 33 Mad. 56=5 I. C. 1.

A. I. R. 1916 Calcutta 870

JENKINS, C. J. AND HOLMWOOD, J.

Bal Makund Ruiya and *others*—Plaintiffs—Appellants.

v.

Mati Lal Burman and *others*—Defendants—Respondents.

Appeal No. 438 of 1912, decided on 4th August, 1915, from the Original Decree of Sub-Judge, Second Court, Hooghly, dated 6th September, 1912.

(a) Mortgage—Simple Mortgage—Rights of mortgagor—Mortgagor can create a temporary lease.

A simple mortgage does not, as a matter of conveyancing, arrest the mortgagor's power of leasing in the ordinary course of management. Therefore, so long as nothing takes place which impairs the value or impedes the operation of the mortgage, the mortgagor is quite within his powers in creating a temporary lease. 10 W. R. 325, foll. [P. 872, C. 2.]

(b) Mortgage—Decree — Suit by purchaser under mortgage-decree against lease-holder in possession — Leases for 50 years — Plaintiff buying with notice of leases—Mortgage not shown to have been impaired in value by

leases—Held leases could not be treated by plaintiff as inoperative—Lessee was not bound to redeem.

In a suit for possession by a purchaser under a mortgage-decree against a lease-holder in possession who was not a party to the mortgage suit, it appeared that the leases under which the defendant held the lands in suit were created for 50 years and the plaintiff bought with notice of the leases and the person under whom he claimed had recognized the leases in the most unequivocal manner, and it was not shown that the mortgage was impaired in value or impeded in operation by the leases:

Held, that the leases could not be treated by the plaintiff as inoperative and the lessee was under no obligation to redeem. [P. 873, C. 1.]

B. C. Mitter, *Sarat Chandra Basak*, and *Bepin Chandra Bose*—for Appellant.

Rash Behari Ghose, *Dwarka Nath Mitter*, *Baranashibasi Mookerjee*, *Braja Lal Chakravarty*, *Mohini Mohan Chatterjee*, *Manmath Nath Mukherjee* and *Satindra Nath Mukherjee*—for Respondents.

Jenkins, C. J.—The contests on this appeal is as to the respective rights of a purchaser under a mortgage-decree and a lease-holder in possession who was not a party to the mortgage suit. The plaintiff in this suit is the purchaser and the contesting defendant is the lease-holder. The plaintiff prays for possession or in the alternative that the lease-holder be directed to redeem.

The other defendants are the mortgagors and former claimants under mortgages or their representatives. The two mortgagors are Debendra Narayan, who is represented by defendant No. 3, and his brother Upendra Narain defendant No. 4. These brothers were the sons of Joy Narain Saha, a Hindu governed by the Bengal School of Law who died before the mortgages to which I will next refer. On his death each of these brothers became entitled to ¼th share in the family property, their uncle, with whom we have no concern, being entitled to the other moiety.

On the 3rd of May, 1894, Debendra mortgaged his ¼th of the property in suit to the defendant Srimati Iswari Debi and Srimati Bhuban Mohini Debi, the mother of defendants Nos. 7 and 8, to secure Rs. 400 with interest at 2 per cent. per mensem with monthly rests.

On the 10th of January, 1896, Upendra mortgaged his ¼th share in the property to Panchanan Prosad Kundu, who is now represented by defendants Nos. 10 and 11, to secure Rs. 1,900 with interest.

On the 13th June, 1898, Debendra and Upendra mortgaged the property in suit to Upendra Nath Mukherjee, father of defendant No. 2, to secure Rs. 5,000 with interest.

On the 3rd of October, 1898, the two brothers again mortgaged the property to Upendra Nath Mookerjee to secure Rs. 15,000 with interest.

These are the mortgages with which we are concerned in this suit and I now pass on to describe what was done with them.

On the 26th of May, 1900, a suit, No. 41 of that year, was brought on Debendra's first mortgage, and on the 8th of July, 1901, a decree for sale was passed. The ¼th share of the property in suit was bought at the Court sale by Indra Narayan Pal, defendant No. 9.

In 1904 Suit No. 57 of that year was instituted by Upendra Nath Mukherjee on his two mortgages and he joined as defendants Debendra and Upendra and their mother, the two ladies who were mortgagees under Debendra's 1st mortgage, Indra Narain Pal, the mortgagee under Upendra's 1st mortgage, and P. N. Mallik to whom this last mortgage had been transferred on the 22nd October, 1900.

In 1905 Suit No. 55 of that year was instituted by P. N. Mallik on Upendra's 1st mortgage and the defendants to that suit were Upendra, Debendra and their mother, the Kundus who had transferred to P. N. Mallik the mortgage then in suit, Upendra Nath Mukherjee, the predecessor of the present contesting defendant, and others who need not be particularised.

On the 30th June, 1905, a decree was passed in Suit No. 57 of 1904 brought by Upendra Nath Mukherjee and thereby a sale of the mortgaged properties was directed free from all incumbrances, and it was ordered that Indra Narain Pal should get payment first out of ¼th of the sale-proceeds of the sum of Rs. 2,178-2-6, due on account of the mortgage-bond dated the 3rd May, 1894, with interest at the rate of the bond up to the 12th August, 1901 and certain other sums making a total of Rs. 2,305-7-0. Similarly Rs. 7,670 odd was directed to be paid in respect of the mortgage of 10th January, 1896. There then followed a power to redeem.

On the 23rd May, 1906, a decree in the suit was passed directing a sale subject

to the *mokarari maurasi* right and the *pattas* there described. And it was noted that Upendra Nath Mukerjee had obtained a decree in Suit No. 57 of 1904.

On the 17th June, 1907, the property in suit was put up to sale in Suit No. 57 of 1904 and was bought by the plaintiff Balmakunda Ruiya at Rs. 30,000. A deposit of Rs. 7,500 was paid and after the balance had been paid, the sale was confirmed.

Difficulties as to possession followed with the usual sequel of criminal proceeding and ultimately on 23rd February, 1911, this suit was instituted. The suit was heard by the Subordinate Judge, 2nd Court of Hooghly.

By way of defence the lessee, the contesting defendant, relied on certain leases which, according to them, either vested in him a title paramount or had become binding on the plaintiffs by recognition or otherwise. The lessee also claimed that the suit was barred against him by limitation, and advanced other defences.

The result of the trial was that the Sub Judge decided in effect as to the bulk of the property that the lessee would only resist the plaintiffs' claim for possession by redeeming the property on the terms stated in the Court's decree.

According to those terms the lessee had to pay Rs. 2,172-14-0 in redemption of the 1st mortgage and Rs. 6,780-11-2½ in redemption of the 2nd mortgage, but the plaintiffs' claim for interest after the confirmation of the sale under the decree in Suit No. 57 of 1904 was dismissed.

Neither party was satisfied with this decree and so the plaintiffs have appealed and the defendant has filed cross-objections. To appreciate the points at issue, it is necessary to observe the dates of the leases on which the defendant lessee relies. Some purport to have been transferred and the rest have been granted direct to the lessee's predecessor. Those said to have been transferred may be eliminated from discussion, for the contesting parties have come to the following arrangement regarding them :

"It is agreed between Mr. B. C. Mitter on behalf of the appellants and Sir Rash Behari Ghosh on behalf of the respondent that the tenancies to which the *kabalas* of 14th March, 1888 and 9th November, 1903 relate came into existence prior to the mortgage of 3rd May, 1894 and that no notice to determine the same has been given, but this Court is not to affirm but to leave open whether those leases are *maurasi mokarari* or not, so that if necessary that point may be determined in subsequent litigation."

As a result of this the decision of the Subordinate Judge dismissing the suit in relation to the property comprised in these tenancies is to be confirmed on this ground, but on this ground alone. The direct leases are dated the 27th of October, 1894 and the 17th of January, 1895 and two, the 22nd of November, 1897. Thus it will be seen that all are subsequent to the 1st mortgage and the last two are subsequent to the 2nd mortgage. But no cross-objection has been preferred as to these last two, so that the only contest is as to whether the 1st two prevail over the plaintiff's right to possession. These leases are each for 50 years with an option of renewal for ten years and it has not been, nor could it be, maintained that the leases did not at least entitle the lessee to redeem. But the lessee maintains that he is entitled to retain possession without redeeming the plaintiffs.

The relative positions of a mortgagee and of a tenant under a tenancy created by the mortgagor after a legal mortgage are well settled in England, but it would be a mistake to apply these English rules to the relations resulting from an Indian simple mortgage. The rule of *Keech* v. *Hall* (1), the leading English case, is one of conveyancing but under a simple mortgage, the mortgagor does not part with possession, and the right of a mortgagee is merely to cause the mortgaged property to be sold for the payment of his debt.

And so we find that a simple mortgage does not as a matter of conveyancing arrest the mortgagor's power of leasing in the ordinary course of management. Thus in *Banee Pershad* v. *Reet Bhunjum Singh* (2), it was decided, and the propriety of the decision has never been questioned, that as long as nothing took place which impaired the value or impeded the operation of the mortgage, the mortgagor in creating a temporary lease acted within his powers. This aspect of the case was not developed as fully as it might have been at the trial. It has not been shown

(1) (1778) 1 Dougl. 21.
(2) (1868) 10 W. R. 325

that the first mortgage was impaired in value or impeded in operation by the first two leases. There is no evidence as to what class of lease is ordinarily granted in the case of properties such as that in suit, and the only restriction on leasing mentioned in the mortgage is against the granting of a *kayemi maurasi*. The impugned leases do not come within that description.

We learn from the Commissioner's report that

" the disputed land is situated in the town of Salkia adjoining the Bandaghat and appertains to a very thickly populated and important commercial quarter of the town, lying as it does exactly on the river Hooghly ..Over the disputed land and that on the north of it there exist the jute press and godowns of the defendant. "

And so the lease involved building operations. At the same time the first mortgage was only for Rs. 400, and the view ot the Subordinate Judge was that it could not be said that the mortgages security even of the 1st and 2nd mortgages became insufficient by the execution of these leases. Nor can it be urged that the plaintiffs have been taken by surprise, for the lower Court has held that purchaser bought with notice of the leases, and no attempt has been made to impugn the correctness of this finding.

Moreover no complaint was made by the 1st mortgagees or by Indra Narain who purchased under their decree.

On the contrary, Indra Narain under whom the plaintiffs claim so far as they rest on the first mortgage, recognised and adopted the leases in the most unequivocal manner, for he brought a suit expressly on them and obtained a decree.

This suit was instituted in the Court of the Munsif at Howrah in 1907 and thereby rent was claimed and recovered on the registered *kabuliyats* of the 27th October, 1894 and the 17th January, 1895. And before this rent was also paid to the Receiver appointed in Suit No. 57 of 1904, the suit in which the plaintiffs' purchase was made. In view of these facts I do not think the two leases of the 27th October, 1894 and the 17th January, 1895 can be treated by the plaintiff as inoperative, and I hold that the lessee is under no obligation to redeem. Mr. B. C. Mitter at one time thought that the lessee had made an admission as to boundaries favourable to him, but in this he was manifestly mistaken.

The result then is that the decree of the Sub-Judge will stand as to the plots comprised in the mortgage of the 16th January, 1896, for as to these no appeal has been preferred, but it will be subject to a modification to which the plaintiffs assent, as by an oversight the decree has been so expressed as to give rise to possible error. The decree as drawn directs that the plaintiffs will be entitled to get a decree for foreclosure against defendant No. 1 with respcet to the land covered by the third and fourth leases, dated the 22nd November, 1897 and the 22nd November, 1897 respectively. This must be altered by substituting the words " covered by the mortgage of the 16th of January, 1896. " In view of the statement made on behalf of the lessee that he does not propose to redeem the mortgage of the 16th January, 1896, it becomes unnecessary to consider whether the Subordinate Judge erred in disallowing interest up to the date of the suit. There will be a statement to that effect embodied in the decree.

The result then is that the plaintiffs' claim is dismissed as to the plots comprised in the tenancies to which the *kabalas* of 14th March, 1888 and 9th November, 1903 relate, that is to say, the plots measuring 3 *cottas* and 7 *cottas* 6 *chhittaks* and in this connection there will be embodied in the decree the terms to which the parties have agreed.

The plaintiffs' claim will also be dismissed as to the plots comprised in the leases dated the 27th October, 1894 and 17th January, 1895 and measuring 7 *cottas* and 2 *bighas* and 8 *cottas* respectively.

The rest of the Subordinate Judge's decree will stand with the variation which I have indicated. The appellants must pay the defendant No. 1 halt his costs of this appeal and two gold *mohurs* as hearing-fee to each of the defendants Nos. 2 and 15.

Holmwood, J.—I agree.

V.B./R.K.

Decree modified.

A. I. R. 1916 Calcutta 874

CHAUDHURI, J.

Ram Dutt Ramkissen Dass—Plaintiffs.

v.

E. D. Sassoon & Co.—Defendants.

Original Suit No. 546 of 1914, decided on 23rd April, 1915.

Contract—Construction—Sale of goods—Jute sold for shipment with guarantee of quality at port of distination—Inferiority in quality—Right of buyer to recover price—Home guarantee clause relating to arbitration construed.

The plaintiffs sold jute to the defendants in Calcutta for shipment to London on a contract containing a clause about "Home Guarantee," to the effect that weight, condition and quality are guaranteed by the sellers at the port of destination with the condition superadded that in the event of any dispute whatsoever arising out of or in any way relating to the contract, either before or after the date of expiration of the contract, the dispute shall be referred to arbitration in accordance with the rules and bye-laws of the Jute Association in London. The Bye-law 6 of that Association provided that the parties entering into a Home Guarantee would be bound by the award tendered in conformity with the terms of the guarantee. On its arrival at London, the jute was sold by the defendants to a London buyer. The latter objected to its quality, upon which an arbitration took place according to the terms of the English Jute Association, with the result that an allowance for inferiority in quality was awarded to the London buyer, with option to the defendants to invoice back the jute. However, it was not invoiced back nor was its price paid by the defendants. Before this award the plaintiffs had instituted a suit in Calcutta for the price or return of the goods. In that suit the defendants pleaded that the plaintiffs were not entitled to the value but were bound to take back the goods, which, however, had been sold by the defendants in London. They did not put forward any claim for damages on account of the inferior quality but reserved their right to bring a separate suit in respect of that claim :

Held, that as the goods were not invoiced back and the defendants had not asked for stay of the suit pending the award in London, the plaintiffs were entitled to a decree for their value.

Held, also, that although according to the Home Guarantee Clause a contention about quality between the plaintiffs and the defendants may have been referred to arbitration in London, an award on a submission by the defendants and the London purchaser in accordance with the rules and conditions of the London Association Contract of 1913 would not be binding in a dispute between the defendants and the plaintiffs who were not a party to that submission. [P. 876, C. 1.]

N. N. Chaudhuri and *N. Sircar*—for Plaintiffs.

L. P. E. Pugh and *J. H. R. Surila*—for Defendants.

Judgment.—By a contract dated the 2nd March, 1914 the plaintiffs sold to the defendant firm 500 bales of what is known as $\frac{(B\ D)}{G}$ 2 jute. The jute was to be placed alongside exporting vessel at once. The contract form used is that of the Baled Jute Association. It purports to be the form approved by the Association dated the 30th June, 1909, as appears on the form itself. In addition to the printed terms in the contract form there is a clause in writing to this effect

"weight, condition and quality guaranteed by sellers at port of destination as substitute for $\frac{(S\ C)}{(C)\ B}$ grade under the terms and conditions of London Association Contract, 1913. Any short weight to be paid by sellers and any overweight to be refunded by buyers."

One of the terms of the contract in suit is (Clause 14), "cash on delivery of Mate's or Dock receipts." It appears that according to the shipping instructions of the defendant firm dated the 3rd March, the plaintiffs placed the goods alongside exporting vessel on the 6th March, 1914. The defendants firm obtained possession of the Mate's receipt and shipping documents relating to these goods without the knowledge and consent of the plaintiffs. They had meanwhile opened two bales for purposes of inspection and marked the whole consignment with their own mark. The Mate's receipt and the shipping documents show that their mark was used. The defendant firm did not pay the value to the plaintiffs when they received the documents as above stated. The following facts are not disputed, namely, that on or about the 17th March the plaintiffs wrote to the defendant firm complaining that they had not been paid and that the defendant firm had wrongfully obtained possession of the Mate's receipt and shipping documents. They threatened proceedings, civil or criminal as advised. The ship had in the meantime left the Port of Calcutta with the goods. It left on or about the 12th March, 1914. The plaintiffs instituted this suit for the price, or in the alternative for the return, of the goods on the 28th April, 1914. On the 30th April, 1914, the defendant firm wrote to the plaintiffs that the London Chamber had made an award in respect of this jute, in a dispute between them and their buyers, and on the 1st May, 1914 they informed the plaintiffs that it had been

decided that the goods would be invoiced back. The goods, however, were never in fact invoiced back. In the written statement which was filed on the 30th June, 1914 the defendant firm stated that the goods were lying in London. It, however, transpires from the defendant firm's letters, Exhibits E and F, dated the 6th March, 1915, that the goods have been sold and are no longer available to the plaintiffs. The matter, therefore, stands thus. The defendant firm obtained Mate's receipt and shipping documents without paying for the goods, which they had no right to take. They purported to go to arbitration in London in a dispute between themselves and their buyers. The goods were to be invoiced back, but have not been, and having been sold cannot be invoiced back, yet the defendant firms says that the plaintiff is entitled to no relief. They put their case in this way: That at the port of arrival these goods were objected to, on the ground of quality, by their buyers, that an arbitration took place according to the terms of the English Jute Association Contract, that upon such arbitration, the objection as to quality was upheld and an allowance was awarded with option to the sellers (the defendant firm) to invoice back the goods, and that such option was exercised by them. The plaintiffs, therefore, it is contended, are not entitled to recover the value of the goods, but are bound to take them, back. But what are they to take back? The goods no longer exist. The defendant firm also insist that inasmuch as they suffered loss over their sale, they are entitled to recover damages from the plaintiffs, but they have reserved their right to institute a separate suit for that purpose and do not seek any such relief in this suit. They submit in their written statement that under the terms of the award the goods being invoiced back are at the disposal of the plaintiffs, and, therefore, this suit is not maintainable. It seems to me a very curious position to take up. They wrongfully obtained possession of the goods and have again wrongfully sold them after intimating to the plaintiffs that they were being invoiced back and were at the disposal of the plaintiffs. Their contention is, I understand, based upon the clause in writing I have above referred to, namely, what is known as the Home Guarantee Clause. The contract form used purports to be the approved form of the Baled Jute Association dated the 30th June, 1909. I find, however, from Exhibits G and H that the form used in this case is not the approved form of the 30th June, 1909, although so printed, but it is the form which was adopted by the Association on the 9th September, 1910. In the approved form of 1909 there is a printed clause relating to what is known as the "Home Guarantee." In the approved form of 1910 that clause is deleted. But it is not material to this enquiry as to what the approved form was in 1909 or 1910. The question is, what is the effect of the Home Guarantee Clause in writing appearing in the contract. It is contended that the Bye-laws of the Baled Jute Association printed on the back of the contract form govern this contract, which has a Home Guarantee Clause. It seems to me, however, that these Bye-laws do not come into operation until there is an arbitration by the Calcutta Chamber. Let us look at the contract itself. Clause 15 of the contract provides,

"in the event of any dispute whatsoever arising out of or in any way relating to this contract, or to its construction or fulfilment between the parties hereto, and whether arising before or after the date of expiration of this contract, the dispute shall be referred to arbitration in accordance with the Rules and Bye-laws (of the Baled Jute Association) endorsed on this contract. Each party to the dispute shall appoint one arbitrator and such arbitrators shall have the power to appoint an umpire. Both arbitrators and umpire must be persons engaged in the Baled Jute Trade, and their award shall be final, subject only to right of appeal to the Committee."

The Association Rules and Bye laws, as printed on the reverse, are part of this contract. Bye-law No. 6 runs thus:—

"Where jute is guaranteed at port of discharge, the parties to the contract for the Jute concerned agree to accept and be bound by the award which is tendered in conformity with the terms of guarantee entered into between the parties. They also agree that the signatures of the arbitrators on such award shall be sufficiently proved by the production of the award purporting to be signed by them."

Learned Counsel for the defendant firm contends that the award referred to in that Bye-law means the London award and not an award to be made in Calcutta; that it means the London award made upon a submission by the Calcutta purchaser, who is the seller in London, and the eventual purchaser of the goods in London, and that such an award

between those parties is binding upon the Calcutta seller who is no party to the arbitration in London. Let us see if the contract sustains this contention. The clause in writing contained in the contract in suit

"is subject to the terms and conditions of London Association Contract, 1913."

It does not say that a London award in a submission by the Calcutta purchaser and the London purchaser, in accordance with the rules and conditions of the London Association Contract of 1913, would be binding in a dispute between the Calcutta seller and the Calcutta buyer. To make such an award binding upon a total stranger to the London submission there should be a clear and unambiguous agreement to that effect. I find it difficult to imply such a term.

It is correctly contended that a contention about quality, between the Calcutta seller and Calcutta buyer, may be validly referred to arbitration in London, in accordance with that clause; but it is sought to extend the meaning of the clause by making an award between the Calcutta purchaser and the London purchaser binding upon the Calcutta seller. I do not think it can be so extended. It may be that the effect of the clause is that the award in an arbitration in London between the Calcutta purchaser and the London pucrhaser may be tendered as evidence in a submission to the Calcutta Chamber by the Calcutta seller and Calcutta buyer of their disputes in Calcutta, and the Calcutta Chamber may make their award referring to the London award. But whether that is so or not I do not think affects the claim in this suit. It is quite clear that possession of the goods was wrongfully obtained. Before the date of the London award, these goods were the subject of litigation in this Court. The defendant firm evidently dealt with these goods against the plaintiffs' protest. They had inspected the goods at the time of the shipment and marked them with their own mark, and treated these goods as if they were theirs. When the defendant firm had notice of this suit, it was open to them to come to this Court and ask for a stay of proceedings, if they rightly contended that the plaintiffs were bound to abide by the decision of the London Chamber. They, however, filed a written statement stating that the goods were at the disposal of the plaintiffs, yet sold them without notice to the plaintiffs, and now assert that the plaintiffs are not entitled to any relief. I am unable to take that view, and hold that the plaintiffs are entitled to the value of the goods. I decree the suit for the price of the goods with costs on scale II. Interest on decree at 6 per cent. I may add that it was contended on behalf of the plaintiffs that under the rules of the Baled Jute Association, if there was any addition to the printed terms on their contract form, it was open to the Association to refuse to arbitrate, and that, therefore, the Arbitration Rules on the printed form were not applicable to this case. There is ground for that argument, but I do not think it matters much in this case.

V.B./R.K.

Claim decreed.

A. I. R. 1916 Calcutta 876

MOOKERJEE AND BEACHCROFT, JJ.

Nagendra Nath Basu — Defendant—Appellant.

v.

Parbati Charan Koyal and *another*—Plaintiffs—Respondents.

Appeal No. 435 of 1912, decided on 16th February, 1914, against the Appellate Decree of Sub-Judge, Second Court, 24 Parganas, dated 14th November, 1911.

(a) Civil P. C. (5 of 1908), O. 6, R. 4—Suit to set aside *ex parte* decree on ground of fraud—General allegations of fraud are insufficient—One kind of fraud set up—Another kind of fraud cannot be allowed to be substituted for it.

Where a plaintiff seeks relief on the ground of fraud, he is bound, under O. 6, R. 4, to specify in his plaint the facts which constitute the fraud; and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.

[P. 878, C. 1.]

Where the plaintiff brought a suit to set aside an *ex parte* decree and a sale thereunder on the ground of fraud on the allegation that the processes in the suit and in the execution proceedings were suppressed, and it was found that these processes were, as a matter of fact, not served but there was no ground for holding that the non-service was in any way attributable to the defendant's (the plaintiff in the previous suit) interference:

Held, that as the plaintiff had failed to prove the fraud as laid in the plaint, he could not succeed in the suit.

[P. 878, C. 2.]

(b) Civil P. C. (5 of 1908), O. 6, R. 4—*Ex parte* decree—Plaintiff preventing service—Decree will be set aside.

A judgment will be vacated if it is proved that the successful party has taken means to prevent service of notice upon the other or has procured a false return of service. [P. 878, C. 1.]

(c) Civil P. C. (5 of 1908), O. 6, R. 4—*Ex parte* decree not set aside—Suit to set it aside on ground of fraud is not barred.

The mere circumstance that a defendant has failed to have an *ex parte* decree set aside under S. 108, Civil Procedure Code of 1882 or to have an execution sale set aside on the ground of material irregularity, does not debar him from seeking relief, in a suit properly framed for the purpose, on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. [P. 878, C. 1 & 2.]

(d) Decree—Effect of—Decree vacated for reason not attributable to plaintiff—Judgment is to be treated as valid for purposes of protection to party acting under it until reversed—Sale in execution of such decree — Decree for rent obtained by purchaser is not affected by subsequent cancellation.

A judgment pronounced by a Court upon an erroneous view of the law and subject, to be reversed by an Appellate Tribunal, is treated as valid for all purposes of protection or justification to the party acting under it before reversal, and the same rule applies where the judgment is vacated for irregularity or like reason not attributable or chargeable to the plaintiff, or for which, he is not actually or constructively to blame. *Simpson* v. *Hornbeck*, 3 Lans. 53, ref. to. [P. 879, C. 1.]

The effect of the reversal of a certificate sale of a tenure is that as between the tenure-holder and the purchaser at the certificate sale, or his representative-in-interest, the latter becomes liable to make restitution to the former; but a decree for rent obtained by the latter and a sale held on the basis thereof are not in any way affected by the subsequent cancellation of the certificate sale. [P. 879, C. 1.]

Mohini Mohan Chakrabutty and *Prokash Chandra Mojumdar*—for Appellant.

Gour Chandra Pal—for Respondents.

Judgment.—This is an appeal by the second defendant in a suit to set aside an *ex parte* decree. The plaintiffs held the disputed land within a tenure which was sold under the Public Demands Recovery Act, on the 7th September, 1908 and was purchased by the first defendant. The second defendant purchased the tenure from the first defendant and on the 18th June, 1909 instituted a suit for rent against the plaintiffs. The suit was decreed *ex parte* on the 16th July, 1909; in execution of this decree, the property was purchased by the decree-holder on the 20th November, 1909. Meanwhile proceedings had been instituted for cancellation of the sale under the Public Demands Recovery Act, on the ground amongst others that no notice had been served under S. 10 and that consequently the proceedings were invalid and inoperative. The sale under the Public Demands Recovery Act was set aside for the reasons stated on the 29th March, 1910. On the 7th May, 1910 the plaintiffs commenced this action to set aside the *ex parte* decree as also the sale consequent thereon on a twofold ground, namely, *first*, that the decree was vitiated by fraud; and *secondly*, that as the certificate sale was subsequently set aside the rent-decree also was in essence cancelled. The Court of first instance held that the *ex parte* decree in the rent suit was not liable to be set aside on either ground. Upon appeal the Subordinate Judge has in concurrence with the Court of first instance held that the decree is not liable to be set aside on the ground that the certificate sale has been subsequently set aside; but he has also held, herein differing from the Court of first instance, that the rent decree must be set aside on the ground that it had been obtained by fraud. In this view, the Subordinate Judge has set aside the decree and sale and has declared that the title of the plaintiffs has not been affected by the proceedings in the rent suit.

On the present appeal by the second defendant the decision of the Subordinate Judge has been challenged on the ground that the facts found by him do not justify the inference that the rent-decree was vitiated by fraud. This position has been contested on behalf of the plaintiffs-respondents, who have further endeavoured to support the decree of the Subordinate Judge on the ground that his decision upon the second question raised was erroneous.

In so far as the question raised in the appeal is concerned it is, in our opinion, plain that the view taken by the Subordinate Judge cannot be supported. It is now well settled, as was laid down by the House of Lords in *Wallingford* v. *Mutual Society* (1) and by the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (2), that general allegations of fraud, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice:

(1) (1880) 5 App. Cas. 685.

(2) (1888) 15 Cal. 533=15 I.A. 119 (P.C.).

Jyotiprakasa Nandi v. *Jowmull Johury* (3) and *Balaji* v. *Gangadhar* (4). Where a plaintiff seeks relief on the ground of fraud he is bound, under O. 6, R 4 of the Code of Civil Procedure, to specify in his plaint the facts which constitute fraud. It is also well settled that a charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof be substituted for it: *Abdul Hossein Zenail Abadi* v. *Charles Agnew Turner* (5). In the case before us, the specific allegation of fraud made in the plaint was to the effect that the second defendant had in collusion with the officers of the Court caused a suppression of the processes in the suit as also in the execution proceedings. No doubt, if this allegation had been established, the plaintiffs would have been entitled to succeed; because it is firmly settled that a judgment will be vacated, if it is proved that the successful party has taken means to prevent service of notice upon the other or has procured a false return of service: *Abdul Mozumdar* v. *Mahomed Gazi Chowdhry* (6), *Mahomed Golab* v. *Mahomed Sulliman* (7) and *Narsing Das* v. *Bibi Rafikan* (8). Unfortunately for the plaintiffs, however, the facts found by the Subordinate Judge do not support the conclusion that the processes, either in the suit, or in the execution proceedings were suppressed at the instance of the then plaintiff. The Subordinate Judge had found, so far as the processes in the suit are concerned, that they were not served. He does not find, nor has he stated any facts from which any inference could be drawn to the effect, that this non-service of processes in the suit was in any way attributable to the interference of the plaintiff in the rent suit. It may be conceded, as was laid down by their Lordships of the Judicial Committee in *Radha Raman Shaha* v. *Pran Nath Roy* (9) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (10), that the mere circumstance that a defendant has failed to have an *ex parte* decree set aside under S. 108, Code of Civil Procedure, or to have an execution sale set aside on the ground of material irregularity, does not debar him from seeking relief in a suit properly framed for the purpose, on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. But to enable the plaintiff to succeed in a suit so framed he must specifically allege the circumstances of fraud and he must prove the fraud as laid in the plaint. Reference has been made on behalf of the respondents to the decision of *Nemai Chand Kanji* v. *Deno Nath Kanji* (11), where certain circumstances were stated as *indicia* of fraud. That decision, however, is of no assistance to the respondents as the Subordinate Judge has not found all those circum stances to exist in the case before us. We must hold accordingly that the facts found by the Subordinate Judge do not constitute fraud and do not afford any basis for cancellation of the *ex parte* decree in the rent suit.

The *next* question for consideration is whether the Subordinate Judge in concurrence with the Court of first instance has taken an erroneous view as to the effect, if any, of the reversal of the certificate sale upon the decree in the rent suit. At the time when the suit for rent was instituted, the second defendant was the only person competent to maintain a suit for rent. He had purchased the property from the first defendant, who was the purchaser at the sale under the provisions of the Public Demands Recovery Act. He duly obtained the sale certificate from the Revenue Authorities, was placed in possession of the property by them and subsequently got his name registered under the Land Registration Act. At the time of the institution of the rent suit he was consequently the only person who could claim to recover rent from the tenants. Indeed, the tenants were not entitled under the provision of S. 78 of the Land Registration Act, and S. 60 of the Bengal Tenancy Act, to plead in answer to the claim that rent was due to another person. The decree was made by a Court of competent jurisdiction and was executed by the Court which made it. The sale, it has been found, was regularly hold. Under these circumstances, we cannot hold that the fact that the certificate sale, which was the root of the

(3) (1909) 36 Cal. 134=1 I.C. 784.
(4) (1908) 32 Bom. 255.
(5) (1887) 11 Bom. 620=14 I.A. 111 (P.C.).
(6) (1894) 21 Cal. 605.
(7) (1894) 21 Cal. 612.
(8) (1910) 37 Col. 197=5 I. C. 198.
(9) (1901) 28 Cal. 475 (P.C.).
(10) (1902) 29 Cal. 395=29 I. A. 99 (P. C.).
(11) (1898) 2 C. W. N. 691.

title of the second defendant, was subsequently set aside did, in any way, affect the validity of the decree in the rent suit. The question of the effect of the cancellation of a decree upon intermediate acts based on it may sometimes be not altogether free from difficulty; but as pointed out in *Simpson* v. *Hornbeck* (12), one principle is well settled, namely, a judgment pronounced by the Court, upon an erroneous view of the law and subject, therefore, to be reversed by an Appellate Tribunal, is treated as valid for all purposes of protection or justification to the party acting under it before reversal, and the same rule applies where the judgment is vacated for irregularity or like reason not attributable or chargeable to the plaintiff or for which he is not actually or constructively to blame. In the case before us, the certificate under the Public Demands Recovery Act and the sale consequent thereon were set aside because the notice under S. 10 had not been duly served; for this irregularity, however vital it may be, the purchaser at the certificate sale, a stranger to the proceedings. clearly cannot be held responsible and it is not possible on any legal principle, to justify the view that all acts of the purchaser on the basis of his purchase at the certificate sale should be deemed nullified as soon as the sale was set aside. The effect of the reversal of the certificate sale is that as between the original tenure-holder and the purchaser at the certificate sale or his representative-in-interest, the latter becomes liable to make restitution to the former. But it does not follow that all legal processes, duly and regularly taken at a time when the title of the certificate purchaser or his representative was in full force, were vitiated by the reversal of the certificate sale. A fruitless attempt has been made to invoke the aid of the well-established doctrine that the Court may, in exceptional cases, take notice of events which have happened since the institution of the suit so as to do complete justice between litigants: *Ram Ratan Sahu* v. *Mohunt Sahu* (13), *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (14) and *Udit Chobey* v. *Rashika Prasad Upadhya* (15). Nor is there any real analogy between the present case and the class of cases to which reference was made, namely, *Shama Purshad Roy Chowdury* v. *Hurrow Purshad Roy Chowdury* (16) and *Kali Churn Dutt* v. *Jogesh Chunder Dutt* (17). In these cases it was held that where decrees have been made on the basis of a decree in an earlier suit, which was subject to the result of an appeal, the reversal of the earliest decree operated in essence as a reversal of the subsequent decrees based thereon. That clearly is a case of an entirely different description. There is also no analogy between the case before us and another class of cases in which it has been held that where an order has been obtained on the basis of a decree, the cancellation of the decree operates to discharge the order made on the basis thereof: *Nawab Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan* (18), *Mina Kumari Bibee* v. *Jagat Sattani Bibee* (19) and *Set Umedmal* v. *Srinath Ray* (20). In our opinion it is plain that the rent-decree and the sale held on the basis thereof have not, in any way, been affected by the cancellation of the certificate sale. Indeed, in the present case, if the plaintiffs were to succeed, the defendant would be deprived of the property he has acquired in satisfaction of his claim for rent, and would nevertheless continue liable to make restitution to the tenure-holder, whom he had dispossessed on the strength of his purchase at the certificate sale; such a position as this cannot be supported on any conceivable principle of justice, equity and good conscience.

The result is that, as both the grounds on which the plaintiffs seek to impeach the title of the second defendant fail, this appeal must be allowed, the decree of the Subordinate Judge reversed and that of the Court of first instance restored with costs in all the Courts.

V.B./R.K.

Appeal allowed.

(12) 3 Lans. 53,
(13) (1907) 11 C. W. N. 732.
(14) (1907) 6 C. L. J. 102.
(15) (1907) 6 C. L. J. 662.

(16) (1865) 3 W.R. 11=10 M. I. A. 203 (P.C.).
(17) (1877-78) 3 Cal. 30=1 C. L. R. 5.
(18) (1888) 10 All. 166=15 I. A. 12 (P.C.).
(19) (1884) 10 Cal. 220.
(20) (1900) 27 Cal. 810.

A. I. R. 1916 Calcutta 880 (1)

JENKINS, C. J. AND MOOKERJEE, J.

Maharaja Birendra Kisore Manikya Bahadur—Plaintiff—Appellant.

v.

Ramkumar Chakravarti and *others*—Defendants—Respondents.

Appeal Nos. 3482 to 3484, 3527, 3530, 3572, 3574, 3575, 3579 and 3580 of 1912, decided on 11th July, 1913, from the Appellate Decrees of Dist. Judge, Comilla, dated 24th May, 1912.

Adverse possession—Landlord and tenant—Right claimed in his own right in settlement is hostile—Suit 12 years after that is barred.

A right claimed by a defendant at a settlement proceeding in himself is a right claimed hostile to the plaintiff and a suit brought more than 12 years after is barred by limitation.

[P. 880, C. 2.]

Gobind Chandra Dey Roy—for Appellant.

Facts appear from the following judgment of the first Court, dated 12th February, 1912:—

This is a suit for assessment of rent on certain property and for mesne profits. The case for the plaintiff is that at the last cadastral survey, the defendants were recorded as tenure-holders under plaintiff with regard to the disputed property; that the defendants have not yet taken settlement; and that hence this suit.

The defendants plead *nishar* right and raise other objections, which will appear from the issues.

The issues settled are:—

1. Is the suit barred by limitation?
2. Is the disputed property liable to assessment of rent? If so, at what rate?
3. Is the plaintiff entitled to get mesne profits? If so, how much?
4. To what relief, if any, is plaintiff entitled?

Findings.

Issue No. 1:—According to the recent decision of Justices Caspersz and Chatterjee, limitation ought to run from the date of the dispute. This suit was instituted more than 12 years after the date of decision of the dispute, *vide* defendants' documents. Hence it is barred.

The other issues need not be decided.

Hence ordered that the suit be dismissed with costs.

Judgment.—Both Courts have agreed in dismissing this suit, and it is conceded that no case is more favourable to the plaintiff than this. The Munsif expressly purported to follow the decision in *Birendra Kishore Manikya Bahadur* v. *Roshan Khan* (1), where, in circumstances like the present, the learned Judges considered that hostile right was claimed to the knowledge of the plaintiff, and no suit was brought until more than 12 years after. Therefore, it was thought that the suit as framed was clearly barred by limitation and liable to be dismissed. That decision was certainly binding upon the lower Appellate Court, as it is on us, and we must, therefore, dismiss the appeal.

V.B./R.K.

Appeal dismissed.

(1) (1912) 39 Cal. 453=13 I. C. 518.

A. I. R. 1916 Calcutta 880 (2)

HARRINGTON AND TEUNON, JJ.

Manindro Nath Mitter—Accused—Petitioner.

v.

Bengal-Nagpur Railway Co.—Opposite Party.

Criminal Reference No. 697 of 1910, decided on 13th July, 1910.

Railways Act (9 of 1890), Ss. 68 and 112—Intent to defraud company is necessary for offence under S. 112—Absence of evidence justifying inference that passenger knew that ticket was used—Passenger knowing that he was committing breach of rules—Intention to cheat cannot be inferred.

The fact that a passenger is travelling by a Railway train and, on being called upon, produces a ticket bearing date of a previous day, throwing away another in his possession, cannot lead to an inference of dishonest intention so as to justify a conviction under S. 112 the essence of the offence under that section being an intent to defraud the Railway Company: [P. 881, C. 2.]

In the absence of any evidence from which it can be clearly inferred that a passenger knows that the ticket he is holding has been used before, an intention on his part to cheat the Railway Company cannot be inferred from the mere fact that the passenger is aware that he is committing a breach of the Railways Act or rules framed thereunder. [P. 881, C. 2.]

Where there is nothing on a ticket intimating to its holder that, under the Railway rules, it is only available for a particular train or on a particular day, his knowledge of the Railway rules cannot be inferred from the fact that the rules have been posted on the Railway Stations, unless and until it is proved that the attention of the particular traveller was drawn to them.

[P. 881, C. 2.]

Birendra Chandra Das for *Jadu Nath Kanjilal*—for Petitioner.

Manmatha Nath Mukerjee—for Opposite Party.

Judgment.—This was a Rule calling upon the District Magistrate to show cause why the conviction and sentence passed upon the petitioner should not be set aside, on the ground that the facts found did not disclose the commission of any offence under S. 112 of the Railways Act (Act IX of 1890).

S. 112 of the Act makes it an offence in any person to enter a railway carriage in contravention of S. 68 of the Act with intent to defraud a Railway administration and S. 68 provides that no person shall, without the permission of a Railway servant, enter any carriage on a Railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket.

In the present case the petitioner was travelling on the 3rd May by a railway train, and when called upon to produced his ticket by a ticket checker he produced a ticket dated the 2nd of May. Now, it appears that though the ticket contained nothing on the face of it to show that this was the case, yet the rules of the Railway Company are that a ticket is only available for the particular railway journey for which it is issued and if a person is unable to travel, by the train by which he intended to travel then he ought to go back to the Station Master for a refund of the money he paid for the ticket. When he was called upon to produce his ticket, it is alleged, and found as a fact, that he had in his possession another ticket, similar to the ticket he produced, which he threw away; and when it was explained to him that this ticket was not available on that day, he offered to pay the fare. Now, the question is whether these facts justify a conviction for a breach of the provisions of S. 112 of the Railways Act, bearing in mind that the essence of an offence under that section consists of an intent to defraud the Railway Company.

The learned Vakil who has shown cause against this Rule has argued that the possession of another ticket and the throwing it away indicate that the petitioner was dishonest. We do not think that that can be fairly inferred from the circumstances. The petitioner might have known that he was committing a breach of the Railways Act or rather of the rules regulating the Railway, but we think that until there is evidence from which it could be clearly inferred that he knew that the ticket had been used before, it is very difficult to say that there is anything from which an intention to cheat the Railway Company could be inferred. In this particular case there is no evidence to show that the ticket was issued to any other person than the petitioner and there is no evidence that the ticket in question had been used before. The inference, therefore, is that the ticket properly represents a fare which had been paid and for which the holder of the ticket is entitled to travel by the intended train. Even supposing that a breach of the rules was committed and the man knew that he ought not to have travelled on the 3rd, we think it is very difficult to say that he intended to cheat the Railway Company as long as he held a ticket which represented the fare paid. He chose to avail himself of the ticket on a wrong day instead of going direct to the Station Master for a refund of the money or for a ticket in return—but in that state of facts he would have had, we think, consideration for the money paid and the Railway Company would have received the price of that journey, namely, the cost of the ticket.

With reference to the main knowledge of the Railway rules, it is strenuously argued that the ticket was not available on the following day; but it is to be observed that though these rules are said to be posted upon the Railway Stations, there is nothing to show that the attention of this particular traveller was ever drawn to them and it is a very strong circumstance, we think, that when this ticket is looked at, there is nothing on the face of it or on its back which would intimate to the holder of the ticket that it was only available for a particular train and we think that, in the absence of any such intimation, it was quite possible for the man to think that it was genuinely usable for another train on the day on which the ticket was issued and perhaps for a train on the day following. The essence of the offence to defraud the Railway Company has not been proved in this case.

For these reasons we think that the conviction and sentence of the petitioner cannot stand.

We, therefore, set aside the conviction and sentence and acquit him.

The fine, if paid, must be refunded to the petitioner.

V.B./R.K.

Conviction quashed.

A. I. R. 1916 Calcutta 882

MOOKERJEE AND N. R. CHATTERJEA, JJ.

Hobibullah—Defendant—Appellant.

v.

Abtiakallah and *others*—Plaintiffs—Respondents.

Appeal No. 371 of 1915, decided on 20th August, 1915, from the Order of Sub-Judge, Dacca, dated 28th July, 1915.

(a) Civil Procedure Code (5 of 1908), O. 40, R. 1 (1) —"Just and convenient"—Meaning of —Court should make appointment of Receiver for protection of property or prevention of injury, according to legal principles.

The words "just and convenient" in O. 40, R. 1 (1), Civil Procedure Code, do not mean that the Court can appoint a Receiver simply because it thinks it convenient to do so. They mean that the Court should make such appointment for the protection of property, or the prevention of injury, according to legal principles. They confer no arbitrary and non-regulated discretion on the Court. [P. 882, C. 2.]

(b) Civil Procedure Code (5 of 1908), O. 40, R. 1 (1) —Suit for title to office of *mutawalli*— Allowance not paid by defendant to beneficiaries —No allegation of waste or mismanagement —Held no ground was made for appointment of Receiver.

Where in a suit relating to title to the office of *mutwalli*, it was established that the defendant, since he took possession as *mutwalli*, had not paid allowances to the beneficiaries, but there was no allegation of waste or mismanagement against him.

Held, that, at that stage of the suit, no ground was established to justify an order for appointment of a Receiver. [P. 882, C. 2.]

B. Chakravarty and *Surendra Nath Guha*—for Appellant.

Dwarka Nath Chuckerbutty and *Kali Kinkar Chuckerbutty*—for Respondents.

Mookerjee, J.—We are invited in this appeal to consider the propriety of an order for the appointment of a Receiver in respect of the subject-matter of the litigation in the Court below. The suit relates to title to the office of *mutwalli* of an endowment created on the 10th March, 1847 and the contesting parties are the rival claimants to that office, which was held by *Nawab* Sir Sulimulla up to the time of his death on the 16th January, 1915. The Subordinate Judge has granted the application for the appointment of a Receiver, on the ground that it is just and convenient that a Receiver should be appointed under Clause (1), R. 1, of O. 40 of the Code of 1908. On behalf of the defendant it was contended before him that the grounds which justify the appointment of a Receiver had not been established. The Subordinate Judge was, however, of opinion that he had a wide discretion under R. 1 of O. 40 of the Code, and could appoint a Receiver if he thought it just and convenient to do so. The only ground established up to the present stage is that allowances payable to beneficiaries under the deed of the 10th March, 1847 have not been paid since the defendant took possession of the properties as *mutwalli*; but there is no allegation of waste or mismanagement. In fact, the plaintiffs intimated to the Court that they were prepared to accept the defendant or his present manager, Mr. Hudding, as Receiver. The defendant, on the other hand, has intimated to this Court, as he did in the Court below, that he was ready and willing to pay into Court regularly the sum payable as allowances under the *wakfnama*. We are clearly of opinion that no ground has been established for the appointment of a Receiver at the present stage.

In view of the observations made by the Subordinate Judge, it is desirable to point out that the words 'just and convenient' in O. 40, R. 1 (1), do not mean that the Court can appoint a Receiver simply because the Court thinks it convenient to do so. They mean that the Court should make such appointment for the protection of property or the prevention of injury, according to legal principles; as was explained in *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (1), the object and purpose of the appointment of a Receiver is generally the preservation of the subject-matter of the litigation, pending a judicial determination of the rights of the parties thereto. They confer no arbitrary and non-regulated discretion on the Court. In support of this view, reference may be made to the cases of *Beddow* v. *Beddow* (2) and *Aslatt* v. *Corporation of Southampton* (3). It is conceivable that in the present case the

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(1) (1907) 5 C. L. J. 270=34 Cal. 305 at p. 315.

(2) (1878) 9 Ch. D. 89=47 L. J. Ch. 588.

(3) (1880) 16 Ch. D. 143=50 L. J. Ch. 33=43 L. T. 464=29 W. R. 117.

appointment of a Receiver may hereafter prove necessary, if circumstances alter; for instance, if it is found that the estate is in danger, because no longer properly managed, or that difficulties have arisen in connection with litigation about the properties comprised in the estate, or that there is good ground to apprehend that the defendant may misapply trust funds, the Court may properly appoint a Receiver. But we are clearly of opinion that at the present stage no ground has been established to justify the order for appointment of a Receiver.

The appeal is allowed and the order of the Subordinate Judge discharged. This order is made on the basis of the undertaking given by the defendant to pay into Court regularly the sums payable as allowances under the *wakfnama* of 1847 and to bring into Court the arrears of allowances due, to amount payable in each case to be determined by the Subordinate Judge. The term "allowances" includes all sums payable to the beneficiaries under the *wakfnama*. When the deposits are made, the beneficiaries will be at liberty to withdraw the sums.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 883 (1)

JENKINS, C. J. AND
N. R. CHATTERJEA, J.

Krishna Chandra Bagdi and *others*—Plaintiffs—Appellants.

v.

Satish Chandra Banerjee—Defendant—Respondent.

Appeal No. 40 of 1914, decided on 28th May, 1915, from the Appellate Decree of Sub Judge, Burdwan, dated 27th September, 1913.

Bengal Tenancy Act (8 of 1885), Sch. III, Art. 3—Applicability—Purpose of Act must not be overlooked—Dispossession must be clear to apply Art. 3.

In applying the law of limitation prescribed by Article 3, Schedule III of the Bengal Tenancy Act the purpose and scope of the Act must not be lost sight of.

To deprive a tenant of his right of suit as being barred by the special limitation of Article 3 of Schedule III of the Act, there must be a plain dispossession within the meaning of the Article. [P. 883, C 2.]

Hira Lal Sanyal—for Appellants.

Hemendra Nath Sen—for Respondent.

Judgment.—This suit has been decided adversely to the plaintiffs on the ground that it is barred by what is commonly called the special law of limitation, that is, the law of limitation as prescribed by the Bengal Tenancy Act. It seems to be overlooked at times, in applying the provisions of that Act, that it is one to amend and consolidate certain enactments relating to landlord and tenant and that, as its preamble shows, what was regarded as expedient was to amend and consolidate certain enactments relating to landlord and tenant.

S. 184 of the Act prescribes certain rules of limitation by a reference to the Schedule. But S. 184 as also Chapter XVI of which it is a part, is but a portion of this Code which governs the relations of landlord and tenant. In determining what Article 3 of Schedule III of the Bengal Tenancy Act means, we must not leave out of sight the purpose and scope of the Act. It was not the design of the Act, as I understand it, to deprive a tenant of the rights that he otherwise possesses against a third person between whom and himself there was no relationship of landlord and tenant. It was only intended to deal with such rights as existed between landlord and tenant.

I am aware that very extended operation has been attributed to Article 3, in one case *Aminuddin* v. *Ulfat-un-nissa* (1) at any rate. But that is contrary to the general current of decisions and to the spirit of the Act. To deprive a tenant of his right of suit there must be a plain dispossession within the meaning of Art. 3 of the Schedule. Bearing in mind what it was that the Act did intend, in my opinion there is no justification here for saying that there was such a dispossession as the learned Subordinate Judge in reversal of the Munsif has thought fit to find. Therefore, his decree must be set aside and the case must go back to the lower Appellate Court, in order that it may there be determined on the merits apart from the special law of limitation which has no application.

Costs will follow the result.

V.B./R.K.

Appeal allowed; Case remanded.

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(1) (1908) 13 C.W.N. 108=9 C.L.J. 131.

A. I. R. 1916 Calcutta 883 (2)

GREAVES AND WALMSLEY, JJ.

Abdul Ali Choudhury and *others*—Petitioners

v.

Emperor—Opposite Party.

Criminal Revn. No. 1159 of 1915, decided on 28th October, 1915, against the Order

of Sessns. Judge, Sylhet, dated 28th July, 1915.

Criminal Procedure Code (5 of 1898), S. 106—Findings necessary for order under S. 106—Findings not sufficiently clear—Conviction under S. 143, Indian Penal Code—High Court has jurisdiction to set aside order in revision—Indian Penal Code (45 of 1860), S. 143.

Where the findings of the lower Courts do not sufficiently and clearly show that the acts for which the accused were convicted under S. 143, Indian Penal Code, necessarily involved a breach of the peace or any evident intention of committing the same, a High Court in revision would set aside an order under S. 106, Criminal Procedure Code, binding down the accused to keep the peace. [P. 884, C. 2.]

A. Rasul and *Babu Hemendra Kumar Das*—for Petitioners.

Orr, (*Deputy Legal Remembrancer*)—for the Crown.

Judgment.—The accused in this case were convicted under S. 143, Indian Penal Code, and bound down under S. 106, Criminal Procedure Code. It has been urged before us that the order under S. 106, Criminal Procedure Code, is without jurisdiction as there was no finding of any likelihood of a breach of the peace being committed or of any evident intention of committing acts which would involve a breach of the peace. The Appellate Court came to no finding upon this point. All that is said in the judgment of the Appellate Court is that the appellants formed with others an unlawful assembly with the common object set forth in the charge. In the lower Court the findings are as follows:—

"The common object of this unlawful assembly was by means of criminal force or show of criminal force to take possession of the plot or land cultivated by Syam Bap."

There is a further finding to this effect:

"There can be no doubt that had not Afruz Bakht Chowdhry directed Syam Bap and his other tenants not to resist the accused but no remain quietly in Alphu Moral's *bari*, there might have been a serious riot as Afruz Bakht is, according to the evidence on the record, the leading *zemindar* in Aurangpur and must have many men under his control. Obviously the accused persons thought that they had their enemy at their mercy as, if on account of having been bound down under S. 107, Criminal Procedure Code, he decided not to resist their attacks they could do what they liked in seizing land by force, while if he did resist their armed attack by sending a similar body of men and a riot ensued, they would be able to get him mulcted of the amount of Rs. 5,000."

Various decisions have been quoted before us, but it seems to us that the law is succinctly and accurately laid down in *Jib Lal Gir* v. *Jogmohan Gir* (1), where it is said that

"Being a member of an unlawful assembly does not necessarily involve a breach of the peace. It does, however, involve an apprehension that a breach of the peace may result. Nor does a conviction of an offence under S. 143 of being a member of an unlawful assembly necessarily amount to a conviction of 'taking unlawful measures with the evident intention of committing a breach of the peace. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the persons convicted amounted to this, or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of Revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same."

We have already referred to the findings in this case and they do not seem to us to sufficiently and clearly show that the acts for which the accused were convicted under S. 143 necessarily involve a breach of the peace or any evident intention of committing the same.

The Rule is, therefore, made absolute and the order under S. 106, Criminal Procedure Code, set aside.

V.B./R.K.

Rule made absolute.

(1) (1899) 26 Cal. 576.

A. I. R. 1916 Calcutta 884

CHATTERJEE AND CHAPMAN, JJ.

Rukmini Koeri —Defendant—Appellant.

v.

Nilmani Bandyopadhyaya—Plaintiff—Respondent.

Appeal No. 34 of 1913, decided on 29th March, 1915, from the Original Decree of Sub-Judge, first Court, 24 Parganas, dated 12th August, 1912.

Transfer of Property Act (4 of 1882), S. 59—What is sufficient attestation in case of *Pardanashin* lady is stated—Presence of witness is the main thing.

A mortgage-deed was executed by a *pardanashin* lady. It was attested by two witnesses, one of whom was her husband who actually saw the signature being made, the other one was present in the same room with the lady just outside a screen and he knew her voice and heard her say "yes" when the document was explained to her:

Held, that under the circumstances the mortgage-deed was duly attested in accordance with law. [P. 885, C. 1 & 2.]

Semble.—The criterion in such cases is the presence of the witnesses at the time of the execution. [P. 885, C. 1.]

Caspersz, *Haribhusan Mukerjee*, *Ambica Pada Choudhury* and *Rai Guru Saran Persad*--for Appellant.

Jogesh Chandra Roy, *Brojo Lal Chakravarti* and *Sitaran Banerji* for, Respondent.

Judgment.—This appeal arises out of a suit on a mortgage-bond executed by a *pardanashin* lady. The signature on the document is admitted, but the lady says it was not explained to her. That it was explained to her, is proved by her husband whom we have examined and also by the witnesses for the plaintiff. The receipt of the consideration is also proved. The objection mainly pressed by learned Counsel on her behalf is that the document has not been duly attested in accordance with law. He relies on the recent decision of the Privy Council in the case of *Shamu Patter* v. *Abdul Kadir* (1) which confirms the decision of the Madras High Court *Shamu Patter* v. *Abdul Kadir* (2). The learned Judges of the Madras High Court held that a mortgage-deed is attested by witnesses within the meaning of S. 59 of the Transfer of Property Act, only when such attesting witnesses are actually present at the time of the execution and that the provisions of the section are not complied with when the witnesses are not present at the execution but attest on subsequent acknowledgment. The same view had been taken by this Court in several cases arising under S. 59 of the Transfer of Property Act: see *Girindra Nath* v. *Bejoy Gopal* (3) and *Abdul Karim* v. *Salimun* (4). The decision of the Privy Council, therefore, does not make any departure from the Calcutta view of the case. The criterion is the presence of the witnesses at the time of the execution. In this case the husband actually saw the signature being made and the husband is one of the attesting witnesses. The witness Surendra says he was present just outside the screen in the same room with the lady and he knew her voice and heard her say *hun* (yes) when the document was explained to her. We think this presence of Surendra in the same room with the executant and at the time of the execution which is admitted and proved, taken with the presence of Kuldip Sahai who saw her put her signature, is sufficient to meet the requirements of the law. This is the view that was taken in the case of *Harmongal Narain Singh* v. *Ganaur Singh* (5), *Isri Prosad* v. *Rai Gunga Prosad Singh Bahadur* (6) and *Sarurjigar Begam* v. *Baroda Kant Mitter* (7) and we do not think that the Privy Council has laid down a different law.

We are sorry to say that the conduct of Babu Kuldip Sahai who is an enrolled Mukhtear of this Court in this matter is not beyond reproach and he cut a rather sorry figure in the witness-box. As he has said, however, that he has practically retired from practice we do not think it necessary to press this matter further.

In the result we dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) (1912) 35 Mad. 607 = 16 I. C. 250 = 39 I. A. 218 (P. C.).
(2) (1908) 31 Mad. 215.
(3) (1899) 26 Cal. 246.
(4) (1900) 27 Cal. 190.
(5) (1909) 3 I. C. 309.
(6) (1909) 3 I. C. 311.
(7) (1910) 37 Cal. 526 = 5 I. C. 539.

A. I. R. 1916 Calcutta 885

CHATTERJEE AND CHAPMAN, JJ.

Naba Gopal Goswami — Petitioner — Appellant.

v.

Sri Gopal—Defendant—Respondent.

Appeal No. 23 of 1912, decided on 24th March, 1915, from the Original Decree of Dist. Judge, Nadia, dated 22nd November, 1911.

(a) Probate and Administration Act (5 of 1881), S. 51—Probate proceeding—Existence of minor heir of deceased coming to knowledge of Judge—Notice must be issued upon him and guardian *ad litem* appointed.

In a Probate proceeding as soon as the Judge is informed of the existence of a minor heir of the deceased in case of intestacy, it becomes incumbent upon him to issue notice upon the minor and to have a guardian *ad litem* appointed for him. *Walter Rebells* v. *Maria Rebells*, 2 C. W. N. 100, foll. [P. 886, C, 2.]

(b) Probate and Administration Act (5 of 1881), S. 51—Letters of Administration—Grant of—Revocation proceedings started on application of maternal uncle of minor—Guardian *ad litem* appointed—Application for revocation withdrawn applicant alleging satisfaction as to genuineness of will—Revocation proceedings struck off—Letters of Administration granted—Held representation by maternal uncle of minor was not effected for purpose of order ultimately passed, on order in solemn form.

Whereafter the grant but before the issue of Letters of Administration in respect of an alleged will, a revocation proceeding was instituted on the application of a maternal uncle of

the minor heir of the deceased but when a guardian *ad litem* for the minor had been appointed in the proceeding, the maternal uncle made an application for withdrawing his application for revocation on the allegation that he had made inquiries and had been satisfied that the will was genuine, whereupon the Judge struck off the revocation case and issued Letters of Administration; on the application for revocation by the heir on attaining majority:

Held, that the representation of the maternal uncle of minor heir in the revocation case could not be said to have been effective for the purpose of making the order ultimately passed by the Judge an order in solemn form, as the revocation case was quite a separate case from the Probate case. [P. 886, C. 2.]

(c) Probate and Administration Act (5 of 1881), S. 51—Probate proceeding—Minor not cited nor represented—He is entitled to have will proved in solemn form in his presence.

A minor, who was neither cited nor properly represented in a Probate proceeding by which his interests have been affected, is entitled to come in (even after a great lapse of time) and to have the will proved in solemn form in his presence. [P. 887, C. 1.]

Ram Chandra Mozumdar, *Brojo Lal Chakrabutty*, *Govind Chunder Chakrabatty*, *Herambo Chandra Guha* and *Budhar Haldar*—for Appellant.

Provas Chunder Mitra and *Baranasibasi Mukerjee*—for Respondent.

Judgment.—This appeal arises out of an application for revocation of Letters of Administration granted to one Ram Gopal Bhattacharjee in respect of the will by one Raghupati Bhattacharjee, his deceased brother. An application was made in August 1896 and in this application the only heir left by the deceased was not named, nor was any citation issued upon her. Upon *ex parte* evidence of another brother of the applicant named Sripati Bhattacharjee Letters of Administration were ordered to be granted. Immediately thereafter, the learned Judge was informed by an anonymous letter that there was a daughter in existence and that the will was not a genuine one. The learned Judge then issued notice upon the maternal uncle and the maternal grandmother of the daughter of the deceased. The maternal uncle Durga Das then made an application on his behalf for the revocation of the Letters of Administration which had not then been issued. Durga Das thereafter made an application for the appointment of a guardian *ad litem* of the minor and an order to that effect seems to have been made. Then a few days after, Durga Das made an application for withdrawing his application for revocation on the allegation that he had made enquiries and had been satisfied that the will was a genuine one. Upon this application being made Durga Das's revocation case was struck off and Letters of Administration were issued.

It is contended by the learned Vakil for the respondent that this was tantamount to a contentious proceeding in which the minor was represented, that in fact the application was made on behalf of the minor herself and that after attaining majority she was not entitled to object to the ultimate grant that was made. But the difficulty that we find in accepting this contention is this, namely, that as soon as the learned Judge was informed of the existence of the minor heir of the deceased in case of intestacy, it was his duty to issue notice upon the minor and to have a guardian *ad litem* appointed for her. It was so held in the case of *Walter Rebells* v. *Maria Rebells* (1). It is stated in that case that if an application is made for the Probate of a Will which affects the interests of a minor, the proper course is to serve the minor with a notice and have a proper guardian *ad litem* appointed for him. Now in this case, it is admitted that the minor was not served with notice. It might be that the service of notice on the minor, who was then living in the custody of the applicant, for Letters of Administration would not have been of much use still there was that want of notice. There was, however, that order for the appointment of a guardian *ad litem* but the appointment was made in the revocation case which was a quite separate case from the Probate case. If this guardian *ad litem* had been appointed in the Probate case, it would have been the duty of the Court to proceed with the case as a contentious case in the presence of the minor represented by her guardian *ad litem*. In that case fresh evidence would have had to be taken and an order made upon the contention. That has not been done. Therefore the representation by Durga Das cannot be said to have been effective for the purpose of making the order ultimately passed an order in solemn form.

Another application was made by another relation of the minor named Nakuleswar Bhattacharjee on the same allegation as was made by Durga Das. In this case Ram Gopal put in a written statement. Therein he stated that this Nakuleswar was indebted

(1) (1898) 2 C. W. N. 100.

to the deceased testator and tried to get himself discharged from the debts due to the estate and failing therein he threatened to harass him with litigation regarding the will. There is evidence in this case by a nephew of Nakuleswar to the effect that Nakuleswar was made to give up that proceeding ultimately, when it was before the High Court, on the consideration of his getting back all the ornaments which he had pledged with Raghupati and of his being paid a certain sum of money. There is no order in the lower Court by which Nakuleswar was allowed to proceed as a next friend of the minor and in its absence we do not think that the interests of the minor were properly represented by Nakuleswar or that the minor was at all represented in this litigation. If the minor was neither cited nor properly represented in this litigation, she is entitled to come in and to have the will proved in solemn form in her presence. If the will is a genuine one, it will be proved in her presence. Of course there may be paucity of evidence on account of the lapse of time but however great the lapse of time may be, such evidence as is available will be considered and such an order made as will leave no reason for the complaint that the case of the minor has never been properly placed before the Court.

In this view of the case we think that the Court below should have made an order for revocation and ordered the will to be proved in solemn form.

The appeal is, therefore allowed, and the decree of the lower Court is set aside. Costs of this appeal will be costs in the cause. We assess the hearing-fee at three gold *mohurs*.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 887

MOOKERJEE AND BEACHCROFT, JJ.

Jamadar Singh—Defendant and Appellant—Applicant.

v.

Jagat Kishore Acharya Chowdhury—Plaintiff—Respondent—Opposite Party.

Appeal No. 733 of 1914, and Rule No. 656 of 1915, decided on 20th July, 1915, from the Appellate Decree of Sub-Judge, Dacca, dated 27th November, 1913.

(a) Bengal Tenancy Act (8 of 1885), S. 153 (*a*) —"Amount claimed in suit"—Expression refers to rent for recovery whereof suit is instituted.

The expression "amount claimed in the suit" which occurs in Clause (*a*) of S. 153, Bengal Tenancy Act, must be read with the words "in any suit instituted by a landlord for the recovery of rent" and has plainly reference to rent for the recovery whereof the suit has been instituted. [P. 888, C. 1.]

(b) Bengal Tenancy Act (8 of 1885), S. 153—Bar to appeal cannot be evaded by joining claim for money with a claim for rent.

The bar to an appeal provided in S. 153 of the Bengal Tenancy Act cannot be evaded by the joinder of a claim for money with a claim for rent. [P. 888, C. 1.]

(c) Bengal Tenancy Act (8 of 1885), S. 153—Suits for recovery of rent and recovery of damages for breach of contract—Second Appeal not provided for—Bar under S. 153 cannot be evaded by amalgamating two claims in one suit for rent.

Where there would have been no second appeal if two different suits had been instituted for the recovery of rent and the recovery of damages for breach of a contract, by reason of S. 153, Bengal Tenancy Act, and S. 102, Civil Procedure Code, the bar provided by these two sections could not be evaded by amalgamating the two claims in one suit for rent. [P. 888, C. 1.]

(d) Civil P. C. (5 of 1908), S. 115—Error of law is no ground for revision.

An error of law committed by a Subordinate Court in deciding a case is not a ground for interference by the High Court in the exercise of its revisional jurisdiction. [P. 888, C. 2.]

Sasankajiban Roy—for Appellant.

Satish Chunder Ghose—for Respondent.

Mookerjee, J.—The objection taken by the respondent to the competency of this appeal raises a question of first impression. The plaintiff instituted this suit against the defendant for recovery of a sum of Rs. 132-8-0. He claimed Rs. 82-8-0 as arrears of rent and damages; and he added thereto a claim for Rs. 50 as damages for breach of contract. His allegation was that the defendant had failed to prepare and deliver certain papers as he had undertaken to do, and had made himself liable under the terms of the agreement between them to pay to the plaintiff the sum of Rs. 50. The defendant protested against the joinder of these claims in one suit; but his objection was overruled. The case was tried on the merits, and a decree was ultimately made against him. That decree has been confirmed on appeal by the Subordinate Judge. On the present appeal, the defendant seeks to contest the propriety of the decision of the Court of Appeal below.

A preliminary objection is taken on behalf of the respondent that the appeal is incompetent under S. 153 of the Bengal Tenancy

Act. That section provides that an appeal shall not lie from any decree passed on appeal in any suit instituted by a landlord for recovery of rent, where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100, unless the decree has decided one or more of several specified questions. The appellant contends that as this is a suit instituted by a landlord for recovery of rent and the amount claimed in the suit exceeds Rs. 100, the appeal is competent. In our opinion, this argument is based upon a superficial reading of S. 153. No doubt, the suit has been instituted by a landlord for recovery of rent, although he has joined to the claim for rent a claim for damages for breach of contract; but the amount claimed on account of rent does not exceed Rs. 100. It is plain that the expression "the amount claimed in the suit," which occurs in Clause (*a*) of S. 153, must be read with the words "in any suit instituted by a landlord for the recovery of rent"—which find a place in the introductory paragraph of the section. The "amount claimed" has plainly reference to the rent for the recovery whereof the suit has been instituted. The term 'rent' may possibly include whatever is recoverable as rent under the provisions of the Bengal Tenancy Act as also sums ancillary to rent, such as interest on rent in arrears, or, statutory damages for non-payment of rent. But the Legislature could never have intended that the bar provided in S. 153 should be evaded by the joinder of a claim for money with a claim for rent. The contention of the defendant in substance is that although there would have been no second appeal, if two different suits had been instituted for the recovery of the arrears of rent and the recovery of damages for branch of contract by reason of S. 153, Bengal Tenancy Act, and S. 102, Code of Civil Procedure, he is entitled to evade the provisions of both these sections because the two claims have been amalgamated in one suit. We are clearly of opinion that this argument should not previal. The result follows that the appeal is barred under S. 153, Bengal Tenancy Act in so far as the claim for rent is concerned. In respect of the claim for damages for breach of contract, there can be no question that the appeal is equally barred, under S. 102, Civil Procedure Code.

We have finally been invited to interfere with the decision of the Subordinate Judge in the exercise of our revisional jurisdiction.

We are of opinion that this is clearly a a case where the Court cannot interfere under S. 115, Civil Procedure Code. If the contention of the appellant be conceded to be well founded, the utmost that can be said is that the Subordinate Judges has committed an error of law: but that is undoubtedly not a ground for interference in the exercise of our revisional jurisdiction. In fact, if we were to accede to the prayer of the appellant, we should allow him an appeal in the disguise of revision, where an appeal is expressly barred by statutory provisions.

The result is that the appeal is dismissed with costs and the Rule is discharged.

V./B.R.K

Appeal dismissed; Rule discharged.

A. I. R. 1916 Calcutta 888

MOOKERJEE AND ROE, JJ.

Keshari Chand Surana and *others*—Defendants—Appellants.

v.

Asharam Mahato — Plaintiff — Respondent.

Appeal No. 3874 of 1912, decided on 27th May, 1915, from the Appellate Decree, of Dist. Judge, Cachar, dated 17th August, 1912.

(a) Negotiable Instruments Act (26 of 1881), Ss. 4 and 5—*Shahjog hundi* is neither a bill of exchange nor promissory note.

A *shahjog hundi* is not a bill of exchange nor a promissory note. It is only payable to the respectable holder and not equivalent to a *hundi* payable to a bearer. [P. 890, C. 2.]

(b) Stamp Act (2 of 1899), S. 35 (*a*)—Attested *shahjog hundi* is a bond within S. 6 and is admissible on payment of duty.

A *shahjog hundi* attested by a witness is a bond within the meaning of the Indian Stamp Act and is admissible in evidence upon fulfilment of the conditions mentioned in S. 35 (*a*) of the Act. [P. 890, C. 2.]

Haradone Chatterjee—for Appellants.

Manmatha Nath Mookerjee and *Satindra Nath Mookerjee* for *Satis Chunder Sen*—for Respondent.

Judgment.—This is an appeal by the defendants in a suit for recovery of money due on five instruments described in these proceedings as *hundis*. The substantial question in controversy between the parties is, whether these instruments have been properly admitted in evidence under S. 35 (*a*) of the Indian Stamp Act. The

documents are engrossed on paper which bears an impressed stamp of four annas each. They are, each of them, attested by a witness, and the money secured thereby is not payable on order or demand. The contention of the appellants is that they were not admissible in evidence even upon fulfilment of the conditions mentioned in S. 35 (*a*) of the Indian Stamp Act. That section is in these terms:

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped." Then follows Clause (*a*) providing that any such instrument, not being an instrument chargeable with a duty of one anna (or half an anna) only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

It is consequently plain that unless the instruments before us fall within the description of a bill of exchange or a promissory note or an instrument chargeable with a duty of one anna or half, an anna only, they were admissible in evidence on payment of duty and penalty. There is no controversy that the instruments do not fall within any of the classes of documents chargeable with a duty of one anna or half an anna only. The question ramains, whether they are bills of exchange or promissory notes; the answer must depend on the terms of the documents. The following is a literal translation of one of them :—

"*Hundi*:

Stamp -/4/-

1½ Sri Ganeshji helps.

1½ to Bhai Kesri Chand Sugan Chand of the good and prosperous place Calcutta—by Kesri Chand Sugan Chand of the port of Calcutta whose compliments please accept. Further (we draw) *hundi* here for Rs. 400 in words four hundred rupees full double of two hundred rupees, the half thereof, in favour of Bhai Buldeo Das Asaramji. Please pay after 511 five hundred and eleven days from *Miti Sawan* I *Sudi* 5 Thursday, value in Company's coin to the respectable holder. *Miti Sawan* I *Sudi* 5 *Sambat* 1966 Thursday.

(Sig.) KESRI CHAND SEPANI.

Witness – MATHURA DASS KATHARI."

(On back).

"———

400/-

—

(Torn) Due 15th December, 1910.

74½ to Kesri Chand Sugan Chand."

The term bill of exchange, as defined in Clause (2) of S. 2 of the Indian Stamp Act, means a bill of exchange, as defined by the Negotiable Instruments Act, 1881, and includes also a *hundi* and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any person for, any sum of money. The expression "bill of exchange" is defined in the Negotiable Instruments Act to mean an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. The instrument set out above does not fall within this definition of a bill of exchange, for a two-fold reason, *first*, because it does not contain an unconditional order for payment and, *secondly*, because a bill of exchange contemplates two persons a drawer and a drawee. Nor does the instrument fall within the wider definition given in S. (2), Clause (2) of the Indian Stamp Act, because it is not a document which entitles the person named therein to payment by any other person of, or to draw upon any person for, any sum of money. It is also clear that the instrument is not a promissory note as defined in Clause (22) of S. 2 of the Indian Stamp Act read with Ss. 4 and 5 of the Negotiable Instruments Act. A promissory note is defined there to be an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. The document contains a qualified promise to pay, which takes it out of the definition [*Fisher* v. *Calvert* (1), *Mortgage Insurance Corporation Ltd.* v. *Inland Revenue, Commissioners* (2)]. There is no unconditional

(1) (1879) 27 W. R. 301.
(2) (1888) 21 Q. B. D. 352=57 L. J. Q. B. 630.

undertaking to pay in this case, nor is the instrument payable to the bearer, because a *shahjog hundi*, which is the name given to the instrument before us, is only payable to the respectable holder and is not equivalent to a *hundi* payable to the bearer [*Davlatram Shriram* v. *Bulakidas Khemchand* (3), *Ganesdas Ramnarayan* v. *Lachminarayan* (4), *Thakur Das* v. *Futteh Mull* (5), *Bhuputram* v. *Hari Prio Coach* (6) and *Lalla Mal* v. *Kesho Das* (7)]. The document is, in our opinion, a bond, although it is called a *hundi* [*Venku* v. *Sitaram* (8)]. This is plain from S. 2, Clause (5)(*b*) of the Indian Stamp Act, where a bond is defined as an instrument, attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another. The view we take of the nature of this instrument is identical with that adopted by Fletcher, J., in the case of *Jallan Chand* v. *Asaram*, *Assaram* v. *Kesri Chand* (9).

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(3) (1869) 6 B. H. C. R. 24.
(4) (1894) 18 Bom. 570.
(5) (1905) 7 B. L. R. 275=16 W. R. 3.
(6) (1901) 5 C W. N. 313.
(7) (1904) 26 All. 493.
(8) (1905) 29 Bom. 82=6 Bom. L. R. 841.
(9) (1916) 33 I. C. 247.

A. I. R. 1916 Calcutta 890

SHARFUDDIN AND CHAPMAN, JJ.

Tulsi Raut—Applicant—Appellant.

v.

Nabi Bux and *others*—Decree-holders—Respondents.

Appeal No. 496 of 1914, decided on 16th December, 1915, from the Order of Dist. Judge, Mozafferpur, dated 31st July, 1914.

Decree—Execution — Several auction-purchasers—Order setting aside sale reversed at instance of one auction-purchaser—Order does not stand good even against other auction-purchasers.

When on an appeal preferred by one of the auction-purchasers at an execution sale, an Appellate Court reverses the order of the first Court setting aside the sale, the order of the first Court does not stand good even against the other auction-purchasers who did not appeal.

[P. 890, C. 2.]

Dwarkanath Mitter—for Appellant.

Harihar Prasad Singh—for Respondent.

Judgment.—This is an appeal against the order of the District Judge of Mozaffer pur, dated the 31st July, 1914, setting aside an order of the Munsif, dated the 23rd April, 1914.

An application was made to the Munsif under O. 21, R. 90, Civil Procedure Code, and S. 47 of the Code, on the allegation that the *ex parte* decree in the execution of which the land was sold was obtained fraudulently and that the land was sold fraudulently, which the decree-holder purchased himself in the name of his servant and relation Nabi Bux. The first Court held in favour of the applicant and set aside tho sale on the grounds, *first*, that the decree on the strength of which the sale had taken place having been obtained fraudulently and having been set aside, all further proceedings after the decree were null and void; *secondly*, that there was fraud in the publication of the necessary notice of the sale which had caused inadequacy of price; and *thirdly* that the real purchaser was the decree-holder himself and that he purchased *benami* for himself in the name of Nabi Bux. The purchaser thereupon appealed to the District Judge, who has set aside the order of the Munsif. The order of the District Judge is now the subject of appeal.

On behalf of the appellant, many grounds were taken in the memorandum of appeal; but the learned Pleader appearing for him has confined himself only to two grounds mentioned therein, namely, to grounds Nos. 4 and 5. Ground No. 4 has no substance in it. There is a distinct finding of the lower Appellate Court to the effect that the auction-purchaser and the decree-holder have not identical interest and that the auction-purchaser was an innocent purchaser. He says:

"the reasons for holding that he is the real purchaser and the auction-purchaser a *benamidar* are insufficient and the auction-purchaser positively denies that this is so."

The 5th ground is that there are three auction-purchasers. Two of them did not appeal to the District Judge. It is, therefore, contended that the sale, so far as these two men are concerned, should be set aside. We do not think that this can be done. It is really one sale in execution of the decree and the property was knocked down to three individuals. It is impossible to make a division in the sale with regard to a portion

of the property and to allow the sale to stand with regard to the other portion.

For these reasons we dismiss the appeal with costs, two gold *mohurs*.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 891 (1)

FLETCHER AND WALMSLEY, JJ

Ashmatulla Sircar and *others*—Judgment-debtor—Appellants.

v.

Pan Mahmud Chowdhury — Decree-holder--Respondent

Appeal No. 500 of 1914, decided on 28th June, 1915, against the Order of Dist. Judge, Rungpore, dated 23rd May, 1914.

Civil P. C. (5 of 1908), S. 60 (c)—Agriculturist, who is, stated—Whole house is protected—Burden of proof is on judgment-debtor.

S. 60 (*c*) of the Code of Civil Procedure, 1908, protects from attachment in execution the whole house occupied by an agriculturist who belongs to the class of common agriculturists such as live in Bengal, that is, the *raiyat* who tills the field and whose main source of livelihood is cultivation.

Persons who have a small cultivation in land, but who have apparently been engaged in the jute business and also as middlemen, are not agriculturists within the meaning or S. 60 (*c*), Civil Procedure Code.

The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor.

[P. 891, C. 1 & 2.]

Jotendranath Roy - for Appellants.

Mohini Mohan Chakrabutty—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned District Judge of Rungpore reversing the decision of the Subordinate Judge. The appellants before us are the judgment-debtors, the respondent being the decree-holder. The only point that is involved in this appeal is whether the judgment-debtors are agriculturists and, as such, are entitled to claim exemption of six corrugated iron huts which have been attached in execution of a decree against them. S. 60 (*c*) of the Code protects from attachment in execution of the whole house occupied by an agriculturist, the common agriculturist such as lives in this country, that is, the *raiyat* who tills the field. The class of tenant-farmer in the western countries is practically unknown here. These alleged agriculturists in the present case have a small cultivation in the land; but apparently they have been engaged in the jute business and also as middlemen. The learned Judge has, on the evidence before him, found that these people are not agriculturists within the meaning of S. 60 (*c*) of the Code of Civil Procedure.

In that the learned Judge seems to be right. The cases in the Bombay High Court show that the protection given under S. 60 to the house of an agriculturist is, that his house should be maintained. It has been held that the protection applies only to the house occupied by an agriculturist in that capacity. I should doubt whether these alleged agriculturists who have got six corrugated iron huts, belong to the class of common agriculturists that are known in Bengal, whose main source of livelihood is by cultivation. It has also been held that the plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. The Judge, in any case, is entitled to hold that the judgment-debtors have not proved that they are agriculturists in the strict sense of the word as used in S. 60 (*c*), Code of Civil Procedure. The learned Vakil, who has appeared for the appellants, has quarrelled with the use by the learned Judge of the words "strict sense" as applied to agriculturists. That term has, however, been used in the cases in Bombay and it seems to me to be a fairly accurate definition of the class of agriculturists that is meant to be protected by S. 60 (*c*), Code of Civil Procedure. I think the learned Judge was, on the evidence before him, entitled to come to the finding as he did, that these judgment-debtors were not agriculturists within the meaning of S. 60 (*c*). The present appeal, therefore, fails and is dismissed with costs, one gold *mohur*.

Walmsley, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 891 (2)

MOOKERJEE AND ROE, JJ.

Sris Chandra Datta Chaudhuri and *others*—Defendants—Appellants.

v

Mahima Chandra Datta Chaudhuri and *another*—Plaintiffs—Respondents.

Appeal No. 1931 of 1911, decided on 11th May, 1915, from the Appellate Decree of Sub-Judge, Backergunge, dated 26th April, 1911.

(a) Partition—Suit for—Permanent tenure-holders—Rights of.

Permanent tenure-holders under some of the owners of a joint estate are entitled to seek partition as against the co-sharers of their lessors in the estate. 24 Cal. 575 and 37 Cal. 918 (P. C.), foll. [P. 892, C. 2.]

(b) Partition—Suit for—Property wherein each party does not claim interest cannot be included.

A partition suit can include no property wherein each of the parties to the suit does not claim an interest. Case-law discussed. [P. 893, C. 1.]

(c) Partition—Suit for — Co-sharers — Co-sharers in possession of different parcels of land by mutual arrangement—Transfer by co-sharer of his share in parcel in possession of co-sharers —Transferee can maintain suit for partition of parcel.

Where one of the co-owners, who are by mutual arrangement in possession of different parcels of land included in their joint property, transfers his share in a parcel in the possession of his co-sharers, the transferee is entitled to maintain, as against them, a suit for partition of that parcel. 24 Bom. 128, dist. [P. 893, C. 2.]

Jogesh Chunder Roy and *Gunada Charan Sen* —for Appellants.

Brojendru Nath Chatterjee—for Respondents.

Mookerjee, J.—This is an appeal by the first three defendants in a suit for partition of joint property. The substantial question now in controversy between the parties is, whether the suit as framed is maintainable.

The disputed property, the subject-matter of the partition claimed by the plaintiffs, is included in an estate Azimpur which has been divided and formed into five separate estates. One of these divisions is called Choi Hissya, wherein the sixth defendant has a share. The plaintiffs have acquired the position of permanent tenure-holders under the sixth defendant in a *taluq* Ananda Bose and a *howla* Chandraprabha; they claim an one-anna nineteen-and-a-half-*gandas* and one *til* share in the *howla* and *taluq* mentioned. Their allegation is that the lands now in suit, which are comprised in *Mauza* Icholi, are included in the Choi Hissya estate and have been separated by metes and bounds so as to be capable of partition without reference to other lands of the estate. The defendants, who are some of the proprietors of the estate and the lessors under them, contend that the plaintiffs are not entitled to maintain this suit for partition in respect of these lands alone, but are bound to claim partition of all the lands in the Choi Hissya estate, although the plaintiffs have no interest in any lands other than those now in dispute. The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision and made a preliminary decree for partition. In our opinion the decree of the Subordinate Judge is manifestly correct.

It cannot be disputed, in view of the decision of the Full Bench in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (1) and of the Judicial Committee in *Bhagwat Sahai* v. *Bipin Behary Mitter* (2), that the fact that the plaintiffs are permanent tenure-holders and seek partition as against the co-sharers of their lessors in the estate, is no objection to the grant of relief to them. But it has been argued on behalf of the defendants-appellants that as, by private arrangement amongst the co- proprietors, separate parcels of the lands of the Choi Hissya estate have been in occupation of different proprietors, the plaintiffs as lessees under some of them should not be allowed to maintain a suit for partition of the lands included in the one *mauza* wherein alone they are interested and thereby to disturb the arrangement made by the superior landlords. The contention in substance is that the plaintiffs are in no better position than their grantor and as their grantor would not in ordinary circumstances have been allowed to maintain a suit for partition as against his co-sharers in respect of a portion only of joint property, the plaintiffs are under a similar disability. This argument has been controverted as unsound on behalf of the respondents and the principle has been challenged as to comprehensive that a suit for partition must in all circumstances include all the joint properties owned by the parties to the suit. In support of this view reliance has been placed upon the decisions in *Padmamani Dasi* v. *Jagadamba Dasi* (3), *Punchanun* v. *Shib Chunder Mullick* (4) *Ram Mohan Lal* v. *Mul Chand* (5), *Syed Habibur Rasul* v. *Ashita Mohan Ghosh* (6) and *Hem Chandra Chowdhury* v. *Hemanta Kumari Debi* (7). We may state at once that it is not necessary for the purposes of the present case to maintain the view that a suit for partition

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(1) (1897) 24 Cal. 575.
(2) (1910) 37 Cal. 918=7 I. C. 549=37 I. A. 198 (P.C.).
(3) (1871) 6 B. L. R. 134.
(4) (1887) 14 Cal. 835.
(5) (1906) 28 All. 39.
(6) (1908) 12 C. W. N. 640.
(7) A. I. R. (1914) Cal. 212=23 I. C. 442

need not embrace all the joint properties owned by the parties thereto. We shall accordingly assume that as an ordinary rule, a suit for partition must include all the properties jointly held by the parties: *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (8), *Jogendra Nath Rai* v. *Baldeo Das* (9), *Mahomed Fazlur Rahman* v. *Mahomed Fayzur Rahman* (10), *Satya Kumar* v. *Satya Kripal* (11) and *Mansaram* v. *Ganesh* (12). But as a necessary corollary to this rule, we have the complementary principle that a partition suit can include no property wherein each of the parties to the suit does not claim an interest: *Ram Taran Nag Mozumdar* v. *Hari Charan Nag Mozumdar* (13), *Radha Kanta Shaha* v. *Bipro Das Roy* (14), *Ram Lochhi Koer* v. *Collingridge* (15), *Kailash Chandra Das* v. *Nityananda Das* (16), *Uma Sundari Debi* v. *Benode Lal Pakrashi* (17), *Ram Mohan Lal* v. *Mul Chand* (5) and *Subba Row* v. *Anantanarayana Iyer* (18). But on behalf of the appellants this principle has been assailed as inequitable; we are unable, however, to give effect to this criticism.

Take one concrete illustration. Suppose two properties A and B are jointly owned by X and Y. By mutual arrangement X holds possession of A, while Y holds possession of B, but no final and definitive partition is effected between the parties. Y, though in possession of B, transfers to Z his one-half share in A. Is Z entitled to claim partition as against X? There is no room for controversy that Z is entitled to maintain a suit for this purpose, though the result may be that X will thereby be driven to sue Y for partition of B. But this does not involve any hardship upon X; when he consented to take exclusive possession of A and allowed his co-owner Y to occupy B, he did so with full knowledge that the arrangement might be disturbed by partition, whether that partition was effected at the instance of Y or of a transferee from Y. If this view were not maintained, it would be necessary to hold that when by mutual arrangement, co-owners are in possession of different parcels of land included in their joint property, their right of alienation is restricted thereby. In the case mentioned, as soon as Y transfers his interest in A to Z, A ceases to be part of the joint property owned by X and Y and acquires the character of joint property held by Y and Z; at the same time, B retains its character of joint property owned by X and Y. Consequently in respect of A either X or Z is entitled to claim partition against the other; and a similar position must be maintained with regard to Y. In the case before us, it has been urged that the plaintiffs should not be granted relief till they instituted a suit for partition, not merely of the lands comprised in *Mauza* Icholi wherein alone they are interested as permanent tenure-holders, but also in ninety-nine other *mauzas* which are comprised in the Choi Hissya *Zemindary*, and wherein they have no interest at all. To give effect to this contention would be to affirm the principle that the plaintiffs can institute a suit for partition in respect of property in which they possess no interest whatsoever; no conceivable theory has been suggested to support such a view, while S. 44 of the Transfer of Property Act clearly points to the contrary conclusion. We may add that reference was made in the course of argument to the case of *Shivmurteppa* v. *Virappa* (19), which is plainly distinguishable on the ground that there the subject-matter of the litigation was co-parcenary property held by members of a joint Mitakshara family.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

We may mention that an objection has been raised before us in respect of parcel No. 75. The parties are agreed that the question whether parcel No. 75 is liable to be partitioned as included in *Mauza* Icholi in the Choi Hissya *Zemindary* should remain open for determination by the Court below before the final decree for partition is made; a declaration to this effect will accordingly be inserted in the decree.

V.B./R.K.

Appeal dismissed.

(8) (1887) 14 Cal. 122.
(9) (1908) 35 Cal. 961.
(10) (1911) 10 I. C. 354.
(11) (1909) 3 I. C. 247.
(12) (1912) 16 I. C. 383.
(13) (1914) 22 I. C. 30.
(14) (1905) 1 C. L. J. 40.
(15) (1907) 11 C. W. N. 397
(16) (1909) 3 I. C. 21.
(17) (1907) 34 Cal. 1026.
(18) (1912) 14 I. C. 524.
(19) (1900) 24 Bom. 128.

A. I. R. 1916 Calcutta 894

MOOKERJEE AND BEACHCROFT, JJ.

Atimannessa Bibi—Plaintiff—Appellant.

v.

Abdul Sobhan and *others*—Defendants—Respondents.

Second Appeal No. 3561 of 1911, decided on 21st July, 1915, against the Decree of Dist-Judge, 24 Parganas, dated 18th September, 1911.

(a) Mahomedan Law— *Wakf—Mutwalli*— **Right of descendant of founder to be appointed** *mutwalli* **described—Religious office is not heritable but goes by appointment.**

A descendant of the founder of a *wakf* has a preferential claim to the office of *mutwalli*, but he does not become *mutwalli* by right of inheritance, he has to be appointed such by the *qadi*, who may supersede him if he is not qualified. [P. 895, C. 2 & P. 896, C. 1.]

No right of inheritance attaches to a religious endowment. It is by appointment that one officer succeeds to another appointment either by the original appropriator or by his successor or executor or by the superintendent for the time being, or failing all these, by the Ruling Power. 13 Bom. 555, foll. [P. 896, C. 1.]

(b) Bengal Regulation (4 of 1793), S. 15— Appointment of *mutwalli* **is matter of religious usage within S. 15.**

The appointment of a *mutwalli* to a *wakf* is a matter regarding religious usages and institutions within the meaning of S. 15 of Regulation IV of 1793 and must be determined with regard to the provisions of the Muhammadan Law on the subject. 13 W. R. 21, foll. [P. 900, C. 1.]

(c) Jurisdiction—Subordinate Judge is incompetent to deal with matters of *wakf*—**District Judge derives his right by virtue of S. 92, Civil P. C. in public** *wakfs*—**(Per** *Mookerjee, J.*)— **Held District Judge even must be authorised to act as** *qadi* **in matter of private** *wakfs*.

A Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf. [P. 900, C. 1.]

In respect of *wakfs* created for public purposes of a religious nature, a District Judge may be assumed to have been authorised, by virtue of S. 92 of the Civil Procedure Code of 1908, to discharge the functions of *qadi*. [P. 900, C. 2.]

Per *Mookerjee, J.*—In respect of private *wakfs* even a District Judge has no authority to exercise the functions of a *qadi*, the Local Government should authorize either District Judges or Subordinate Judges or even judicial officers of a lower grade to exercise the functions of a *qadi*. [P. 900, C. 2.]

(d) Civil P. C. (5 of 1908), S. 92—Suit by descendant of founder for declaration of being *mutwalli* **and for injunction against defendants appointed** *mutwalli* **by Dist. Judge in another suit—Held Subordinate Judge cannot supersede Dist. Judge's order—Held further** *wakf* **being found to be public trust, plaintiff's remedy was by suit under S. 92 and get herself appointed on strength of her preferential right.**

On the allegation that a certain *wakf* was a private one, the plaintiff instituted a suit for declaration of her title as *mutwalli* and for an injunction to restrain the defendants, one of whom had been appointed *mutwalli* by a District Judge in a suit under S. 539, Civil Procedure Code of 1882 (to which, the plaintiff was not a party) from interfering with her possession of the endowed properties. The Subordinate Judge who tried the suit, found that the *wakf* constituted a public trust, but he decreed the suit holding that the plaintiff as the sole surviving descendant of the founder had a superior claim to the office of *mutwalli*. On an appeal by the defendants, the District Judge held that the *wakf* was a public one, but dismissed the plaintiff's suit on the ground that so long as the decree in the suit under S. 539 remained in force, no relief could be awarded to the plaintiff:

Held, that the plaintiff's suit was rightly dismissed inasmuch as the Subordinate Judge had no authority to appoint the plaintiff as *mutwalli* in supersession of the order made in the suit under S. 539, Civil Procedure Code of 1882.

Held, further, that as the *wakf* was declared to be a public trust, the plaintiff's remedy was to proceed under S. 92, Civil Procedure Code, 1908, and get herself appointed *mutwalli* on the ground that as the sole surviving descendant of the founder at the time of the death of the last *mutwalli*, she had the preferential right to the office. [P. 900, C. 2.]

Umakali Mookerjee, Tarakisor Choudhury, Mahammad Mustafa Khan and *Satis Chandra Mookerjee*—for Appellant.

Arther Caspersz and *Wahid Hossain*—for Respondents.

Mookerjee, J.—The subject-matter of the litigation which has culminated in this appeal consists of immovable property dedicated as *wakf* in or about the year 1836 by a Muhammadan named Azimuddin Mistri. A mosque was erected by the founder on a portion of the land and income for its maintenance is derived from the remainder, which is in the occupation of tenants. Azimuddin constituted himself the first *mutwalli* and acted as such so long as he was alive. He appointed his grandson Imamuddin as the next *mutwalli*; the latter executed a *tawliatnama* on the 13th March, 1854 whereby he appointed one Sekandar as his successor in the office of *mutwalli* with authority to appoint a successor. On the 1st December, 1892, Sekandar, in exercise of the power vested in him, appointed his daughter Sobran Bibi as *mutwalli*; she performed the duties of the office for over seven years and died in the year 1900 without appointing anyone as *mutwalli*. Two brothers of Sobran,

Yakub, Yasin by name, however, took possession of the *wakf* properties and administered them for a term of seven years. On the 22nd February, 1907, Yakub and Yasin executed a deed of relinquishment in favour of the plaintiff Atimannessa Bibi, daughter of Imamuddin, the grandson of Azimuddin. In this deed they admitted that as the sole surviving descendant of the founder she had a preferential claim to the office of *mutwalli*. Immediately after this, there was a scramble for the possession of the *wakf* properties and on the 22nd July, 1907, a suit was instituted with the consent of the Advocate-General, under S. 539 of the Civil Procedure Code of 1882, in the Court of the District Judge by persons who claimed to be interested in the due administration of this religious trust. The assistance of the Court was sought, as it could only have been sought, on the allegation that the trust had been created for public purposes. The three sons of Sekandar were originally joined as defendants. The present plaintiff subsequently applied to be made a defendant, but as she alleged that the *wakf* constituted a private trust not affected by S. 539, her application was refused on the authority of the decision in *Budh Singh Dudhuria* v. *Niradbaran Roy* (1). As the original defendants did not deny that the trust was a public one within the meaning of S. 539, the suit as against them was tried in due course and one Abdus Sobhan who had married the daughter of Kariman; a son of Sekandar, was appointed *mutwalli* on the 28th May, 1908. The District Judge, however, expressed the opinion that he had a very strong suspicion that the suit was purely collusive and had been brought to defeat Atimannessa. On the 16th March, 1910 she commenced this suit for declaration of her title as *mutwalli* of this trust which, she alleged, was a private *wakf*, and also for an injunction to restrain the defendants (in which category she included Abdus Sobhan) from interfering with her possession of the endowed properties. The Subordinate Judge held, that the *wakf* constituted a public trust, contrary to the allegations of the plaintiff, but that as the sole surviving descendant of the founder she had established a claim to the office of *mutwalli* superior to that of any stranger; in this view, he decreed the suit. On appeal, the District Judge affirmed the view of the trial Court as to the public nature of the *wakf*, but dismissed the suit on the ground that so long as the decree in the suit under S. 539 remained in force, no relief could be awarded to the plaintiff. The plaintiff has now appealed to this Court. On an analysis of the elaborate arguments addressed to the Court on both sides, the following two points emerge for consideration, namely, *first*, did the plaintiff as the sole surviving descendant of the founder become *mutwalli* by operation of law when the last *mutwalli* died without appointing a successor; and *secondly*, can the plaintiff be appointed *mutwalli* in this suit instituted in the Court of the Subordinate Judge and relief granted to her on the basis of such appointment?

As regards the first ground, it is plain that the plaintiff did not by operation of law become the *mutwalli* by right of inheritance on the death of the last *mutwalli*. The rule on the subject is thus stated by Neil Baillie in his Treatise on Muhammadan Law (Volume 1, page 593:

"When the superintendent has died and the appropriator is still alive, the appointment of another belongs to him and not to the Judge; and if the appropriator be dead his executor is preferred to the Judge. But if he has died without naming an executor the appointment of an administrator is with the Judge. In the Asul it is stated that the Judge cannot appoint a stranger to the office of administrator, so long as there are any of the house of the appropriator fit for the office, and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him. When the appropriator has made it a condition that the superintendent shall be of his children and children's children, and the Judge appoints another than one of these without any malversation, is the person so appointed the superintendent? Boorhanood Deen has said 'No'."

It is obvious from this statement of the law that though a descendant of the founder has a preferential claim to the office of *mutwalli*, he does not become *mutwalli* by right of inheritance but has to be appointed such by the *qadi* who may supersede him if he is not qualified. This view is confirmed by two texts from works of recognised authority on Muhammadan Law, translated in the Judgment of this Court in the case of *Salimulla* v. *Abdul Khayer Mohammed Mustafa* (2). One of these texts is from the Isaf of Al-Tarabulusi (Cairo Edition, page 42) and the other is from the Fatawa Alamgiri

(1) (1905) 2 C. L. J. 431.

(2) (1910) 37 Cal. 263=3 I. C. 419.

(Calcutta Edition Volume II, page 507) (see other texts translated by Ameer Ali in his Muhammadan Law, Volume I, 4th Edition, pages 451, 759, 760, 763 and 765. See also Anglo-Muhammadan Law by Sir Ronald Wilson, paragraph 328 and Tyabji on Muhammadan Law, page 414). Indeed it may be taken as a settled doctrine of Muhammadan Law that no right of inheritance attaches to a religious endowment. As Parsons, J., observed, with the concurrence of Sargent, C. J., in *Sayad Abdula Edrus* v. *Sayad Zain* (3), it is by appointment that one officer succeeds to another appointment, either by the original appropriator or by his successor or executor or by the superintendent, for the time being or failing all these, by the Ruling Power. This is laid down distinctly by Macnaughten in his Muhammadan Law (Chapter X on Endowments, paragraphs 5 and 6; Precedents of Endowments, Cases IX and X). Consequently, the position cannot be sustained that the plaintiff became by operation of law the *mutwalli* of his *wakf* as the sole surviving descendant of the founder when the last *mutwalli* died without having appointed his successor. This conclusion is in accord with the decision in *Moohummud Sadik* v. *Moohummud Ali* (4) and *Shahoo Banoo* v. *Aga Mahomed Joffer Bindaneem* (5). The first contention of the appellant must accordingly be overruled.

As regards the second ground, the question arises whether in the present suit, instituted in the Court of the Subordinate Judge, the plaintiff can be appointed *mutwalli* of the *wakf*. As is obvious from the texts already mentioned, where, as here, the appropriator is dead and has not left an executor, the power of appointment rests with the *qadi*. The problem thus requires solution, who is the judicial officer in the British Indian system of law who corresponds to the *qadi* under the Muhammadan Law and can exercise his functions in relation to *wakfs*. The question has never been fully investigated, but it was assumed in the cases of *Shama Churn Roy* v. *Abdul Kabeer* (6), *In the matter of Woozatunnessa Bibee* (7) and *In re Halima Khatun* (8) that the Civil Court of superior jurisdiction, in the locality where the *wakf* properties are situated, is vested, generally speaking, with the powers exercised by the *qadi* under the Muhammadan *regime*. On the other hand, in *Nemai Chand* v. *Golam Hossein* (9), it was observed that if a District Judge or a Judge of this Court in its original jurisdiction could exercise the functions of a *qadi*, there was no apparent reason why a Subordinate Judge who has jurisdiction over the *wakf* property should not be deemed equally competent to discharge those functions. As the question is of paramount importance, I have investigated the position of a *qadi* under the Muhammadan Law, a problem which, so far as I am aware, has been treated historically only in the valuable lectures on the History of Moslem Legal Institutions delivered by Dr. Abdullah-al-Mamun Suhrawardy as Tagore Professor of Law in the University of Calcutta. No assistance in the solution of this question has been derived from an examination of the legislative enactments and judicial decisions relating to the powers and duties of a *qadi* appointed under the Anglo-Indian System of law. Amongst these may be mentioned Bombay Regulation XXVI of 1827 repealed by Act XI of 1864 (Act XII of 1880); Harrington's Analysis of the Bengal Regulations, Volume I, 2nd Edition, pages 67, 219 and 223; Colebrooke's Supplement of Digest of Regulations, pages 1, 14 and 19; Moreley's Digest, Introduction, pages 30, 31 and 34, and title Kazi; *Muhammad Yusub* v. *Sayad Ahmed* (10), *Jamal* v. *Jamal* (11), *Daudsha* v. *Ismalsha* (12), *Baba Kakaji Shet Shimpi* v. *Nassaruddin* (13) and *Advocate-General of Bombay* v. *Abdul Kadir* (14). It is necessary, therefore, to examine the original texts on the subject. The following texts illustrate the position of the *qadi* under the Muhammadan Law.

(TRANSLATION OF TEXT I.)

If the executor or the *mutwalli* is appointed by the Judge (*hakim*), the safest course is that he (the Judge should

(3) (1891) 13 Bom. 555.
(4) (1798) 1 Mac. Sel. Rep. 22.
(5) (1907) 34 Cal. 118=4 L. B. R. 66=34 I.A. 46 (P. C.).
(6) (1899) 3 C. W. N. 158.
(7) (1909) 36 Cal. 21=1 I. C. 512.
(8) (1910) 37 Cal. 870=7 I. C. 33.
(9) (1910) 37 Cal. 179=3 I. C. 353.
(10) (1862-65) I. B. H. C. R. Ap. 18.
(11) (1875-77) 1 Bom. 633.
(12) (1878-79) 3 Bom. 72.
(13) (1894) 18 Bom. 103.
(14) (1894) 18 Bom. 401.

write in the judicial records and registers that he (the executor) is the executor appointed by a Judge possessing the authority of appointing the executor and the *mutwalli*. For if he (the Judge) limits himself to his statement.

"and he is the executor appointed by the Judge,"

he (the executor) may sometimes happen to be (appointed) by a Judge not possessing the authority of appointing the executor and the *mutwalli*. For the *qadi* does not possess the power of appointing the executor and the *mutwalli*, except when mention of the administration of *wakf* properties and orphans is expressly made in the Royal Letters Patent (Manshur) of his (*qadi's*) appointment. Thus it becomes like the rule regarding the deputy *qadi* (*naib qadis*), for it is indispensable therein to mention that *qadi* so and so is permitted to have a deputy to guard against this notion supposition doubt (Jami-al-Fusulayn by Shaykh Mahmud C. Ismail, better known as Ibn Qadi Samawao, Cairo Edition, Volume II, page 15).

(TRANSLATION OF TEXT II.)

Here there is a point to which attention should be called (*anbih*) and which is indispensable and it is—What is meant by the *qadi* who possesses the power of appointing the executor and the *mutwalli* and has the supervision of *wakf*? I say it is the chief *qadi* (*qadi* of *qadis*) and not every *qadi*, because of what is stated in the 27th Chapter of Jami-al-Fusulayn (Text I is quoted here). There is no doubt that the Sultan's saying "I appointed the chief *qadi*" is like expressly mentioning these things in the Letters Patent, as is expressly stated in the Khulasah in connection with the question of the *qadi's* power of appointing his substitute or successor. According to this, in their in (jurists') statement regarding obtaining a loan with the sanction of the *qadi*, by *qadi* the chief *qadi* is meant, and in every place where the *qadi* is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement

"When the order, or judgment of a *qadi* is brought before him, is referred to him, he executes it,"

for this is general, (*i,e.*. here the word *qadi* is used in a general sense) (Bahr-al-Raiq, Cairo Edition, Volume V, page 252).

(TRANSLATION OF TEXT III.)

(He was questioned) regarding a registered *wakf* set aside by a deputy *qadi* who relied on the absence of its bindingness according to the Great Imam,

"Has the deputy the power of setting it aside for the reasons mentioned or is the power of setting it aside peculiar to the original *qadi*"?

(He answered): It is stated in the Bhar-al-Rai (Text II is quoted here as far as "*wakf* affairs").

Thus it (*i. e.*, Bahr-al-Raiq) is explicit regarding that the deputy *qadi* has not the power of setting aside the *wakf* and that is peculiar to the original (*qadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this although our master Shaykh Muhammad b. Sirajal-Din-al-Hanuti has examined, criticised, discussed it; because of the difference of opinion* with regard to the application in an unrestricted sense of the like of it to the deputies in this age.

And there is no special text with regard to this question so far as our research goes and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq, goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically, and God knows best (Fatawa Khayriyah, Volume I, page 118, 2nd Edition, Government Press Gulaq, Cairo).

(TRANSLATION OF TEXT IV.)

"Here there is a point, etc." Al-Ramti † says—I say, in the collection of *fatwas* of our master Muhammad b. Siraj-al-Din-al-Hanuti there is a question with regard to their (jurists') statement that the *istibdal* (exchange) can be effected by the *qadi* when there is no stipulation of the *wakf* (to that effect). Is the chief *qadi* meant thereby or it is not peculiar to him, and is it a condition that it should be written in his Letters Patent?

The answer:—We have not seen any one restricting it to the condition that it should be in his Letters Patent as they (jurists) have restricted it with regard

* The author of the Radd-al-Muhtar quoting this passage reads the word translated "difference of opinion" as *ikhtilal*—confusion, disorder, tumult. See below Texts IV and V.

† Author of Fatawa Khayriyah.

to the power of giving minor girls in marriage and with regard to (the *qadi's* power of appointing) his substitute, successor. Therefore, it should be acted upon in an un-restricted general sense. And amongst those which indicate that (the power of effecting) *istibdal* does not peculiarly belong to the chief *qadi* but rather it (*istibdal*) can be as much effected by his deputy as by himself, is the fact that it is not lawful for him to appoint his deputy as his substitute, successor, unless the power of doing so is delegated to him by the Sultan. And when the power of doing so is delegated to him (*qadi*) then the authority of his deputy is based on the permission of the Sultan, and he (the deputy) stands in the stead of the person appointing him his deputy, *viz.*, the chief *qadi*, as they (jurists) have expressly laid it down regarding the question of appointing a successor. Therefore, what is understood by their (jurists') statement is that when in the Letters Patent of the *qadi*, the power of giving minor boys and girls is stipulated he (*qadi*) has that power and then the person appointed by him. So they (jurists') have made the permission of the Sultan to the *qadi* as to giving in marriage sufficient with regard to his *qadi's* conducting it as well as (with regard to) the person appointed by him (*qadi*) because of his standing in his (*qadi's*) stead. And when the conducting of marriage is lawful for the deputy with their (jurists') express declaration that it should be stipulated for the *qadi* in the Letters Patent, then how without it? The text of Ibn-al-Hammam regarding the order of succession of matrimonial guardians is as follows :—

"Then the Sultan, then the *qadi* if the (power of) giving in marriage of minor girls and boys is stipulated in his patent of office then the person appointed by the *qadi*."

Thus he (Ibn-al-Hammam) has made the stipulation, I mean, his statement,

"If . . . stipulated in his patent of office,"

refer to the *qadi* only and not to him and to the persons appointed by him, because he (Ibn-al-Hammam) has not put it (the stipulation) after both of them (*i. e.*,) after the word *qadi* and "the person appointed by him"). Yes, it is true that in the writings of some of them (jurists) is to be found that he (Ibn-al-Hammam) has put the stipulation after the word *qadi* as well as

"The person appointed by him."

Thus the text is capable of being made to refer to the *quadi* as he is the original (incumbent) or to both of them. Finis. But he (Al-Ramti has stated in the Khayriyah (collection of his *fatwas*, see Text III towards the commencement of the chapter of *wakf*, the text of the Bahr-al-Raiq mentioned here. Then he says, Thus it (*i.e.*, Bahr-al-Raiq) is explicit regarding that the deputy *qadi* had not the power of setting aside the *wakf* and that that is peculiar to the original (*qadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this, although our master Shaykh Muhammad b. Sirai-al-Din-al-Hanuti has examined, criticised, discussed it; because of the confusion* with regard to the application in an unrestricted sense of the like of it to the deputies in this age. And there is no special text with regard to this question so far as our research goes, and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq, goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically, and God knows best (Manhat-al-Khaliq, marginal gloss on the Bahr-al-Raiq by Ibn-Abidin the author of the Radd-al-Muhtar, Volume V, Cairo Edition.)

TRANSLATION OF TEXT V.

"Then the power of appointment is for the *qadi*."

"For the *qadi*":—In the Bahr-al-Raiq, he has restricted it to the chief *qadi*, relying on the passage from the Jami-al-Fasulayn quoted by us one leaf back. Then he (the author of the Bahr-al-Raiq) states,

"According to this their (jurists') statement regarding obtaining a loan with the sanction of *qadi*, by *qadi*, the chief *qadi* is meant and in every place where the *qadi* is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement, 'when the order or judgment of a *qadi* is brought before him, is referred to him, he executes it.' For this is general."

It is stated in the Khayriyah,

"Thus it (*i.e.*, Bahr-al-Raiq) is explicit regarding that the Deputy *qadi* has not the power of setting aside the *wakf* and that that is peculiar to the original (*qadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should

*The word translated confusion here is *ikhtilal* in the original, while in Text III the word used is *ikhtilaf*, difference of opinion.

be placed upon this although our master Shayakh Muhammad b. Sira-al-Din-al-Hanuti has examined, exercised, discussed it, because of the confusion (*ikhtilal*) with regard to the application in an unrestricted sense of the like of it to the deputies in this age. And there is no special text with regard to this question so far as our research goes and similarly so far as the research of our above mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq, goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically."

And he (the author of the Fatawa Khayriyah, Khayr-al-Din-al-Ramti) has quoted, in his marginal gloss on the Bahr-al-Raiq, the text of his master al-Hanuti *in extenso* and has confirmed it (See-Text IV). And of it (the text) is—And amongst what indicates that (the power of effecting) *istibdal* of *wakf* is not peculiar to the chief *qadi* but rather is lawful to his deputy as well, is the fact that his deputy is his *locum tenens*. Therefore, what is understood by their (jurists') statement is that when (the power of) giving minor girls and boys is stipulated in his Letters Patent that (power) belongs to the person appointed by him. The text of Ibn-al-Hammam as to the order of succession of matrimonial guardians is, "Then the Sultan, then the *qadi* if that is stipulated in his patent of office, then the person appointed by the *qadi*." End of the quotation in substance. (Note) but he (the author of the Arfa-al-Wasail) has stated that the governance of the *wakf* is for the *qadi* even though the Sultan has not stipulated it in his investiture and has not ascribed, assigned it to anyone. And this is contrary to what is reported, quoted in the Jami-al-Fasulyan (Radd-al-Mahtar, Volume III, page 635, Edition Constantinople).

(TRANSLATION OF TEXT VI.)

"If the *qadi* associates with the *mutwalli* a reliable person." It is stated in the Bahr-al-Raiq (Text II is quoted here) (Al-Tahawi's commentary on the Durr-al-Mukhtar, Volume II, page 567, Government Press, Gulaq Cairo).

(TRANSLATION OF TEXT VII.)

He was questioned: Is the *qadi's* appointment of another person as *mutwalli* valid even if he is not the chief *qadi* or does it depend upon his being that, and what is meant by the chief *qadi*?

He answered:—When the *mutwalli* dismisses himself, resigns his office before, in the presence of, the chief *qadi* and he (the chief *qadi*) appoints another as *mutwalli* it is valid. Similarly when the (news of) dismissal, resignation, reaches the *qadi*, he becomes dismissed, otherwise not. By the chief *quadi* is meant the person who is expressly authorised by his Letters Patent to have the administrations of *wakf* properties and orphans, or to whom the Sultan says, "I have made the chief *qadi*." It is stated in the Bahr-al-Raiq (Text II is quoted here) (Fatawa Mahdiya, Vol. II, page 575, Cairo Edition.)

(TRANSLATION OF TEXT VIII.)

When the Sultan says to a man "I made thee a *qadi*," he has not the power of appointing a substitute, successor except when he (Sultan) permits him to do that expressly or by implication by saying, "I made thee chief *qadi*," because it is the chief *qadi* who acts as he pleases respecting *qadis* as regards investiture or dismissal. Thus it is laid down in the Dhakhirah. (Fatawa Alamgiri, Volume III, page 388, Calcutta Edition.)

(TRANSLATION OF TEXT IX.)

And the *qadi* cannot appoint as successor, substitute a deputy except when (the authority to do so) is delegated to him expressly, like, "appoint whomsoever thou likest;" or implicitly, like, "I made thee chief *qadi*." And here the implication is stronger, for in the explicit stated above, he possesses the power of appointing a successor, not that of dismissal. And in the implicit he possesses both, like his (Sultan's) saying,

"Appoint whomsoever thou likest, supersede (substitute) whomsover thou likest,"

for it is the chief *qadi* who acts as he pleases respecting them (*qadis*) as regards investiture or dismissal (Durr-al-Mukhtar, page 529, Edition Calcutta).

(TRANSLATION OF TEXT X.)

The appointment of a *qadi* is not valid unless the person appointed combines in himself the conditions of evidence (qualifications of witness) according to the Hidayah, *viz.*, Islam, Taklif, Freedom, etc. (Fatawa Alamgiri, Volume III, page 378 Calcutta Edition.) *Cf.* Hamilton's Hedayah, Grady's Edition, Book XX, page 334.

(TRANSLATION OF TEXT XI.)

It is stated in Multaqa

"And Islam is not a condition in him, *i. e.*, in the Sultan who invests (a person with the office of *qadi*). Thus it is laid down in the Jatarkhaniyah." (Fatawa Alamgiri, Volume III, page 379, Calcutta Edition.)

(TRANSLATION OF TEXT XII.)

It is valid to accept the investiture of office of *qadi* from a just Sultan and from a tyrant even though an infidel (it is stated by Miskin and others) except when he prevents him from doing justice, what is right; then it is unlawful (Durr-al-Mukhtar, page 524, Edition Calcutta).

TRANSLATION OF TEXT XIII.)

And qualified for it (office of *qadi*) is one who is qualified for being a witness. This is contrary to the statement of al-Zaylai in the (chapter on) Arbitration to the effect that the investiture of an infidel with the office of *qadi* in order to decide between non-Moslems under Moslem protection (Ahl-al-Dhimmah) is valid" (Durr-al-Mukhtar, page 521, Edition Calcutta).

It is clear from an examination of these texts that, under the Muhammadan Law, that *qadi* alone was competent to exercise authority in respect of *wakfs* who was so expressly authorised in his Letters Patent. There was some difference of opinion upon the question, whether such express authority was needed when a person was explicitly appointed the chief *qadi*: but even here the balance of opinion of jurists favours the view that power should be expressly conferred on the chief *qadi* to validate the administration of *wakf* by him. There is also authority to show that the supreme authority in the State, by whom the *qadi* is appointed, need not be a Muhammadan, and although there is some divergence of opinion, there is also authority to show that the office of *qadi* may be held by a non-Moslem for decision of disputes between non-Moslems under Moslem protection. As this is a matter regarding religious usages and institutions within the meaning of S. 15 of Regulation IV of 1793, the rights of the parties must be determined with regard to the provisions of the Muhammadan Law on the subject [*Per* Peacock, C. J., in *Kudratulla* v. *Mohini Mohan Shaha* (15)]. It follows accordingly that a Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf. Whether a District Judge has implied authority to exercise the functions performed by a *qadi* under the Muhammadan Law is doubtful. In respect of *wakfs* which may be described as trusts created for public purposes of a religious nature within the meaning of sub-S. (1) of S. 92, of the Civil Procedure Code, 1908, the District Judge may be assumed to have been authorised to discharge the functions of a *qadi*. The real difficulty arises in the case of private *wakfs*; it is desirable that to cover such cases the Local Government should authorise either District Judges or Subordinote Judges or even judicial officers of a lower grade, if it be thought desirable, to exercise the function of a *qadi*. When authority has been so conferred, a question may arise whether the assistance of the Court is to be invoked by a suit or by an application [see *Mahamed Haji Zakeria* v. *Ahmadbhai Habibbhai* (16)]. The case before us, however, is reasonably free from difficulty. The Courts below have concurrently found that the *wakf* was public and have thus negatived the fundamental allegation of the plaintiff. The District Judge had jurisdiction under S. 539 of the Civil Procedure Code of 1882 to appoint the defendant as *mutwalli*. The Subordinate Judge had no authority to recall that order and to appoint the plaintiff as *mutwalli*. [*Saiyad Ali* v. *Ali Jan* (17).] It might have heen otherwise if the suit had been instituted by a person already appointed *mutwalli*, for example by a testamentary instrument, *Muhammad Abdul Majid Khan* v. *Ahmad Saeed Khan* (18). The remedy of the plaintiff obviously is to proceed under S. 92 of the Code of 1908 and to get herself appointed *mutwalli* on the ground that she had the preferential right to the office as the sole surviving descendant of the founder at the time of the death of the last *mutwalli*. In fact, she would have been so appointed in the suit mentioned, if she had not asserted at the time that the *wakf* was private. It would be open to her now, however, to accept the decision in this suit that the *wakf* is public and to proceed on that basis under S. 92.

The inference follows that in the present suit as framed, the plaintiff cannot be appointed *mutwalli* and the suit has consequently been rightly dismissed. The

(15) (1870) 13 W. R. 21.

(16) (1901) 25 Bom. 327.
(17) (1913) 35 All. 98=18 I. C. 573.
(18) (1913) 35 All. 459=20 I. C. 37.

appeal is accordingly dismissed with costs.

Beachcroft, J.—I agree that this appeal must be dismissed for the reasons given by my learned brother. I express no opinion as to the position of the District Judge with reference to private *wakfs*.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 901

MOOKERJEE AND ROE, JJ.

Bhudar Chandra Goswami—Defendant—Appellant.

v.

C. R. S. Betts—Plaintiff—Respondent.

Appeal No. 1742 of 1912, decided on 26th May, 1915, from the Appellate Decree of Dist-Judge, Assam Valley Dists., dated 11th April, 1912.

Contract Act (9 of 1872), Ss. 55 and 73—Defendant's elephant engaged from 1st October further time for delivery of elephant granted upto 6th—Elephant not delivered upto 11th—*Held* time was of essence and plaintiff entitled to damages.

On the 1st October, 1910 the plaintiff engaged the defendant's elephant up to the 31st March, 1911 for a sum of Rs. 700 for the purpose of *kheddah* operations (to capture wild elephants). The defendant agreed to deliver the elephant to the plaintiff on the 1st October, 1910, but subsequent to the contract the defendant obtained an extension of time till the 6th October, for the delivery of the elephant. The defendant did not deliver the elephant till the 11th October, 1910; in a suit by the plaintiff for damages against the defendant for breach of the contract:

Held, that the parties intended that time should be of the essence of the contract and that, therefore, the defendant was liable to pay damages for breach of the contract.

[P. 901, C. 1.]

N. C. Bardulai—for Appellant.

Monmohan Dutt—for Respondent.

Mookerjee, J.—This is an appeal by the defendant in a suit for damages for breach of contract. On the 1st October, 1910, the plaintiff stipulated with the defendant to engage his elephant up to the 31st March, 1911 for a sum of Rs. 700 for the purpose of *khedda* operations (to capture wild elephants). The contract provided that the elephant would be delivered by the defendant to the plaintiff on the 1st October, 1910; but the defendant obtained an extension of time till the 6th October, and yet did not deliver the elephant till the 11th October. The plaintiff refused to accept the elephant, and on the 26th October, 1910, instituted this suit for recovery of damages to the extent of Rs. 2,000. The plaint states that, according to the terms of the contract, the defendant, upon failure to make over the elephant on the date specified, would pay the plaintiff the sum of Rs. 2,000 as compensation. The Courts below have found that this is not a correct interpretation of the contract, which merely provided that, if before the expiry of the term of six months, the defendant, for any reason, takes back the elephant, he will render himself liable to pay damages to the extent of Rs. 2,000. Consequently, the foundation of the claim for damages as laid in the plaint cannot be sustained; and the Courts below would have been justified to dismiss the suit. The Courts below, however, have not taken this strict view and have been more considerate to the plaintiff, as they have determined the question of the loss actually sustained by him from the failure of the defendant to deliver the elephant on the date specified. The Subordinate Judge held that the damages should be assessed at Rs. 869; the District Judge, on appeal, has reduced the amount to Rs. 669. This decree is now assailed before us on two grounds; *first*, that as time was not of the essence of the contract, the plaintiff is not entitled to a decree for damages; and *secondly*, that, if this contention fails, damages have been overassessed.

S. 55 of the Indian Contract Act provides that when a party to a contract promise to do a certain thing at or before a specified time and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. What, then, was the intention of the parties in the case before us? As Lord Cairns observed in *Bowes* v. *Shand* (1), merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance. *Prima facie*, then, the parties may be deemed to have intended that time should be of the essence of the contract in the case before us. This conclusion is confirmed by the

(1) (1877) 2 A.C. 455=36 L.T. 857.

circumstance that the defendant obtained an extension of the time for delivery of the elephant; if the time were not of the essence of the contract, he need not have asked for extension of time. We must thus proceed on the assumption that according to the true intention of the parties time was of the essence of the contract. This leads us to the question, whether the damages have been assessed properly.

Under S. 73 of the Indian Contract Act, when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. Let us test the award made by the District Judge in the light of this principle. The compensation decreed has been assessed under three heads; *first*, wages of *mahuts* and *phundis* advanced by the plaintiff (Rs. 456), less the amount recovered by him (Rs. 264); *secondly*, a sum of Rs. 27 spent in the purchase of jute and other articles; and *thirdly*, a sum of Rs. 450, which represents the cost of hire of another elephant engaged by the plaintiff to be used along with the elephant of the defendant. We are of opinion that the damages have been correctly assessed under the first *two* heads but the claim must be disallowed in respect of the *third* head. The District Judge has found that the other elephant, engaged by the plaintiff from Nowgong, arrived after the defendant tendered his elephant. Consequently, when the defendant tendered his elephant, the other elephant was not available for use. That does not absolve the defendant from liability for damages for breach of his contract. But these damages cannot include the costs of hire of the other elephant. It is to be noted that at the time when the plaintiff was giving his evidence, he had not in fact paid Rs. 450 to the owner of the second elephant; that there is nothing in the record to show that the owner of the second elephant has ever demanded any sum from the plaintiff; that in his evidence-in-chief the plaintiff made no mention of damage arising from the proposed hire of the second elephant; and that when making his statement of claim to the defendant's agent shortly after the breach of the defendant's contract, the plaintiff did not suggest that any sum was due from him to the owner of the second elephant. On these facts, we must hold that there was some feature in the contract relating to the second elephant absolving the plaintiff from liability to its owner. We accordingly hold that the plaintiff is not entitled to damages under the *third* head.

The result is that this appeal is allowed in part and the decree of the District Judge modified. The plaintiff will have a decree for Rs. 219 only. Each party will receive and pay costs in proportion to his success and failure in each Court. A self-contained decree will be drawn up in this Court so that there may be no dispute as to the amount of costs payable by one party to the other.

V.B./R.K.

Appeal partly allowed.

A. I. R 1916 Calcutta 902

HOLMWOOD AND WALMSLEY, JJ.

Madan Mohun Nath Sahi Deo—Plaintiff—Appellant.

v.

Pratap Udai Nath Sahi Deo—Defendant—Respondent.

Appeal No. 74 of 1915 and Rule No. 170 of 1915, decided on 13th May, 1915, from the Original Order of Dy. Collector, Ranchi, dated 10th February, 1915.

Chota Nagpur Tenancy Act (6 of 1908), Ss. 191 (2), 139 and 208—Applicability—Execution of rent decree by arrest of judgment-debtor has the effect of staying proceedings for sale.

A warrant for the arrest of a person against whom decree for rent has been obtained under the Chota Nagpur Tenancy Act has the effect of only staying proceedings for sale of the tenure. Neither S. 191 (2), which refers to persons arrested on decrees for money, nor S. 139, which refers to suits for recovery of money from defaulting agents, has any application to the case. [P. 903, C. 1.]

Bepin Chandra Mullick—for Appellant.

Caspersz and *Jogesh Chandra Dey*—for Respondent.

Judgment.—This is an appeal against the order of a Revenue Officer empowered to hear rent suits under the Chota Nagpur Tenancy Act who, in execution of the decree of another Deputy Collector for Rs. 11,103 and odd, passed an order

in execution that a warrant of arrest against the judgment-debtor returnable by the 25th February should be issued in spite of the judgment-debtor's objections. Those objections as far as we have been able to understand them have been repeated here, and the first is that the decree for rent of Kairo, *Perganah* Khukra, is not a decree for the rent of the entire tenure. The learned Deputy Collector unnecessarily discusses this point, and incidentally misreads the decision of this Court in *Chandra Nath Tewari* v. *Protap Udai Nath Sahe* (1). But with that we have nothing to do, inasmuch as the executing Court is not entitled to go beyond the decree, and the decree shows that the rent was for the entire village, which is certainly an entire unit for agricultural purposes. There is, therefore, no reason why the decree should not be executed under the Chota Nagpur Tenancy Act.

Then S. 184 is sought to be ignored by the appellant and he carries this on to S. 210, then comes back to S. 208 and so seeks to read the Act backwards. The procedure under the Act seems to be perfectly simple. The first section which deals with it is S. 184, which lays down that the process of execution may be issued against either the person or property of the judgment-debtor and shall not be issued simultaneously against both the person and property. Then S. 191 (2), which is relied upon by the appellant, has nothing whatever to do with the present question before us. That refers to a person who is arrested on a decree for money. Then on reference to S. 139, which the appellant also relies upon, a suit referred to in Clause (7) would clearly seem to be a suit which is not for rent on account of agricultural land but a suit for recovery of money from defaulting agents and others. Then S. 208 (2) provides that when a warrant of execution has been issued under this Chapter against the person or movable property of the judgment-debtor, that is, a warrant under S. 184, no application shall be received under sub-S. (1) of S. 208 while such warrant remains in force. Nothing can be clearer than this, that a warrant of arrest may precede everything else and that it stays proceedings for sale of the tenure. The provision of S. 210, giving the Deputy Commissioner protective jurisdiction in favour of agriculturists whose tenures and holdings have been sold in pursuance of S. 208, has nothing whatever to do with the question before us; and we find that all the arguments adduced before us have been unnecessary and mostly irrelevant, and that from the time that has elapsed since those decrees were first made it would appear that the judgment-debtor is purposely endeavouring to throw every possible technical legal objection in the way of getting out of paying rent which has been declared to be honestly due from him. This is a state of things which we cannot encourage.

The appeal is dismissed with costs. We assess the hearing fee at four gold *mohurs* as the value of the decree is upwards of Rs. 5,000.

There is a Rule connected with this appeal, namely, Rule No. 170 which was issued to show cause why the warrant of arrest should not be set aside as being made without jurisdiction under the Chota Nagpur Tenancy Act. We cannot find that any question of jurisdiction arises under that Act and this Rule must be discharged with costs, two gold *mohurs*.

The record will be sent down without delay.

V.B./R.K.

Appeal dismissed; Rule discharged.

(1) A. I. R. (1914) Cal. 611=23 I. C. 105.

A. I. R. 1916 Calcutta 903

CASPERSZ AND DOSS, JJ.

Makbul Ali and *others*—Appellants.

v.

Jogesh Chandra Ray—Respondent.

Appeal Nos. 537, 557 and 558 of 1907, and Appeal No. 2224 of 1907 and No. 1431 of 1908, decided on 8th March, 1910, from the Appellate Orders of Dist. Judge, Chittagong, dated 9th September, 1907.

Landlord and Tenant—Rent—Suit for—Holding including *khilla* and *hasila* lands—Rent assessed on *hasila* (cultivated) land only—Stipulation to pay rent on waste land brought under cultivation—Increase in rental accrues on any portion of waste land being cultivated—Receipt of rent at admitted rate—Landlord can sue for additional rent—Waste lands to be assessed must be actually cultivated—Bengal Tenancy Act (1885), S. 115.

Where under a land revenue system tenants have *khila* (waste) lands included in their holdings for the purpose of reclamation though rent

is assessed on the actual *hasila* (cultivated) area only and there is a stipulation in the lease that on the waste lands becoming cultivated they will be assessed at the settlement rate of rent, the increase in the rental would accrue automatically on any portion of the waste becoming cultivated and to such a process neither S. 113 nor any other section of the Bengal Tenancy Act can operate a legal bar. [P. 904, C. 2.]

In such a case the landlord can after realising the admitted rents for the years in suit sue to recover additional rent for the same period on account of the increase in the *hasila* area, unless it is proved that the landlord received all his dues for the period and the tenant paid him on the understanding that no further demands would be made in respect of the holding for that period. [P. 904, C. 2.]

The *khila* portions of the tenants' holdings in such case cannot be assessed with additional rent merely if they become fit for cultivation; unless they are actually cultivated they cannot be assessed with additional rent at the original fair rent rates accepted by the Settlement Officer.

Caspersz, Shamsul Huda, Girija Prasanna Roy Choudhury, Serajul Islam and *Jyotish Chandra Sarkar*—for Appellants.

Rash Behary Ghosh and *Tara Kishore Choudhury* and *D. L. Khastgir*—for Respondents.

Judgment.

In M. A. Nos. 537, 557 and 558 of 1907.—These are appeals by the tenants in suits instituted by the *Noabad Talukdar* to recover arrears of rent in respect of the *khila* lands which became *hasila* during the years 1264 to 1267 of the *Maghi* era which is prevalent in the District of Chittagong where the lands are situated. The word *khila* signifies 'waste;' *hasila* on the other hand means 'cultivated.' It is admitted that the *talukdar* has realised his rent dues for the years in suit, in accordance with the rentals fixed as fair by the Settlement Officer. The question for determination is whether the fair rate of rent is to be applied to the *khila* lands as soon as they became *hasila* (as contended for by the *talukdar*) or whether the assessment should be made after fifteen years (the period mentioned in the written statements of the tenants).

The first Court dismissed the suits. On appeal, the District Judge of Chittagong has remanded, the cases under S. 562 of the old Code of Civil Procedure, for a finding upon the point whether the lands were brought under cultivation before the year 1267 M. E. The District Judge has found that the *talukdar* is entitled to receive additional rent on the *khila* areas in the respective suits for the years 1264 to 1267 M. E. "if they are fit for cultivation."

It is urged for the tenants (defendants-appellants) that the Settlement Officer, in the year 1892 fixed a consolidated rental on each of the holding, his decision having the force of a decree in virtue of S. 107 of the Bengal Tenancy Act as it stood in the year 1892 before the Amending Act III (B. C.) of 1898, remodelled Chapter X of the Rent Law. It has also been argued, though not very strenuously, that the plaintiff, *taluqdar*, having realised the admitted rents for the years in suit cannot now recover additional rent for the same period.

The second contention must fail because there is no finding nor do the rent receipts show, that the *talukdar* received his dues from tenants, and that the latter paid him on the understanding that no further demands would be made. The principle of estoppel clearly does not apply to the facts of these cases and we do not find that the *talukdar* made any admissions on the subject of the *khila* areas being left unassessed.

The first contention, also, cannot succeed in the circumstances of this litigation. One of the peculiarities of the Chittagong Land Revenue System is that tenants have *khila* lands included in their holdings for the purpose of reclamation though rent is assessed on the actual *hasila* area only. Hence the stipulation "*khila hasila haila bondobastimate nirrekh*," that is, on the waste lands becoming cultivated, they will be assessed at the settlement rate of rent. The *khatian* (of the year 1895) contains the entry to the effect already mentioned, namely, that *khila* was to be assessed with rent on becoming *hasila*. This later entry, or stipulation, is based on the admission recorded in the fair rent proceedings of the year 1892, that the tenants were "liable to pay at the rate of 8-annas a *kani* on the *hasila* area." In our opinion the increase in the rental would accrue automatically on any portion of the waste becoming cultivated. To such a process neither S. 113, nor any other section of the Bengal Tenancy Act, can operate as a legal bar. Whatever degree of finality may attach to the decision of the Settlement Officer, it is

not a question, here, of *res judicata*, but of construction. The decision proceeds on the basis of the admitted and settled incident of the tenancy, and additional rent is imposed on account of the increase in the *hasila* area. The *taluki rubokari* drawn up two years after the fixation of fair rents on the tenants, is not relevant for the present purpose. It only shows that the *khila* lands left in possession of the *talukdar* were dealt with on a different system, the terms imposed on the *talukdar* being peculiar to him.

We are fortified in our conclusions by the observations of Pigot and Banerji, JJ., in *Ram Chunder Chuckrabutty* v. *Giridhur Dutt* (1), where the facts were similar to those of the present cases.

There is, however, a verbal inaccuracy in the judgment of the District Judge. The *khila* portions of the tenants' holdings cannot be assessed with additional rent merely "if they are fit for cultivation." The proper direction, and we now make it, is that any portions of the *khila* areas *actually cultivated* during the years in suit, or any shorter period within that limit, shall be assessed with additional rent at the original fair rent rates accepted by the Settlement Officer. With this variation these appeals are dismissed with costs.

In Appeal No. 2024 of 1907.—We accept the entry in the plaintiff's *khatian* as correct, inasmuch as it accords with the decision of the Settlement Officer which proceeds on the basis of the incident subsequently recorded in such entry. For reasons similar in all respects to those given in our judgment just delivered in the connected Appeals Nos. 537, 557, and 558 of 1907, we set aside the decision of the Subordinate Judge confirming the dismissal of the plaintiff *talukdar's* suit, and we direct that the case be remanded to the Court of first instance to be dealt with in accordance with the observations we have made in regard to those appeals.

The appeal is allowed with costs.

In Appeal No. 1431 of 1908.—In this case the amount of rent Rs. 49 was assessed on a holding which consisted entirely of *khila* lands. The plaintiff's *khatian* contains an entry purporting to be an admission by the *raiyat* in occupation of the land at the time of the settlement that "when the lands of the holdings (which were then *Nalbat*) are fully cultivated, there will be remission of rent for four years, after which the rent will be at the rate of Rs. 22 per drone."

The plaintiff has purchased the rights of this *raiyat* in the holding and has brought the present suit for rent against the under-*raiyat*. The latter cannot be placed in a more favourable position than their lessor, and, if the lands have been fully cultivated for more than four years, the higher rate of Rs. 22 per drone must be applied.

This appeal also is allowed with costs. The case is remanded to the Court of first instance to be dealt with agreeably to the directions we have given.

V.B./R.K.

Appeals Nos. 537, 557 and 558 *dismissed*;
Appeals Nos. 2024, 1431 *allowed.*

(1) (1892) 19 Cal. 755.

A. I. R. 1916 Calcutta 905

MOOKERJEE AND RICHARDSON, JJ.

Rajkumar Sarkel—Defendant—Appellant.

v.

Rajkumar Mali and *others*—Plaintiffs—Respondents.

Appeal No. 418 of 1913, decided on 2nd March, 1915, from the Order of Sub-Judge, Backergunj, dated 13th June, 1913.

(a) Decree—Execution—Decree fraudulent—Sale is not void but voidable.

A sale in execution of a fraudulent decree is not void but voidable.

So long as such decree is not successfully impeached as fraudulent the sale thereunder must stand operative. [P. 906, C. 2.]

(b) Decree—Execution—Right to have decree vacated on ground of fraud extinguished by limitation—Suit to have sale in execution set aside on ground of fraud in decree does not lie—Limitation Act (1908), Schedule 1, Article 95.

As a suit for relief on the ground of fraud must be instituted within three years from the date of discovery of the fraud, where the plaintiff's right to have a decree vacated on the ground of fraud is extinguished by limitation, it is not open to him to have the sale in its execution set aside on the ground of fraud in the decree. 27 Cal. 197, dist. [P. 906, C. 2.]

Mohendra Nath Roy and *Chandra Kanta Ghosh*—for Appellant.

Girija Prasanna Roy Chaudhuri—for Respondents.

Judgment.—This is an appeal by the defendant in a suit for two-fold relief on the ground of fraud. The case for the plaintiffs is that on the 8th June, 1907, the defendant, by fraudulent suppression

of processes, obtained an *ex parte* decree against them, for possession of the second property now in dispute, that the decree-holder not only executed the decree in respect of that property but also for realisation of the costs allowed to him, and that he thus managed to purchase the first property at the sale which followed without the issue of the usual notices and proclamation. The present suit was instituted on the 13th May, 1911 to set aside the alleged fraudulent decree and to recover possession of both the properties. The Courts below have found that it is not open to the plaintiffs to have the alleged fraudulent decree vacated inasmuch as the time prescribed by Article 95 of the first Schedule of the Indian Limitation Act for the purpose had elapsed before the institution of the suit. Under the Article, a suit for relief on the ground of fraud must be instituted within three years from the date of discovery of the fraud. The Courts below have found that the fraud, if any, was brought to the knowledge of the plaintiffs more than three years antecedent to the suit. From this point of view, it is plain that the plaintiffs cannot obtain a declaration that the decree was obtained by fraud and they are consequently not entitled to recover the property covered by the decree. But with regard to the sale in execution of the decree for costs, the Courts below have adopted the view that although the plaintiffs are not competent to have the decree set aside, yet it is open to them to have the sale vacated on the ground that it has been held in execution of a fraudulent decree; in support of this proposition, reliance has been placed upon the decision in *Ram Narain Tewari* v. *Shew Bhunjan Roy* (1). That case is clearly distinguishable. There an *ex parte* decree had been obtained by fraud. The defendants applied to have the *ex parte* decree set aside on the ground that summonses had not been duly served on them; this application was granted. They subsequently sued to have the sale in execution of that decree set aside on the ground that it had been held on the basis of a fraudulent decree and could not consequently be sustained. It was argued in answer to the suit that as the decree had already been set aside, no question of the validity of the decree could be investigated in the suit, and consequently the sale could not be successfully impeached. This contention was rightly overruled, and it was held that as the decree was proved to have been obtained by fraud, the sale also must be vacated, although it was not necessary for the then plaintiff to set aside the decree on the ground of fraud, as he had been previously successful on his application to set aside the decree as an *ex parte* decree. That case plainly bears no analogy to the one before us. Here, as has been found by the Courts below, it is no longer open to the plaintiffs to have the decree vacated on the ground of fraud; their right in this respect has been extinguished by limitation. It is consequently not open to them to have further relief on the ground of fraud. As it is not competent to the plaintiffs to invite the Court to vacate the decree on the ground of fraud, it is not open to them to have the sale also set aside on the ground of fraud in the decree. So long as the decree is not successfully impeached as fraudulent, the sale must stand operative; the grant of the one relief is an essential pre-requisite for the attainment of the other. A sale in execution of a fraudulent decree is not a void but a voidable sale; till vacated by an appropriate proceeding, the rights created thereby are effective. It was consequently essential that the plaintiffs should seek, as they did in their plaint, to have the decree set aside on the ground of fraud before they could have the sale vacated. But the plaintiffs have lost their right to attack the decree; they cannot consequently attack the sale.

The result is that this appeal is allowed, the order of the Court below set aside, and the suit dismissed with costs in all the Courts. We assess the hearing-fee in this Court at one gold *mohur*.

V.B./R.K.

Appeal allowed.

(1) (1900) 27 Cal. 197.

A. I. R. 1916 Calcutta 906

SHARFUDDIN AND CHAPMAN, JJ.

Karamat Ali and *others*—Plaintiffs—Appellants.

v.

Hanuman Das Marwari—Defendant—Respondent.

Appeal No. 831 of 1914, decided on 15th December, 1915, from the Appellate Decree of Dist. Judge, Bhagalpore, dated 9th November, 1914.

Transfer of Property Act (4 of 1882), S. 106—Notice to quit issued on behalf of some of joint owners—Assent of other co-owners—Notice sufficient.

A notice determining a lease issued on behalf of some of the owners is a sufficient compliance with the requirements of S. 106 of the Transfer of Property Act, if the other co-owners are proved to have assented to it by their conduct.

[P. 907, C. 2.]

Khurshaid Hussain—for Appellants.

Manmatha Nath Mukerjee and *Satyendra Nath Mukerjee*—for Respondent.

Judgment.—This appeal arises out of a suit instituted by three brothers, namely, Shaikh Karamat Ali, Shaikh Rahim Bux and Shaikh Rahim Bux against the defendant for recovery of possession of a *pucca* house which is in the occupation of the defendant and also for recovery of compensation. Under S. 106 of the Transfer of Property Act, a notice is said to have been served on the defendant, a copy of which is on the record. It was served by a Civil and Criminal Court Mukhtear Abdul Rahim on behalf of the two brothers Shaikh Karamat Ali and Shaikh Rahim Bux. The first Court gave a decree to the plaintiffs. The defendant appealed to the District Judge, who set aside the decree of the first Court and dismissed the suit on the ground that the provisions of S. 106 of the Transfer of Property Act had not been strictly complied with, inasmuch as there are three plaintiffs in the suit while the notice is by only two of them. The finding of the lower Appellate Court being that the notice was insufficient, it dismissed the suit without entering into the merits of the case.

On behalf of the plaintiffs-appellants it was contended that the interest in the property in question was purchased by two of the brothers whose names appear in the notice and that the third brother Karim Bux may have some private arrangement with the other two brothers for a share in the property. The real lessor was one Shaikh Toomy, whose interest has now come into the hands of the two brothers named in the notice. The defendant was originally a lessee of the shop from the time of the former incumbent, namely, Shaikh Toomy, and his interest having by conveyance came to the two brothers, they now stand in the shoes of Toomy as lessors of the shop in question. Another point urged on behalf of the appellants is that although the notice mentioned the names of only two of the brothers, it should be treated as a notice not only on their behalf but also on behalf of the third brother Karim Bux. On reference to the statements made by Karim Bux himself in the deposition in the suit, it appears that it was really he who acted on behalf of his two brothers in engaging a Mukhtear, having a draft made, posting the notice and receiving an acknowledgment. All this was done by Karim Bux, the reason being, as we have been told, that he looks after the *karbar* and was, therefore, in charge of sending the notice to the defendant. He also says that he verbally told the defendant to vacate.

We are, therefore, of opinion that there are many facts on the record which go to show that the notice in question should be treated also as on behalf of Karim Bux. As the learned District Judge has not entered into the merits of the case, we remand it to him for the purpose of deciding it on the merits.

Costs will abide the result.

V.B./R.K.

Appeal allowed; Case remanded.

A. I. R. 1916 Calcutta 907

MOCKERJEE AND NEWBOULD, JJ.

Mohini Chunder Pal Choudhury—Defendant—Appellant.

v.

Ahmad Ali Khan—Plaintiff—Respondent.

Appeals Nos. 3635, 4283 and 4284 of 1913, decided on 8th April, 1915, from the Appellate Decrees of Sub-Judge, Dacca, dated 31st July, 1913.

(a) Civil P. C. (5 of 1908), S. 115—Erroneous decision on point of limitation is no ground for revision—But revision lies if decision is without considering point of limitation.

An erroneous decision of a lower Court on a question of limitation does not constitute a valid ground for interference by a High Court in the exercise of its revisional powers under S. 115, Civil Procedure Code, though its decision might be open to revision under that section when a suit is decreed without a decision upon the question of limitation. [P. 908, C. 1.]

(b) Bengal Tenancy Aet (8 of 1885), S. 153—Suit for damages for use and occupation or in the alternative claim for Rs. 100 as rent—Held if suit is for rent no second appeal lies under

S. 153 and if otherwise it was barred by S. 102, Civil P. C.

A suit for an amount less than Rs. 100 was framed, in the alternative, for recovery of rent or of damages for use and occupation :

Held, that no second appeal lay in the case, inasmuch as if the suit was treated as a suit for rent, the appeal was barred under S. 153 of the Bengal Tenancy Act and if the suit was treated as one for damages for use and occupation, it was barred under S. 102 of the Civil Procedure Code, 1908. [P. 908, C. 1.]

Gobind Chunder Dey Roy—for Appellant.

Mookerjee, J.—This is an appeal by the defendant in a suit framed, in the alternative, for recovery of rent or of damages for use and occupation. The sum claimed is less than Rs. 100. It is obvious that the appeal is incompetent. If it be treated as a suit for rent, the appeal is barred under S. 153 of the Bengal Tenancy Act, as none of the special questions mentioned therein has been decided by the decree. If, on the other hand, the suit is treated as one for damages for use and occupation, it is barred under S. 102 of the Code of Civil Procedure: *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (1). Whichever view may be taken of the nature of the suit, the appeal cannot consequently be entertained. The appeal is accordingly dismissed.

We have been invited, however, to interfere with the decree of the Subordinate Judge in the exercise of our revisional jurisdiction. But it is plain that the provisions of S. 115 cannot be applied to this case. The Subordinate Judge had jurisdiction to hear the appeal preferred to him and to reverse the decision of the Primary Court. If he has committed an error of law, that does not constitute a valid ground for interference by this Court in the exercise of its revisional powers. It is immaterial that the alleged error touches the question of limitation. The Subordinate Judge has decided, though possibly erroneously decided, the question of limitation which he was called upon to consider: *Sundar Singh* v. *Doru Shankar* (2) and *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka* (3). The position might have been different if he had decreed the suit without a decision upon the question of limitation: *Kailash Chandra Haldar* v. *Bissonath Paramanic* (4). The application for revision must consequently be refused.

This decision. it is conceded, will govern the other appeals and applications, on which similar orders will be drawn up.

V.B./R.K.

Appeals dismissed; *Applications refused.*

(1) (1896) 23 Cal. 884.
(2) (1898) 20 All. 78.
(3) (1912) 39 Cal. 473=15 I. C. 547.
(4) (1897) 1 C. W. N. 67.

A. I. R. 1916 Calcutta 908

CHITTY AND WALMSLEY, JJ.

Nasuruddi Karikar and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1498 of 1915, decided on 17th December, 1915.

(a) Criminal P.C. (5 of 1898), S. 109—Surety—Sufficiency of—It should be considered from general view of his stability.

The sufficiency of a surety should be considered from a general view of his stability and the property which he holds; it should not be regarded simply from the point of view of the movable property which he possesses.

[P. 909, C. 1.]

(b) Criminal P. C. (5 of 1898), S. 109—Bad livelihood case—Surety—Fitness — Determination of.

Semble.—In a bad livelihood case the question of relationship of the surety with the accused has some relevancy in considering the fitness of the surety. [P. 909, C. 1.]

Manmatha Nath Mukerjee and *Tarakeswar Pal Chowdhury*—for Petitioners.

Judgment.—In this case we do not think that the Deputy Magistrate was correct in looking only to the movable properties of the proposed sureties. It is true that, under S. 514, Criminal Procedure Code, so far as a surety's property is concerned, the bond can only be enforced by "attachment and sale of the movable property belonging to such person." But that does not mean that the sufficiency of the surety is to be regarded simply from the point of view of the movable property which he possesses. It is obvious that a man may possess Rs. 1,000 to-day when he passes a bond and get rid of it to-morrow when the bond is passed and have no property against which the Court can proceed. On the other hand, if he has immovable property, though that cannot be attached

under S. 514, Criminal Procedure Code, it is nevertheless a much better safeguard. A man can always raise money on his immovable property if it is not encumbered; and he would probably prefer to do that than go to jail in the event of his bond being forfeited. The sufficiency, therefore, of a surety should be considered from a general view of his stability and the property which he holds. With regard to the closing passage of the Deputy Magistrate's judgment in which he says that some of the sureties proposed are said to be incapable of checking the accused should he revert to his old course of life, we may point out that it is impossible to put an effective moral check upon a man. All that the Court can do is to forfeit any bond which may have been passed, in case the accused reverts to his old course of life. At the same time, the question of relationship may have some relevance, as pointed out by the Additional Magistrate in his letter to this Court. With these remarks, we set aside the order passed and remand the case to the District Magistrate for a further consideration of the sufficiency of the sureties offered in this case. The matter should be disposed of as soon as possible.

V.B./R.K.

Order set aside; Case remanded.

A. I. R. 1916 Calcutta 909

MOOKERJEE AND N. R. CHATTERJEA, JJ.

Ganes Dutt Singh and *others* – Appellants.

v.

Lachmi Narain Singh and *others*— Respondents.

Appeals Nos. 3629 to 3635 of 1912, 580 of 1913 and 3595 to 3598, 3660, 3691 and 3603 of 1912, decided on 26th August, 1915, from the Appellate Decrees of Dist-Judge, Bankipore, dated 18th May, 1912.

(a) Evidence Act (1 of 1872), S. 3—Applicability—Test of proof illustrated.

Where the District Judge in appeal held that in all human probability the tenant defendants had paid an enhanced rent but he declined to draw the inference that this rent paid was at the enhanced rate contracted for by the tenants as in his opinion it was absolutely impossible to determine what the sum paid was:

Held, that the treatment of the case by the District Judge involved an error of law, as he had applied a test of proof other than that embodied in S. 3 of the Indian Evidence Act. 29 Cal. 323 and 39 Cal. 245, ref. to. [P. 911, C. 1.]

(b) Bengal Tenancy Act (8 B. C. of 1885), S. 29—Essential ingredients—Proof of—Presumption.

If two elements are proved, namely, *first*, that there was an agreement to pay rent at a rate higher than the previous rate; and *secondly*, that rent has been paid at a higher rate, the inference follows that the requirements of proviso (1) of S. 29, Bengal Tenancy Act, have been fulfilled, although it is not proved that the whole of the amount payable at the stipulated enhanced rate has been actually realised by the landlord from the tenant. [P. 911, C. 2.]

(c) Bengal Tenancy Act (8 B. C. of 1885), S. 30 Enhancement of rent—Interest payable upon capital spent by landlord for improvement must be included.

Obiter.—The enhancement under S. 30 (*c*) of the Bengal Tenancy Act should include a sum in addition to the interest payable upon the capital spent by the landlord for the improvement, and the enhancement agreed to by the tenant may be taken *prima facie* as his own estimate of what would be fair rent under S. 30 (*c*) till, at any rate, the tenant shows that his estimate was erroneous. [P. 912, C. 1.]

(d) Bengal Tenancy Act (8 B. C. of 1885), S. 30—Long standing dispute regarding payment of enhanced rent—Landlord not entitled to damages in suit for arrears of rent.

Where in consequence of a long standing dispute between the landlord and the tenant regarding enhanced rent payable by the tenant under S. 30 (*e*) the tenant did not pay the rent.

Held, that in decreeing the landlord's suit for arrears of rent damages should not be awarded against the tenant. [P. 912, C. 2.]

Rash Behary Ghose, Umakali Mukherjee, Kulwant Sahay and *Sivanandan Roy* —for Appellant.

Nogendra Nath Mitter and *Abani Bhusan Mukherjee* –for Respondents.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent due for the years 1313 to 1316 (*Fasli*). The case for the plaintiffs is that the holding in question was originally *bhowli*, that about the year 1889, the rent was commuted into *nagdi* at the rate of Rs 5 a year and that rent was realised at that rate up to the year 1897, when the tenants agreed to pay rent at the enhanced rate of Rs. 6-8 in consideration of an improvement to be effected by the landlords. The improvement in question was a channel through which surplus water might flow out of the land. The plaintiffs assert that the improvement was effected at their expense and that the tenants have enjoyed the benefit thereof. The plaintiffs further allege that rent was paid by the tenants at the rate of Rs. 6-8 per *bigha* till quite

recently, when there was a fresh agreement to pay rent at the enhanced rate of Rs. 9 per *bigha* in consideration of an improvement in the channel. The defendants deny all the allegations of the plaintiffs. They also deny the character of the tenancy and contend that rent was never paid even at the rate of Rs. 5 per *bigha*. They allege further that there was no agreement to pay rent at the rate of Rs. 6-8 on account of the improvement mentioned, much less was there a subsequent agreement to enhance the rent to Rs. 9. They finally contend that if there was an agreement for enhancement of rent, it was illegal as made in contravention of S. 29 of the Bengal Tenancy Act. The Court of first instance gave the plaintiffs a modified decree, which was confirmed on appeal by the District Judge. The case was then brought in second appeal to this Court and was remanded. This Court directed the District Judge to find whether the contract for enhancement of rent was valid and operative under S. 29 of the Bengal Tenancy Act, and, if it was not so operative, to determine, to what extent the rent should be enhanced under S. 30 (*c*) of the Bengal Tenancy Act. This remand was based on two findings contained in the judgment of the District Judge; namely, first, that there was an agreement to pay rent at the rate of Rs. 6-8 in consideration of the improvement to be effected by the landlords; and secondly, that the improvement in question had been made at the cost of the landlords and the benefit thereof had been enjoyed by the tenants. After remand, the District Judge has held, *first*, that the contract for enhancement of rent was invalid under S. 29 of the Bengal Tenancy Act. *Secondly*, that the plaintiffs were entitled to rent at the rate of Rs. 5-10-0 per *bigha* under S. 30 (*c*) of the Bengal Tenancy Act. He has accordingly modified the decree by the Primary Court and has also allowed the plaintiffs damages upon the sum decreed in their favour, The plaintiffs have appealed against this decree. The defendants also have appealed on the ground that no enhancement should have been allowed and that no decree for damages should have been made. The appeals by the plaintiffs raise two substantial questions; *first*, is the contract for enhancement of rent valid under S. 29 of the Bengal Tenancy Act; and, *secondly*, if it is not valid, what is the enhanced rent which should be decreed to the plaintiffs under S. 30 (*c*) of the Bengal Tenancy Act.

As regards the *first* question, there is now no controversy that the tenants did agree to pay enhanced rent in consideration of improvements to be effected by the landlords at their expense, that the improvements have been made and that the tenants have enjoyed the benefit thereof. But as this agreement for enhancement was not in writing and registered, as required by Clause (*a*) of S. 29, the question arises, whether the plaintiffs have brought themselves within Clause (1) of the proviso to that section. Clause (1) of S. 29 provides that the money rent of an occupancy *raiyat* may be enhanced by contract, subject to the condition that the contract must be in writing and registered. To this is added the proviso that nothing in the section shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed. Before the District Judge, it was argued that in all human probability the tenants paid rent at the enhanced rate of Rs. 6-8 a *bigha*, as contemplated by the first clause of the proviso. The considerations urged in support of the argument are set out in the judgment of the District Judge and may be recapitulated here. If there was an agreement to pay rent at the rate of Rs. 6-8 and if the improvements in question were effected by the landlords at their expense and enjoyed by the tenants, is it at all probable that the landlords should have from 1304 to 1312 accepted rent at the lower rate? No suit for rent was previously brought; rent had been amicably settled and it was difficult to understand why the landlords should have, during all these years, contented themselves with the smaller rent after they had invested capital on the works of improvement, in consideration of which the tenants agreed to pay a higher rent. The District Judge concedes that these considerations show that in all human probability the defendants had paid a sum higher than Rs. 5 per *bigha* from 1304 to 1312. But he declined to draw the inference that the rent had been paid at

the enhanced contract rate, because, in his opinion, it was absolutely impossible to say what the sum paid was. In another passage in his judgment, he states that although the tenants agreed to pay Rs. 6-8 per *bigha*, if the landlords would improve the irrigation in the village they did not in fact pay the whole of that amount, and the landlords, rather than fight the whole body of tenants, were glad to accept any addition to the previous rent which they were willing to give. In our opinion, the treatment of the case by the District Judge involves two errors of law, namely, *first*, he has applied a test of proof other than that embodied in S. 3 of the Indian Evidence Act; and *secondly*, he has not correctly appreciated the requirements of the first clause of the proviso to S. 29 of the Bengal Tenancy Act.

As regards the first point, we must bear in mind that S. 3 of the Indian Evidence Act lays down that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The effect of this section has been considered in two recent cases; namely, *Boisogomoff* v. *Nahapiet Jute Company* (1) and *Jarat Kumari Dasi* v. *Bissessur Dutt* (2). In the second of these cases, Jenkins, C. J., pointed out that the materials on which Courts have to pronounce are necessarily imperfect; for apart from the inherent uncertainty of human affairs, the presentment of them to a tribunal is ordinarily the outcome of faulty observation, defective memory, inaccurate description and natural bias, and even that is blurred sometimes by the intervention of interpretation. Demonstration or a conclusion at all points logical cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. The Evidence Act, consequently, expresses the rule in terms which allow full effect to be given to circumstances are conditions of probability or improbability. To the same effect is the observation of Banerjee, J., in the case first mentioned; that S. 3 only lays down a rule of common sense. The judgment of the District Judge in this case shows that he has tested the evidence as if the Indian Evidence Act only provided that a fact is said to be proved when after considering the matter before it the Court believes it to exist. It has been overlooked that a fact is also said to be proved when the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The District Judge has very forcibly set out the circumstances which, in his opinion, show that, in all human probability, the tenants paid rent at a rate higher than Rs. 5. He should consequently have held that the fact in question has been proved.

As regards the second point, the District Judge has apparently held that the case cannot be brought within the first clause of the proviso to S. 29, unless it is proved that the whole of the amount payable at the enhanced rate has been actually realised by the landlords from the tenants. That clearly is not the intention of the Act. If two elements are proved, namely, *first*, that there was an agreement to pay rent at Rs. 6-8, which is higher than the previous rate of Rs. 5 a *bigha*, and *secondly*, that rent has been paid at a higher rate than Rs. 5, the inference follows that the requirements of the section have been fulfilled. In these circumstances, we must hold, upon the facts found in the judgment of the District Judge, that the contract for enhancement of rent from Rs. 5 to Rs. 6-8 is operative between the parties.

As regards the *second* question, namely, the enhancement of rent under S. 30 (*c*), we may state that in the view we take of the first question, it is not necessary for us to deal with it in detail. But we may add that the judgment of the District Judge is assailable in second appeal even in respect of that matter. The District Judge has held that the cost of the improvement by the landlord was Rs. 5 per *bigha*, and has, on this ground, allowed the plaintiffs a decree at the enhanced rate of Rs. 5-10 per *bigha*. He has not stated explicitly the process of reasoning which led him to this conclusion. But it has been suggested—and the suggestion seems plausible—that he has added the

(1) (1902) 29 Cal. 323.
(2) (1912) 39 Cal. 245 = 13 I. C. 577.

10 annas as fair interest on the sum spent by the landlord to carry out the improvement. This ignores the fact that the landlord would be entitled to rent at the enhanced rate only so long as the improvement might last, and that a time must come when the rent would have to be reduced to the original rate. The consequence would be that if the landlord were allowed nothing beyond fair interest on the capital invested for the purpose of the improvement, his capital would be lost to him after the lapse of a few years. Consequently, the enhancement should include a sum in addition to the interest payable upon the capital spent. Then, again, as the tenants agreed to pay Rs. 6-8 a *bigha*, in consideration of the improvement, that may be taken, *prima facie*, as their own estimate of what would be fair rent under S. 30 (*c*); and the Court might well adopt this as the basis for a decree till, at any rate, the tenants showed that their estimate was erroneous. But, as we have said, it is not necessary for us to develop this aspect of the case, because the plaintiffs are entitled to rent at the contract rate of Rs. 6-8 per *bigha* for the years mentioned.

Attention may here be drawn to the effect of the second clause of the proviso to S. 29, which makes Clause (*b*) (whereby the amount of enhancement is limited to two annas in the rupee on the rent previously payable) applicable only to cases where no improvement has been effected by the landlord at his expense. Where, as here, such improvement has been effected, an agreement for enhancement of rent at more than two annas in the rupee is valid. But this enhanced rent can continue only so long as the improvement exists and substantially produces its estimated effect in respect of the holding. Thus, although we allow the plaintiffs to realise rent from the defendants at the enhanced rate for the years in suit, in any subsequent suit for rent, it would be open to the tenants to establish, if possible, that rent should not be decreed at the enhanced rate, because the improvement either no longer exists or does not substantially produce the estimated effect in respect of the holding. It is obviously just that if the improvement has ceased to exist in part only, there should be a corresponding reduction in the enhanced rent.

As regards the appeals by the tenants we are of opinion that this is a case where damages should not be decreed. There has obviously been a long standing dispute between the parties, and if the tenants have failed to pay rent regularly, they alone cannot be held responsible; the landlords, on their part, put forward a claim for enhanced rent at the rate of Rs. 9 and that case has completely broken down.

The result is that this appeal is allowed and the decree of the District Judge varied. There will be a decree in favour of the plaintiffs for rent, in respect of the years in suit, at the rate of Rs. 6-8 per *bigha*. The rent in arrears will carry interest at Rs. 12-8 per cent. per annum up to the date of the institution of the suit. The amount decreed will carry interest at 6 per cent. per annum. The parties will pay their own costs throughout the litigation.

This judgment will govern Second Appeals Nos. 3630, 3631, 3632, 3633, 3634, and 3635 of 1912 and 580 of 1913, preferred by the landlords, as also Second Appeals Nos. 3595, 3596, 3597, 3598, 3600, 3601 and 3603 of 1912 preferred by the tenants. In each case, the appeal will be allowed and a modified decree drawn up as above.

V.B./R.K.

Appeals allowed.

A. I. R. 1916 Calcutta 912

HOLMWOOD AND MULLICK, JJ.

Superintendent and *Remembrancer of Legal Affairs, Bengal*—Appellant.

v.

Mon Mohan Roy and *others*—Respondents.

Criminal Appeals Nos. 4 and 5 of 1915, decided on 14th December, 1915.

(a) Criminal Trial—Appeal—Irregularity.

It is irregular for a Judge, while dealing with connected criminal appeals, to make cross-references to the evidence and judgments in the several cases. [P. 913, C. 2.]

(b) Indian Penal Code (45 of 1860), Ss. 120-B and 109—Offence committed before S. 120-B—Conviction under S. 120-B is bad—But accused can be convicted under S. 109.

A conviction under S. 120-B, Indian Penal Code, cannot stand if the offence was committed before that section came into force but the accused can be convicted of abetment under

S. 109, Indian Penal Code, as abetment includes abetment by conspiracy. [P. 913, C. 2.]

(c) Indian Penal Code (45 of 1860), S. 109—Accused, Railway Officer, defrauding company and benefiting consignee firm by endorsing shorter weights—Note books and *Jama Kharcha* containing reference to accused are admissible under Evidence Act (1872), S. 10.

The accused, a loading officer of a Railway Company, fraudulently endorsed shorter weights on the back of consignment notes, whereby the Railway Company were defrauded and the consignees were benefited. It was proved that the firm of the consignees was in negotiation with the accused about something and that the firm had, through its dealings with some loading officer of the Railway Company, been able to defraud the company of considerable sums and the name of the accused signed by himself appeared in one of the note books of the firm and there was positive evidence that it was the duty of the accused to make out the weights on the consignment notes:

Held, that under S. 10, Evidence Act the note books and *jama kharach* of the firm could be used as evidence of abetment by conspiracy against the accused. [P. 914, C. 1.]

Norton and *Manindra Nath Banerjee* —for Appellant.

Dasarathi Sanyal, *Monmotha Nath Mukerjee*, *Jogendra Nath Mazumdar* and *Jitendra Lall Banerjee*—for Respondents.

Judgment.

Criminal Appeal No. 4 of 1915.—These are two Government appeals arising out of an alleged series of conspiracies to defraud the East Indian and connected Railways by endorsing a false weight on the back of the consignment notes, whereby the railway receipts were made out for sums much less than what was really due to the Railway Companies and the consignees benefited by the fraud to the extent of the freight wrongly calculated, so that in one year the Railway Companies concerned have lost Rs. 12,500.

The procedure was very simple if sufficiently ingenious. The clerk, whose duty it was on any given day to convert the true weights in tons into the Indian weights, in maunds from the weighment slip sent from Howrah after the wagons had been weighed, entered a weight several tons less than that on the slip and made the corresponding shortage in the calculation of the weight in maunds. The clerk whose duty it was to calculate the freight to be charged, it is said, was thereby deceived, though it is quite possible he may have been an accomplice, and charged a large sum less than the railway was entitled to for carrying the goods. The consignees who took delivery profited by the fraud and in the cases now before us are said to have paid the accused Mon Mohan Roy, a loader of the East Indian Railway Company, various sums as an illegal gratification for helping to carry out the fraud by making false endorsements on the consignment notes. The trial of the cases was held before Babu R. N. Chatterjee, an experienced Deputy Magistrate, at Howrah and in both the cases he dealt with the evidence as a whole in exhaustive and careful judgments and eventually convicted in case No. 4 Mon Mohan Roy, the loader, East Indian Railway, Dinonath Pal, the head of the firm of Molasses Merchants at Kooshtea, and Janaki Nath Pal his son, also a member of the firm, under S. 120-B, Indian Penal Code, of conspiracy to defraud, and sentenced Mon Mohan Roy to one year's rigorous imprisonment, Janaki Nath to 9 months' and Dinonath to 4 months' under three counts, the sentences to run concurrently. He also gave various terms under Ss. 420 and 420 read with 109, 161 and 161 read with 109, apparently all to run concurrently. So that the sentences under 120-B were really the substantive sentences in the case. In appeal the learned Sessions Judge has dealt with the cases in a somewhat perfunctory manner and has made cross-references to the evidence and judgments in the two cases, which is irregular and confusing. He has rightly found that the convictions under S. 120-B cannot stand by reason of the fact that the offences were committed before that section came into force, but he has entirely omitted to notice that this is immaterial as the law of abetment includes abetment by conspiracy, which was distinctly charged before the Magistrate under S. 420/109. This has led him to consider nothing but the direct evidence against Mon Mohan of making the endorsement of false weights on the consignment notes, and finding this evidence to be insufficient on grounds which we shall presently have to deal with, he has thrown out the whole case holding that unless and until the alleged act of cheating is proved against Mon Mohan no question of taking an illegal gratification or of abetment can arise.

It is hardly necessary to point out that there is such a thing as circumstantial, evidence and as was remarked by Sir Lawrence Peel, C. J., in the case of *R.* v. *Hadger* (1):

"It is perfectly true that the dark covertness of crime cannot often be laid open, that conspiracies like other crimes must be generally supported by circumstantial proof."

Here the circumstantial proof of a conspiracy to defraud the East Indian Railway is overwhelming, though at the outset we can only say that certain firms conspired with certain officers of the railway to that end. In this particular case we have the specific firm of Dinonath Pal in negotiation with the accused Mon Mohan about something and as this firm has through its dealings with one of the loading officers of the Howrah Goods Station been able to defraud the companies of considerable sums and as Mon Mohan's own name signed by himself appears in one of the note books of the firm and there is positive evidence which, if believed, proves that it was Mon Mohan's duty to make out the weights on the consignment notes, we think that there can be no doubt that under S. 10 of the Evidence Act the note books and *jama kharach* of the firm of Dinonath can be used, as they were used by the learned Deputy Magistrate, as evidence of abetment of conspiracy against Mon Mohan Roy. As regards the Judge's finding that the evidence as to the figures being in Mon Mohan's hand has broken down by reason of the inability of the witnesses to stand the test of a partially concealed attendance register, we can only say that the test imposed was not a fair test and the greatest expert in handwriting in the world could not have succeeded in it. But we may point out that the witness Madhub, Superintendent of the Goods Office, who has 23 years of unblemished service in the Railway came so extraordinarily near to complying with the test that we are convinced that he is intimately acquainted with Mon Mohan's handwriting and can recognise it. He was tested with the first page of the attendance register where the names of Upendra Nath Das and Mon Mohan Roy immediately follow one another and he picked out the figures against the name of Upendra Nath Das as being in Mon Mohan's handwriting. Now an examination of the book clearly discloses that the entries of the names and the figures of these two loaders are in the same hand, as frequently happens, throughout the book and would naturally be the case when two men arrive together and one sits down to write their names and the hour of their arrival. From admitted writing of Mon Mohan's we can have no doubt that the names are written by Mon Mohan and not by Upendra and, therefore, presumably the figures which are bold and characteristic are also Mon Mohan's. The same bold and characteristic figures appear on the back of the consignment notes, Exhibits 8, 9 and 12, which are the subject of the charges, and we can see no reason to doubt the genuineness of Madhab's identification of his figures.

We do not rely so much upon Kal Charan Sarkar's evidence, because he is said by the defence to be the person who must have entered the figures and it is quite possible that he may have been an accomplice. At any rate he like all the other subordinate clerks in the Goods Office shows a tendency in cross-examination to give the facts a turn favourable to Mon Mohan. Dealing next with the considerations which have been urged by the defence to show that Mon Mohan could not have entered the figures and that it was not his duty to do so, we can only say that we believe the positive evidence of Superintendent Madhub that it was his duty and we do not accede to the contention that Mr. Pemmell, the Senior Inspector of Accounts, East Indian Railway, who derives his knowledge primarily from Madhub, is personally ignorant of what he deposes to. The delegation of authority may be in the hands of Madhub, but a superior who has had charge of the enquiry must be assumed to have satisfied himself that what he himself vouches for is a fact. It is also obvious from the details of the procedure that the officer who loads and seals the wagon and marks the consignor's statement would naturally be the proper person to enter the actual weight found by the weighing clerks at the coal yard.

The contentions against this are that Mon Mohan goes out to work in the yard at 3 P. M. and, it is assumed, does not return to the office, as the witnesses say that the office closes at 5 P. M., though

(1) Starkie on Evidence p. 132 (1852).

any one who has work to finish can stay on as long as he chooses. It is pointed out that Mon Mohan loaded the wagon about which the first count of the charge in this case is concerned on the 1st November. The weighment slip was received on the 2nd November and it is in evidence that these slips come in at 4 P. M. and are received by Kali Charan Sarkar or some other clerk and as the Railway receipt was prepared after the weights in maunds had been calculated on that same day, the 2nd November Mon Mohan cannot have had anything to do with it. This is assuming that Mon Mohan does not return to the office at 5 P. M. or after, of which there is no evidence. On the contrary the attendance register shows that he seldom if ever left office before 6 P. M. So that he had ample time to perform this simple duty in respect of all wagons loaded under his supervision the day before.

It is always easy where there are several men working in the office to try and shift the responsibility to some one else. Of course when a man is absent from illness or any other cause some one else must do his work and the evidence to this effect is sought to be used to throw a doubt on Mon Mohan's complicity in the transactions evidenced by Exhibits 8 and 9. Those exhibits, however, themselves show that Mon Mohan was in office on those days and filled in the forms.

With regard to Exhibit 12 Mon Mohan's writing does not appear, as the wagon was loaded at Shalimar by one Pasupati Mandal who was acting for Upendra Nath Das. The evidence is, however, clear that even Upendra Nath had nothing to do with working out the weights in maunds and that this was always done by Mon Mohan and it is a remarkable circumstance that the figures by whomsoever made are exactly similar to those on Exhibits 8 and 9. Coming now to the note books and *jama kharach* of the firm of Dinonath Pal, we find it admitted that Janakinath in this particular case, just as we shall see the *gomastha* Narain did in case No. 5, came down to Calcutta to purchase molasses and his expenses are entered in the *jama kharach* books which have been laid before us. There is also mention of sums paid by him to Mon Mohan in the same book on the dates to which these consignment notes refer. A money order sent by Narain in connection with another case shows that it was this Mon Mohan Roy of the Ramakrishnapore Howrah Goods Office that was in communication with the firm of Dinonath and there is no other Mon Mohan Roy in the office according to the evidence. Moreover Mon Mohan Roy's signature, undoubtedly genuine, appears in one of the note books under a sentence the meaning of which has not been discovered. It runs "*Tumi loilipore ami ar jaibo na*" which means

"After you have taken I will not go any more"

It was sought to be urged that these note books and *jama kharach* had been obtained under a search warrant and that all the formalities had not been carried out. It appears that a search warrant was issued but it was not used as the books were voluntarily produced by the old man Dinonath, who appears to have had no knowledge of the fraud and to have given every assistance to the Police.

The attack is, therefore, shifted from the alleged irregularities to the delay in producing them in Court and it is also pointed out that the passages which Sadananda Babu, the Auditor of the East Indian Railway, and the Sub-Inspector speak to as being admitted by Janaki were not marked at the time. The search was ordered by a Magistrate who had no seisin of the case, before the investigation was nearly completed and the books appear to have gone at once to the superior Police Officer at Howrah and to have been examined by the Government Pleader. They were produced in Court in their regular sequence when the Sub-Inspector Jaganath Mukherjee and Babu Sadananda Paulit P. W. Nos. 10 and 11 proved them. There is no internal trace of their having been tampered with and we can see no ground whatever for holding that any of the entries in the note books have been fabricated. The *jama kharach* kept in the ordinary course of business are clearly untouched. We think there can be no doubt that Janakinath paid Mon Mohan Roy Rs. 3, on the three occasions shown in the books and that the proved and completed fraud coupled with the evidence of Mon Mohan's duties and his handwriting fully establish Mon Mohan Roy's guilt under S. 420, Indian Penal Code

and Janakinath Pal's abetment of the same under S. 420/109. The learned Counsel for the Crown does not press the charge against Dinonath Pal.

He is a very old man and has ceased to take any active part in the affairs of the firm. He appears to have suspected nothing of what his son and servants had been doing and gave the authorities every assistance in his power.

We are, therefore, disposed to dismiss the appeal of Government in his case and confirm his acquittal. As regards Mon Mohan Roy and Janaki Nath Pal we think the sentences originally passed by the Magistrate under S. 120-B were quite appropriate, especially as in Mon Mohan's case there is another case of a similar nature in which we are delivering judgment after this. We, therefore, set aside the order of acquittal passed by the learned Judge and convicting Mon Mohan Roy under S. 420, Indian Penal Code, sentence him to be rigorously imprisoned for one year.

We convict Janaki Nath Pal under S. 420/109, and sentence him to be rigorously imprisoned for 9 months.

As regards the charges under Ss. 161 and 161/109 we do not think it necessary to come to any finding. The conduct of the two accused appears to be covered by the general charge of cheating and the illegal gratification was the consideration for the fraud. In any case no separate sentence would be necessary.

Criminal Appeal No. 5 of 1915.—In this appeal the facts are precisely similar to those in Appeal No. 4 except that the *gomastha* of Dinonath Pal, one Narayan Chandra Dutt, was the intermediary in this case and there was only one count charged instead of three.

The evidence as to Mon Mohan's duties, handwriting and the note books and *jama kharach* are of the same nature as in the other case and we find on that evidence that Mon Mohan did make the false endorsement upon Exhibit 6 dated 6th March, 1913, that Narayan was in Calcutta purchasing molasses from Dinonath Pal on that date and that he entered in his note book and in the *jama kharach* Rs. 24 in all paid to Mon Mohan Roy on 3 *challans* of molasses of which only one is in issue in this case.

The same objection was taken as to the admissibility of the note books, but whatever may be thought as to the impossibility of the witnesses remembering three months afterwards the unmarked passage said to have been admitted on May, 3rd in their presence by the accused Narayan and Janaki Nath Pal, who has already been dealt with there can be no difficulty in finding on the evidence of Babu Sadananda Paulit, a highly respectable officer of the Railway on Rs. 300 a month, that Narayan took the book to Calcutta as he said he did and made entries in it there and the *jama kharach* book kept in the regular course of business clearly shows the date 6th March and onwards during which Narayan was purchasing molasses and paying Mon Mohan Roy for something.

Another curious contention is pressed by the defence in this appeal, that it was Kalicharan who was deceived by the false entry and so made to enter on reduced freight and that as he suffered no wrongful loss no charge of cheating can lie.

It is not at all clear, nor is it material that Kalicharan was deceived, but the intention was by deceiving the Railway Authorities to induce them to deliver goods to Dinonath at Kooshtea for a very much smaller freight than they were entitled to.

The Railway Authorities were so deceived and did what they would not have done if they had known the truth. The other arguments urged on either side are the same as we have already noticed and we do not think it necessary to comment any further on them.

Finding in this case that Mon Mohan Roy made a false entry of weights on Exhibit 6 with a view to deceive the Railway Company and to cause them wrongful loss and wrongful gain to the firm of Dinonath and that Narayan, the *gomastah* of that firm, abetted the act of cheating by joining a conspiracy to commit fraud in pursuance of which he paid money of his master's firm to Mon Mohan, we set aside the order of acquittal in their cases and convicting them respectively under Ss. 420 and 420/109, Indian Penal Code, sentence Mon Mohan to be rigorously imprisoned for 6 months under S 420 and Narayan to be rigorously imprisoned for 6 months under S. 420/109.

We do not think it necessary to pass any orders under any other section.

For the reasons given in Appeal No. 4 we uphold the acquittal of Dinonath Pal.

The District Magistrate will take steps for the arrest and committal of the accused Mon Mohan Roy, Janaki Nath Pal and Narayan Chandra Dutt to jail.

V.B./R.K.

Order of acquittal set aside.

A. I. R. 1916 Calcutta 917

N. R. CHATTERJEA AND NEWBOULD, JJ.

Mahomed Ismail—Plaintiff—Appellant.

v.

Samad Ali Bhuyan and *others*—Defendants—Respondents.

Appeal No. 2816 of 1914, decided on 17th December, 1915, from the Appellate Decree of Addl. Dist. Judge, Noakhali, dated 13th June, 1914.

Contract Act (9 of 1872), S. 23—Complaint under Ss. 147 and 325 of Indian Penal Code—Summons issued under S. 325 only—Accused entering into contract to compound case—No evidence to show that accused apprehended conviction under S. 147—Contract held not void as being opposed to public policy—Indian Penal Code (1860), Ss. 147 and 325.

Where in a complaint against a person accusing him of offences under Ss. 147 and 325, Indian Penal Code, the Magistrate after perusing the complaint and examining the complainant issued summons only under S. 325 and the accused, with the permission of the Magistrate, compounded the case by entering into a contract in favour of the complainant:

Held, that in the absence of anything to show that there was any truth whatsoever in the allegations as to the offence under S. 147 or that there was any apprehension in the mind of the accused that he would be convicted under that section, the contract was not void as being opposed to public policy. 40 Cal. 113 and *Williams* v. *Bayley*. (1866), 1 H. L. 200, ref. to.

[P. 917, C. 2 & P. 918, C. 1.]

Dwarka Nath Mitter and *Gour Chandra Paul*—for Appellant.

Judgment.—The plaintiff, who is the appellant in this case, sued for a declaration that certain documents executed by him in favour of the defendants were invalid and void for want of consideration. It appears that in the Court of first instance the case was tried on the question whether the plaintiff executed the documents under coercion. The Court of first instance found that there was no coercion exercised upon the plaintiff and the suit was dismissed.

On appeal the finding of the Court of first instance on the point was affirmed, but then it was contended before that Court that the contracts were opposed to public policy as they were entered into for compounding a criminal case. The learned Subordinate Judge points out that the plaintiff had been summoned only under S. 325 of the Indian Penal Code. An offence under S. 325 can be compounded with the permission of the Court; and the Magistrate gave permission to compound the case. We have been referred to the case of *Nujebar Rahman* v. *Muktashed Husain* (1) by the learned Pleader for the appellant, but in that case the contract was entered into in order to stifle a non-compoundable criminal case, and all that that case decided was that it was contrary to public policy to compound a non-compoundable criminal case and any agreement to that end is wholly void in law.

It was contended by the learned Pleader for the appellants that although an offence under S. 325 of the Indian Penal Code is compoundable with the permission of the Court, the plaintiff was also accused of having committed an offence under S. 147 of the Code in the petition of complaint before the Magistrate and the learned Pleader relied upon the case of *Williams* v. *Bayley* (2) in support of the proposition that where a contract is entered into in order to avoid a criminal prosecution even before the case is brought into Court, the agreement is invalid as being opposed to public policy. In that case, however, the father of the person who had been accused of having committed forgery, took upon himself the liability with the knowledge that unless he did so, his son would be exposed to a criminal prosecution with a moral certainty of conviction, and it was held that under the circumstances he was not a free and a voluntary agent and the agreement he made was not enforcible in equity. In the present case the plaintiff, it is true, was accused of having committed offences under Ss. 325 and 147, Indian Penal Code, in the petition of complaint, but the Magistrate after perusing the petition of complaint and examining the complainant (as he must have done) thought fit to summon the plaintiff only under S. 325. Then, again, there is nothing to show that there was any truth whatsoever in the allegations

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(1) (1913) 40 Cal 113=15 I. C. 259.
(2) (1866) I. H. L. 200.

as to rioting or that there was any apprehension in the mind of the plaintiff that he would be convicted under that section. As we have said, the only section under which he was summoned was S. 325 and an offence under that section is compoundable with the permission of the Magistrate. The Magistrate did permit it and the parties entered into a compromise for settling their longstanding disputes. It is to be observed that the complainant in that case, who is the respondent in this appeal, was also accused under S. 325. The parties settled their longstanding disputes by executing the documents and by payment of money in cash.

We think that under the circumstances the decree of the lower Appellate Court is correct and this appeal must be dismissed, but without costs as the respondents do not appeal.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 918

JENKINS, C. J. AND HOLMWOOD, J.

Amrita Lal Kundu—Judgment-debtor —Petitioner.

v.

Anukul Chandra Das—Decree-holder —Opposite Party.

Civil Rule No. 694 of 1915, decided on 30th August, 1915, against the Order of Sm. C. C. Judge, Howrah, dated 19th June, 1915.

(a) Company—Voluntary Liquidation—Attachment prior to liquidation—Property does not vest in liquidator—Provincial Insolvency Act.

The property of a limited liability company attached before its liquidation does not vest in the liquidator. The powers of the liquidator differ in this respect from those of the Receiver of an insolvent's estate in whom the property vests under the Provincial Insolvency Act.

[P. 919, C. 2.]

(b) Company—Voluntary liquidation—Attachment prior to liquidation—Sale—Proceeds must be distributed in manner laid by Civil P. C. (1908), S. 73.

The proceeds of a sale held in pursuance of the attachment of property of a limited liability company, prior to its liquidation, must be distributed in the manner provided for by S. 730 of the Civil Procedure Code. [P. 919, C. 1.]

Jnanendra Nath Sarkar and *Bhupendra Nath Basu*—for Appellant.

Ramani Mohan Chatterjee—for Respondent.

Facts will appear from the following petition of the liquidator :—

"1. That the Howrah Engineering Co., Limited, is a company with limited liabilities registered under the Indian Companies Act, having its registered office at No. 26, Benares Road, Salkea, Howrah.

2. That the said company had been doing its business tolerably well, when on account of the war it began to suffer losses and to keep up the work going it borrowed Rs. 6,000 from Babu Birbhadra Chandra Roy Choudhury after executing a mortgage-bond in his favour with possession.

3. That the work of the company went on as before and a clerk looked after the business of the company on behalf of the said mortgagee Birbhadra Babu.

4. That one Anukul Chandra Das got a decree against the company for a sum of Rs. 300 in the Court of the Small Causes at Howrah and in execution of the said decree attached and removed some of the working machineries of the said company to Court, thus stopping the work of the company.

5. That thereupon the said company at an extraordinary meeting of the shareholders of the company passed a resolution for voluntary winding up of the said company, and the said resolution was confirmed on the 15th of May, 1915 and your petitioner was appointed liquidator therefor under the Indian Companies Act, VII of 1913.

6. That in the meantime the mortgagee who had filed a claim in the above execution case withdrew it on the appointment of the liquidator in respect of the assets of the said company.

7. That thereafter on the 29th May, 1915, your petitioner as liquidator with respect to the assets of the said company filed an application before the learned Small Cause Court Judge, Howrah, in the above execution case, to the effect that the Howrah Engineering Company having gone into liquidation your petitioner was appointed liquidator and as such under the Indian Companies Act, VII of 1913, he was entitled to have possession of all the properties belonging to the company including those brought in Court in execution of decree against the company, and prayed for release of the machineries that were then in the Howrah Court.

8. That thereupon the learned Judge fixed the hearing of the above applicatio on the 19th June next, and your petitione

made on 31st May a further application praying for the postponement of sale till the hearing of the application.

9. That on the 19th of June, the date fixed for hearing the application, your petitioner filed an application for time accompanied by the receipt granted by Registrar of the Joint Stock Companies to file Registrar's Certificate of liquidation of the aforesaid company; but the learned Judge dismissed the application for time, remarking that he would hear the arguments of your petitioner's Vakil on the assumption that such a certificate was filed but ultimately rejected the other petitions also dated the 29th and 31st of May last, by his order dated the 19th of June, 1915.

That your petitioner being aggrieved by the aforesaid order of the learned Small Cause Court Judge, dated the 19th June, 1915, begs to move this Hon'ble Court on the following amongst other.

Grounds.

1. For that the Court below acted without jurisdiction in dismissing the application for time under the circumstances set forth above.

2. For that the Court below acted without jurisdiction in dismissing your petitioner's applications, dated the 29th and 31st May, praying for release of the goods contrary to the provisions of the Indian Companies Act, VII of 1913.

3. For that the Court below failed to exercise the jurisdiction vested in it by the Companies Act.

4. For that in view of the Ss. 171 and 215 of the Indian Companies Act, VII of 1913, the Court below had no jurisdiction to proceed with the execution case, and to hold sale thereunder.

5. For that the Court below ought to have directed the decree-holder to appear before the liquidator for the settlement of his decree."

Judgment.—We must discharge the Rule. Though the matter is by no means clear, we feel that apart from any defect of jurisdiction the distribution of the proceeds in Court must be governed by the provisions of the Code of Civil Procedure. The proceeds came into Court before the application was made to us to pass an order in favour of the liquidator. The liquidator's argument before us has been to a certain degree based upon the idea that the property of the company vested in the liquidator. It is better that that idea should be at once removed. The liquidator of a company differs in this respect from the Official Assignee in that the property of the company does not vest in him. I am of course leaving out of consideration the possible vesting of the property of an unregistered company under a vesting order.

The opposite party will get his costs of this Rule. We assess the hearing fee at one gold *mohur*.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 919

CHAPMAN AND ROE, JJ.

Sumanta Dhupi and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 552 of 1915, decided on 31st August, 1915, against the Order of Sessns. Judge, Noakhali, dated 11th May, 1915.

(a) Indian Penal Code (45 of 1860), S. 201—Principal—Conviction of.

A principal cannot be convicted as an accessory after the fact. [P. 920, C. 2.]

(b) Indian Penal Code (45 of 1860), Ss. 201 and 302—Accused whether guilty of murder not definite—Mere suspicion is no bar to conviction under S. 201.

Where it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under S. 201. [P. 920, C. 2.]

(c) Indian Penal Code (45 of 1860), Ss. 201 and 302—Murder—That accused disposed of dead body accepted as proved fact—Accused proved beyond doubt to be actual principals present at murder and taking part in murder—They cannot be convicted of minor offence of causing evidence of murder to disappear.

But if in a case of murder it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear, even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn. [P. 920, C. 2 & P. 921, C. 1.]

(d) Criminal trial—Procedure—Alternative indictment.

Per *Chapman, J.*—It is unsatisfactory to have an alternative indictment, one count charging

the accused as principal and the other as accessory after the fact.

Atulya Charan Bose—for the Crown.

Roe, J.—The facts of this case as set forth in the judgment of the learned Sessions Judge are as follows:—On the 3rd February one Girish Kahar disappeared and was never seen again alive. On the 12th February a dead body was found in pond which appears to be an overflow from a tidal river. The body was lying under three feet of mud and on it was a heavy ladder. It was so far decomposed that the Medical Officer who held the *post mortem* examination was unable to give any cause of death: but from its clothing it was identified as the body of Girish by his relations. As soon as the body was discovered, a first information was lodged before the Police in which it was stated that the undoubted cause of the killing of Girish Kahar was that his cousin was an idiot and that his wife Nandarani was an immoral woman, her chief visitors being Sumanta Dhupi and Bhagwan Dhupi, two of the accused now before us, and that Girish was an obstacle to these intrigues. After investigation two other Dhupies, Bharat Dhupi and Pyari Dhupi, were arrested by the Police and were brought before the Deputy Magistrate for the recording of statements which for the purpose of the present case it is not necessary to consider. It is sufficient to say that they are not admissible in evidence against the two accused Sumanta and Bhagwan. Evidence was placed before the Committing Magistrate to the effect that from the condition of the rice in the stomach of the deceased he must have died three or four hours after his last meal, which was taken at 6 P.M. A number of witnesses gave evidence that they saw Sumanta and Bhagwan, Pyari and Bharat between 6 and 8 P. M. loitering near the house of Girish and two boatmen saw Sumanta the same night at 11 P.M. with two other men at a spot a short distance from the place where the body was found. The men that they saw were muddied to the waist. Other witnesses saw Sumanta and Bhagwan about midnight returning to their homes with mud upon their legs. Upon this evidence the four accused Sumanta, Bhagwan, Bharat and Pyari were committed to the Sessions Court under Ss. 302 and 201, Indian Penal Code.

On the case coming on for trial it was at once evident that it would be illegal to try both these offences together. Accordingly the charge under S. 201, Indian Penal Code, was first investigated, the charge under S. 302 being postponed for future consideration.

The facts as found by the Sessions Judge amount to this, that the Medical Officer is wrong in his deductions from the digestion of the food in the stomach of the deceased as to the exact hour of his death. That hour would more rightly be fixed at between 7 and 8 P.M. The Sessions Judge finds on the evidence that it is conclusively proved that Bhagwan and Sumanta disposed of the body of Girish by sinking it in the pond. He finds that it is conclusively proved that Girish was murdered between 7 and 8 P.M. on the night of the 3rd February. He is satisfied that Sumanta and Bhagwan had a sufficient motive for killing him. He finds that they were loitering near the house of Girish at the exact hour of the murder. On these facts he has convicted them under S. 201.

S. 201 is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact. The learned Judge recognises this. His argument is that the evidence on the record is insufficient to justify him in saying definitely that either Sumanta or Bhagwan was actually guilty of the murder and that therefore, there is no bar to their trial under S. 201. I have considered carefully the opinion of many learned Judges upon this section, particularly the opinion of Jardin, C. J., and Ranade, J., in the case of *Queen-Empress* v. *Limbya* (1). I accept with confidence the rule laid down in that case that, where it is impossible to say definitely, however strongly it might be suspected that an accused was guilty of murder, mere suspicion is no bar to a conviction under S. 201. But I am satisfied that if it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present

(1) Unreported Cr. Case Bom. H. C. R. 189 at p. 799.

at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear, even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn.

We must take it as a fact conclusively proved that the accused on the night of the murder of Girish disposed of his dead body. We must take it that before any investigation had been made by the Police Sumanta and Bhagwan were clothed with a motive for the murder. We must take it as proved beyond dispute that the murder was committed between 7 and 8 P.M. and that between 7 and 8 P. M. Sumanta and Bhagwan were seen by numerous witnesses loitering near the house of the deceased. If all these facts are accepted as being conclusively proved, it is beyond question that they amount to a chain of circumstantial evidence amply sufficient to justify the conviction of the accused as principals. If we accept the facts found the appellants were certainly principals. If we do not accept the facts found they are on the merits of the case not guilty. There is in this case no escape from that position. The appellants Sumanta Dhupi and Bhagwan must be acquitted.

With regard to Pyari Dhupi there are two flaws in his conviction. In the first place on the facts found by the Sessions Judge all that he did was to tie the body of Girish to a ladder. In one part of his judgment he says that it is not shown for certain whether Girish was dead when he was tied to the ladder. In another part of his judgment he says that Pyari helped to tie the body to the ladder because he was abused. Accepting these findings of fact it is clear, in the first place, that when Pyari lent his assistance it is not certain that the offence of murder had been committed. In the second place, if indeed he only tied the ladder to the body of the deceased to avoid being abused it cannot be said that he assisted in disposing of the body with the intention of screening the murderers.

For these reasons I am of opinion that the three appellants should be acquitted and released.

Chapman, J.—I agree that the appellants must be acquitted and released. I desire, however, to guard myself from saying what my opinion would be if this case were one of first impression. I consider that I am bound by the decision of *Torap Ali* v. *Queen-Empress* (2). I am unable to distinguish the facts of the present case from the facts of that case. The Crown might well consider in a case of this kind which charge to prove and proceed upon that charge alone. It is unsatisfactory to have an alternative indictment, one count charging the accused as principal and the other as accessory after the fact.

V.B./R.K.

Appeal allowed.

(2) (1895) 22 Cal. 638.

A. I. R. 1916 Calcutta 921

GREAVES AND WALMSLEY, JJ.

Sital Prasad—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1168 of 1915, decided on 4th November, 1915, against the Order of Dist. Magte., Monghyr, dated 8th July, 1915.

(a) Criminal P. C. (5 of 1898), S. 108 (*b*)—Intention to promote or attempt to promote feelings of enmity or hatred not necessary—Likelihood to promote feelings of enmity or hatred sufficient.

To justify an order under S. 108 (*b*) of the Criminal Procedure Code, it is not necessary to find that there was an actual intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects; it will be sufficient when it is found that there are words in the leaflet or matter complained of which were likely to promote feelings of enmity or hatred.

[P. 922, C. 2.]

(b) Indian Penal Code (45 of 1860), S. 153-A—Essential ingredients explained.

Obiter dictum.—To constitute an offence under S 153-A, Indian Penal Code, there must clearly be an intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects.

[P. 922, C. 1.]

Dasarathi Sanyal, Siva Nandan Roy and *Rajendra Prasad*—for Petitioner.

S. Ahmed (*Deputy Legal Remembrancer*)—for the Crown.

Judgment.—The petitioner in this case has been bound down under S. 108 (*b*), Criminal Procedure Code. We granted a Rule calling on the District Magistrate to show cause why the order should not be set aside, on the ground that upon the true construction and

interpretation of the leaflet as a whole the Court below ought to have held that it does not contain any matter the dissemination of which is punishable under S. 153-A, Indian Penal Code, which necessitates there being an intention to promote feelings of enmity or hatred. On behalf of the petitioner it was contended that even if the matter or some of the matter contained in the leaflet was likely to promote feelings of enmity or hatred, there could be no order made under S. 108, unless the Court was satisfied that there was an intention in using the words of the leaflet to promote or attempt to promote feelings of enmity or hatred; and we were referred to *Joy Chandra Sarkar* v. *Emperor* (1) as an authority that for a conviction under S. 153-A there must be a deliberate attempt to excite class against class and an intention to create enmity. We were also referred to the case of *Jaswant Rai* v. *Emperor* (2), which lays down that to constitute an offence under S. 153-A there must be an intention to promote feelings of enmity and hatred. We were further referred to two English cases, *Reg* v. *Sullivan* (3) and *R.* v. *Burns* (4), cases under the English Common Law, which were cited before us as authorities for the proposition that to constitute an offence under S. 153-A, which is said to be founded upon the principles of the English Common Law, there must be intention. The only case to which we were referred which is an actual decision under S. 108 (*b*), Criminal Procedure Code, is the case of *U. Dhammaloka* v. *Emperor* (5). It is a case decided in the Lower Burma Chief Court by a single Judge and he without ambiguity lays down the proposition that to justify an order under S. 108 (*b*) there must be an actual intention to promote or attempt to promote feelings of enmity or hatred.

Our view of the section is at variance with this decision. We think that although to constitute an offence under S. 153-A, Indian Penal Code, there must clearly be intention, different considerations arise with regard to the provisions of S. 108 (*b*), Criminal Procedure Code. It is true that the words of the section are

> "any matter the publication of which is punishable under S. 153-A, Indian Penal Code."

But in our view in order to justify an order under S. 108 (*b*), one has only got to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred; and once one has got those words present, there is no necessity for finding intention as would be necessary if the person was placed under his trial under S. 153-A. If this were not so, there would be no necessity for S. 108, Criminal Procedure Code, as proceedings would be taken under S. 153-A, Indian Penal Code. The result is that we have simply got to look to the actual words of the leaflet to see if there are words which in our opinion are likely to promote feelings of enmity or hatred. The leaflet as a whole is designed to call backsliders from the true Hindu faith to a sense of their misdeeds. If the words of the leaflet had been confined to this, there would have been nothing in respect of which the petitioner before us could have been bound down under S. 108, Criminal Procedure Code. But it seems to us that when we read the leaflet we find that there are passages which go far beyond the object above-mentioned, if that had been the only object. For instance, there was no necessity to refer, as the pamphlet does, to members of the Mahomedan faith as beef-eaters and destroyers of the Vedas and the Shastras. The passage which specially seems to us unnecessary for the alleged purpose of the pamphlet is as follows:

> "Is it proper to observe the festivals and the religious observances of a religion on the basis of which thousands of our temples have been pulled down and the images of our gods and goddesses have been burnt for heating *hamams* for providing hot baths, many places of pilgrimage have been destroyed for the construction of mosques (and mosques built on the sites), crores of beneficial cows have been killed and crores of ignorant widows or orphans and the helpless are deprived of (degraded from) their religion by misleading and enticement."

These facts may be true historically or not, and in the history of any country or of any community or religion there are passages which are best left unrecalled. It seems to us, therefore, that in this and other passages of the pamphlet there are words which are likely to promote feelings of enmity or hatred between

(1) (1911) 38 Cal. 214=10 I. C. 948.
(2) (1907) 10 P. R. 1907 Cr.=5 Cr. L. J. 439.
(3) (1868) 11 Cox. C. C. 44.
(4) (1886) 16 Cox. C. C. 355.
(5) (1911) 10 I. C. 789.

Hindus and members of the Mahomedan religion. Having regard to this we consider that the order made by the District Judge of Monghyr binding down the petitioner was rightly made.

The Rule, is, therefore, discharged.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 923

MOOKERJEE AND ROE, JJ.

Prasanna Kumari Debi — Judgment-debtor—Appellant.

v.

Sris Chandra Majumdar and *others*—Decree-holder—Respondents.

Appeal No. 592 of 1913, decided on 24th May, 1915, from the Appellate Decree of Dist. Judge, Dacca, dated 9th August, 1913.

(a) Execution—Decree—Variation—Executing Court cannot vary decree whether on contest or on consent.

A decree whether after contest or on consent must be executed as made, and cannot be varied by the execution Court in the light of subsequent events. 15 I. C. 719; (1895) 2 Ch 273; appl. [P. 923, C. 2.]

A decree-holder, who by a consent decree was allowed a path way of a certain width towards the east of the westernmost boundary of the land then in possession of the judgment-debtor, is not entitled, on the western boundary having been subsequently encroached upon by a trespasser, to have the decree executed according to the possession of the judgment-debtor at the time of execution. [P. 924, C. 1.]

(b) Decree—Compromise—Validity—Validity of consent stated.

A consent decree has precisely as much validity as and no greater validity than the agreement between the parties which receives judicial sanction. [P. 923, C. 2.]

Dwarka Nath Chuckerbutty and *Romes Chandra Sen*—for Appellant.

Brojendra Nath Chatterjee—for Respondents.

Mookerjee, J.—This is an appeal by the judgment-debtor against an order made in proceedings in execution of a consent decree dated the 12th January, 1901. The respondents sued the appellant for establishment of their alleged right of way over a tract of land towards the west of her tank. During the pendency of the suit the parties came to terms and a decree was made by consent. The substance of the decree was that the respondents were allowed a path way, two-and-a-half cubits wide, (eighteen inches to the cubit) towards the east of the westernmost boundary of the land then in possession of the appellant. The decree specified, in the alternative, that if, on a future occasion, the *thak* map was relayed, the way would lie towards the east of the *thak* line, that is, the western boundary of the way would coincide with the *thak* line, which, it was added, was proof of the title and possession of the appellant. But though this decree was made on the 12th January, 1901, the decree-holders did not prosecute their successive applications for execution to the final stage of delivery of possession; four applications were practically infructuous, and the present application was made on the 11th January, 1913, that is, on the last day of the twelfth year from the date of the decree, within which application for execution is permissible under S. 48 of the Civil Procedure Code. A controversy has now arisen between the parties as to how this decree is to be executed. The decree-holders contend that they are entitled to have the decree executed according to the present possession of the appellant. They have been driven to put forward this contention, because during the dozen of years that have elapsed since the decree was made, persons not bound by the decree have encroached on the land over which the way, if demarcated according to the possession of the appellant in 1901, would lie. The Court of first instance gave effect to the contention of the decree-holders and that order has been affirmed on appeal by the District Judge. In our opinion, this view is manifestly incorrect.

The decree must be executed as made, and cannot be varied by the execution Court in the light of subsequent events: *Madan Mohan Nath Sahi* v. *Bhikhar Shahu* (1). This principle applies with special force to a consent decree of the description now before us. As was well observed in *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.* (2), a consent decree has precisely as much validity as and no greater validity than the agreement between the parties which

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(1) (1912) 15 I. C. 719.

(2) (1895) 2 Ch. 273=64 L. J. Ch. 523=12 R. 331.

receives judicial sanction. Here the agreement between the parties was that the defendant (now judgment-debtor-appellant) would allow the plaintiffs (now decree-holders-respondents) a path way according to the title and possession as they existed at the time when the agreement was made. The Court gave effect to this arrangement and the decree-holders are entitled to the full benefit thereof, but to nothing beyond. Yet they have made no attempt to establish by evidence how the possession stood at the time of the decree and have, on the other hand, claimed, contrary to the decree, a way according to present possession. In this view, the Court would be amply justified to dismiss the application for execution. But we are prepared to give the decree-holders the alternative relief contemplated by the decree, specially as the judgment-debtor does not object to the adoption of that course, namely, that the way should run towards the east of the western *thak* line, as relayed by the Commissioner. No exception was taken to the report of the Commissioner by the decree-holders; an objection was, no doubt, preferred by the judgment-debtor, but it was subsequently abandoned. Consequently the position is that the decree-holders may be given a path way towards the east of the *thak* line; the breadth of the way will be two and a half cubits and eighteen inches will be taken as the measure of a cubit. If, when the way is demarcated, it is found to run over land which has been obstructed by the judgment-debtor herself, the obstruction will be removed. But if the obstruction has been erected by persons who are strangers to the decree and are not bound thereby, the decree-holders must be left to their remedy against such persons by a suit properly framed for the purpose. It has been pressed upon us very earnestly on behalf of the respondents that this view is likely to embarrass the decree-holders. We are not satisfied that there will be any real hardship to them; but if there is any, they themselves are entirely to blame for the result of their inaction during a period of more than twelve years after the decree.

The result is that this appeal is allowed, the order of the District Judge set aside and an order made in terms of this judgment. Each party will pay his own costs throughout these proceedings.

V.B./R.K.

Appeal allowed; Decree modified.

A. I. R. 1916 Calcutta 924

SHARFUDDIN AND COXE, JJ.

Safar Ali and *others*—Defendants—Appellants.

v.

Mohesh Lal Chowdhury and *others*—Plaintiffs—Respondents.

Appeal No. 3083 of 1911, decided on 8th March, 1915, from the Appellate Decree of Dist. Judge, Purneah, dated the 8th August, 1911.

(a) Evidence Act (1 of 1872), S. 65—Non-production of registered sale-deed—Secondary evidence not admissible.

A person to whom property has been sold by a registered deed, cannot, when that deed is not produced, adduce any evidence of the sale to prove his title without laying a foundation for the admission of secondary evidence with respect to it. [P. 925, C. 1.]

(b) Practice—Pleadings—Plea of estoppel not put in issue cannot be raised in argument.

A question of estoppel, which ultimately depends on questions of fact, unless put clearly in issue, cannot be raised in argument. [P. 925, C. 2.]

(c) Evidence Act (1 of 1872), S. 65 (b)—Admission by vendor as to sale—Secondary evidence—Admissibility.

An admission by a vendor as to sale of immovable property in favour of vendee cannot be admitted as secondary evidence in the absence of conditions mentioned in Clause (*b*) of S. 65 of the Evidence Act. [P. 925, C. 1.]

(d) Contract—Stranger—Transaction voidable—Stranger not entitled to question.

Obiter dictum.—When a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. [P. 925, C. 1.]

Jogendra Nath Mookerjee—for Appellants.

Jyotish Chandra Hazra—for Respondents.

Coxe, J.—The land in suit in this case originally belonged to one Bado Mondol. He died leaving three sons, Kalu, Talewar and Akal. It has been found that they succeeded to equal shares in the property and that the shares of Talewar and Akal have come to the plaintiffs, although within these shares there is one share, namely, one-sixth which the defendants held as under-tenants. The share of Kalu has come to the defendants.

The defendants appeal and on their behalf it is argued that the plaintiffs' title has not been proved to the one-third share of Talewar.

This contention, in my opinion, must succeed. It is proved that the share of Talewar came ultimately to Giridhari Lal and it is said that he sold it to the plaintiffs by a registered deed. That deed, however, is not produced and so far as we know, no foundation has been laid for the admission of any secondary evidence with respect to it. It appears to me, therefore, that no evidence of that sale can be adduced under S. 91 of the Evidence Act and that being so, the plaintiffs' title to that share must be regarded as not proved.

The Courts below have held that this defect is cured by the fact that Giridhari Lal supports the plaintiffs. That, however, does not justify secondary evidence of the document against the defendants under S. 65, Clause (*b*), of the Evidence Act.

Reference has been made to the case of *Lal Achal Ram* v. *Raja Kazim Husain Khan* (1). That case, however, has no application. The principle laid down in that case, if I understand it aright, is that when a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. But certainly that case cannot, in my opinion, be invoked practically to repeal S. 54 of the Transfer of Property Act and S. 91 of the Evidence Act.

It has been suggested that we should give the plaintiffs another opportunity of producing this deed. Seeing, however, that the case was instituted in 1909 and that the absence of this deed has been commented on by both the Courts below, I certainly do not think that the plaintiffs should have another chance of producing a document which they were too negligent to file at the proper time. This point, therefore, must, in my opinion, be decided in favour of the appellants.

The *second* point taken is that the plaintiffs are estopped from questioning the defendants' rights. Apparently Akal Lal on the same day sold one-third share to one Gora Lal Sahu under whom the plaintiffs claim and another one-third share to Isak Lal under whom the defendants claim ; and the *kobala* of Isak Lal is recited in that of Gora Lal and *vice versa*. It is, therefore, contended that the plaintiff who claims under Gora Lal cannot dispute the *kobala* in favour of Isak Lal. This contention, however, appears to me quite untenable. It is evident from the judgments of the Courts below that this question of estoppel was never put in issue. There appears to be nothing to show that the position of Kalu was in any way affected by the execution of this *kobala* in favour of Gora Lal. The learned Vakil who appears for the appellants is unable to assure us that there is any evidence that Isak Lal would not have bought the land covered by his *kobala* if the *kobala* in favour of Gora Lal had not been executed. The main element, therefore, to justify a plea in estoppel is wanting : and further it is evident that a plea of this nature, which ultimately depends on questions of fact, ought to be put clearly in issue.

Thirdly, it is contended that the defendants are entitled to retain possession of the land as *raiyats*. This, however, does not appear to have been seriously contested in the Court below. The Judge says :

> " The defendants Nos. 1 to 4 were also under tenure holders, but only in respect of the 2-annas 8-pies share of which they had taken settlement from Mohan Lal under the *kabuliat*."

It was argued that the position of the defendants with respect to the lands which they cultivated personally was different from their position with respect to the lands which they let to tenants. But this is clearly erroneous. Their title to these lands was precisely the same and if it failed with regard to the tenanted lands, it must also fail with regard to the cultivated lands.

The appeal will, therefore, be partly decreed and the suit will be dismissed with respect to the $\frac{1}{3}$rd share said to have descended from Talewar. Otherwise the decree of the lower Court will be confirmed. Having regard to the proportion of success, we pass no order as to costs.

Sharfuddin, J.—I agree.

V.B./R.K.

Appeal partly decreed.

(1) (1905) 27 All. 271=8 O. C. 155=32 I. A. 113 (P. C.).

A. I. R. 1916 Calcutta 926

FLETCHER AND TEUNON, JJ.

Moheswar Panda and *others*—Plaintiffs —Appellants.

v.

Sundar Narain Pattanaik and *others*—Defendants—Respondents.

Appeal No. 3449 of 1912, decided on 21st April, 1915, from the Appellate Decree of Sub-Judge, 2nd Court, Midnapur, dated 19th August, 1912.

Evidence Act (1 of 1872), Ss. 13 (a) and 32 (7) —Admissibility of unprobated privileged will depend upon the proof of execution by one attesting witness.

Documents alleged to be unprivileged wills, which have not been admitted to Probate, are not admissible in evidence under Ss. 13 (*a*) and 32 (7) of the Evidence Act, except on proof by one of the attesting witnesses that they have been executed in accordance with S. 50 of the Succession Act. [P. 926, C. 2.]

Mahendra Nath Ray and *Jyotis Chandra Hazra*—for Appellants.

Biraj Mohan Majumdar—for Respondents.

Judgment.—This is an appeal by the plaintiffs from the judgment of the learned Subordinate Judge of Midnapore, dated the 19th August, 1912, reversing the decision of the Munsif of Contai. The points which have been raised in the appeal concern only to the manner in which the learned Judge of the lower Appellate Court dealt with certain portions of the documentary evidence that had been admitted by the Munsif.

The *first* document which has been dealt with in this appeal is a partition decree (Exhibit B), that is, a decree in a partition suit between the first defendant and his brothers. The learned Judge in the lower Appellate Court remarks that the partition decree is hardly admissible in evidence. The qualification of the word 'admissible' by 'hardly' shows that the learned Judge did not reject that evidence altogether. That appears to be clear from the rest of the judgment where he proceeds to an analytical examination of the decree. It is stated that the learned Judge is wrong. We have not got a copy of the decree and we cannot say that the result which the learned Judge considered to be perfectly clear is wrong. There is nothing in the face of the judgment to show that the result arrived at by the learned Judge is wrong and that arrived at by the Munsif is right. We, therefore, decline to interfere on that account.

The *next* point urged is that the learned Judge of the lower Appellate Court refused to consider two wills that had not been admitted to Probate but had been admitted in evidence by the Court of first instance. The learned Judge refused to admit these documents on the ground that they had not been admitted to Probate. It is stated that these documents though not proved are admissible in evidence under the provisions of Ss. 13 (*a*) and 32 (7) of the Indian Evidence Act. In order that a document can be admissible in evidence under S. 32 (7), the document must amount to a transaction. The question is, do these two alleged unproved wills amount to a transaction. First of all, the evidence in this case does not satisfy the provisions of S. 50 of the Indian Succession Act. The will has not been proved to have been executed in the manner stated therein. Therefore these two documents do not amount to unprivileged wills and under the provisions of the law the learned Judge in the Court of first instance ought not to have admitted them, which are alleged to be unprivileged wills, except on proof by one of the attesting witnesses that the documents had been executed in accordance with the Statute, namely, S. 50 of the Indian Succession Act. That being so, the documents ought not to have been admitted in evidence as they do not amount to a transaction within the meaning of S. 32 (7). Every statement that a person makes on a piece of paper is not entitled to be admitted in evidence under the provisions of S. 32 (7) of the Indian Evidence Act; what is admissible has already been extended and includes not only public but private rights; and further extension would lead to trouble.

That being so, the result arrived at by the learned Judge of the lower Appellate Court is correct, though our reasons for arriving at that result are somewhat different from that of the learned Judge. The present appeal, therefore, fails and must be dismissed.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 927

WOODROFFE AND RICHARDSON, JJ.

Madan Mohan De Sarkar and *others*—Plaintiffs—Appellants.

v.

Rebati Mohan Poddar and *others*—Defendants—Respondents.

Appeal No. 2797 of 1912, decided on 12th March, 1915, from the Appellate Decree of Dist. Judge, Dacca, dated 3rd July, 1912.

(a) Civil Procedure Code (5 of 1908), S. 64—Obligations incurred in respect of property prior to attachment not affected.

The provision of S. 64, Civil Procedure Code, is for the protection of a creditor against transactions subsequent to the attachment; but obligations touching the property attached incurred by the debtor prior to the attachment are not affected by it. [P. 927, C. 2.]

(b) Civil Procedure Code (5 of 1908), O. 38, R. 10—Scope of.

There is no ground for holding that the provision in O. 38, R. 10, Civil Procedure Code, is limited to rights *in rem*. [P. 928, C. 2.]

(c) Civil Procedure Code (5 of 1908), S. 64—Contract of sale of property prior to attachment before judgment—Suit for specific performance of contract—Attachment did not affect right acquired.

Where after a contract for sale of a property had been made by the debtor in favour of the defendant, the plaintiff attached the property before judgment and the property was then sold to the defendant in a suit for specific performance of the contract:

Held, that the defendant's purchase must prevail against all claims of the plaintiff enforceable under the attachment. [P. 928, C. 2.]

Rash Behari Ghose, *Dwarka Nath Chakravarti* and *Kali Kinkar Chakravarti*—for Appellant.

B. Chakravarti, *Basanta Kumar Bose*, *Surendra Nath Guha* and *Sures Chandra Das*—for Respondents.

Woodroffe, J.—The facts of this case, so far as they are relevant to the findings in the judgment, are these. The plaintiffs attached the disputed property before judgment on November 6th, 1895, purchased it at an execution sale on 19th, August, 1897, and obtained symbolical possession on August, 20th, 1898. But on the 25th May, 1897, before the execution sale, the defendants had purchased the disputed property by a *kobala* executed by the Court in pursuance of a contract dated before the attachment. This contract was evidenced by the *bayna patra*, referred to in the judgment, dated the 19th August, 1895. It was followed by a suit for specific performance, the decree in which was passed on the 30th January, 1897. The *kobala*, which was executed by the Court in the suit for specific performance, was executed in pursuance of the aforesaid contract dated before the attachment. The defendants obtained possession before the execution sale at which the plaintiffs purchased.

A number of questions have been argued in the lower Courts and before us. Though it is unnecessary, in the view that we take of this case, to go into all these questions I note them here. In the *first* place, it was objected on behalf of the respondents that the appeal could not proceed in the absence of the heirs of the first respondent Rebati Mohan Poddar, the appeal having been, according to the previous judgment, declared to have abated as regards that respondent. It was *next* contended that the attachment was invalid for the two reasons stated in the judgment of the lower Court, namely, first, by reason of the want of proof that the proceedings were formally in order; and secondly, because S. 483 of the Civil Procedure Code had, it was contended, no application to an attachment of the present character by a mortgagee to realize his security. It was, however, argued and has in fact been held by the lower Court that even if there were a valid attachment the plaintiffs' suit was barred. It was contended on the one hand before us by the appellants that the period of 12 years is to be reckoned from the date upon which the symbolical possession was awarded to the plaintiffs. And it is argued on behalf of the respondent that the limitation must run from at least the date when the defendants obtained possession in 1897 under the decree in the suit for specific performance, and that such possession must not be taken to have been, as is contended, possession on behalf of the judgment-debtor but a possession obtained on their own behalf by suit *in invitum*.

The appeal must, in my opinion, be determined on one of the grounds on which the learned Judge has proceeded in the Court below and with which I now deal. It is true that under S. 64 of the Code alienations after attachment are void as against all claims enforceable under the attachment. On the other hand under the provisions of O. 38, R. 10,

an attachment before judgment does not affect the rights existing prior to the attachment. Now, it appears to me that a creditor can only attach the right, title and interest of his debtor at the date of the attachment and that he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property. The object of the provisions in S. 64 of the Code appears to me to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor, which may imperil his obtaining the fruits of his decree through the attachment which has been effected. I do not think that we are called upon to extend the provisions of S. 64 to cases which, it seems to me, were never contemplated by the section. After an agreement for sale the rights and duties of the seller were to receive the purchase-money and to execute the conveyance.

It has been argued by Dr. Ghose that creditors' right in this matter is paramount. This is so as regards all transactions subsequent to the attachment. But it does not seem to me that their right is paramount in the sense that the creditors are able to brush aside every obligation which may have been binding on the debtor prior to the date when the attachment was made. This would place them in a better position than the debtor whose property was attached. It is true that in this case the actual conveyance was executed after the attachment. But this was merely carrying out an obligation which was incurred prior thereto. It seems to me that if we are to hold that the plaintiff as a creditor can ignore the obligations incurred by the debtor, we should use the provision of S. 64 for a purpose which was not intended, that provision being for the protection of a creditor against transactions subsequent to the attachment.

It may be noted here that before the plaintiff purchased the property at the execution sale he had had notice of the agreement to sell, having been previously impleaded in the specific performance suit to which I have referred. And some portion of the purchase-money was paid at the date of the agreement.

It is said that the agreement created no interest in the land itself. This may be so. But neither did the attachment create any interest in the land and the purchase subsequently made at the auction-sale was later than the defendant's purchase and subject, as I have said, to the notice of the agreement under which the defendant's purchase was made.

Therefore, it seems to me that the natural justice of the case demands that the defendants' purchase should prevail. I do not see any ground for holding that the provision in O. 38, R. 10, is limited to rights *in rem*. The section does not say so, and the Judge has not so held. I agree with his conclusion that the defendants had a right to have the contract to sell specifically performed and that under S. 489, now corresponding to O. 38, R. 10, that right was not affected by the attachment. As he points out, the decree for specific performance was obtained and the sale completed before the attached property was sold to the plaintiff. Accordingly he held, and we think rightly, that in the circumstances of this case the defendants' purchase must prevail.

In this view of the case it is not necessary to enter into the other questions raised in the case.

I would, therefore, dismiss the appeal with costs.

Richardson, J.—I agree, upon the point which has been discussed, with the conclusion arrived at in the Court of Appeal below.

V.B./R.K.

Appeal dismissed

A. I. R. 1916 Calcutta 928

FLETCHER AND TEUNON, JJ.

Jogendra Chandra Banerjee—Defendant—Appellant.

v.

Phani Bhushan Mookerjee and *others*—Plaintiffs—Respondents.

Appeal No. 2911 of 1911, decided on 23rd March, 1915, from the Appellate Decree of Sub-Judge, Burdwan, dated 27th July, 1911.

Hindu Law—Inheritance—*Stridhan* inherited by female heirs does not become their *stridhan*.

Stridhan inherited by female heirs does not become the latter's *stridhan*. The female heirs take only a Hindu woman's estate in the property. 25 All. 468 (P. C.); 5 Cal. 222 & 17 Cal. 911, foll. [P. 929, C. 1.]

Rasheendra Nath Sarkar and *Baikuntha Nath Mitra* for *Dwarka Nath Mitra* —for Appellant.

Hemendra Nath Sen—for Respondent.

Fletcher, J.—This is an appeal by the defendant No. 3 against the judgment of the learned Subordinate Judge of Burdwan modifying the decision of the Munsif. The suit was brought by the original plaintiff, Khantamoni Debi, for declaration of title to the property in suit.

The defendant No. 2 was the son of the original plaintiff. The defendant No. 1 was a mortgagee under him and the defendant No. 3 was the purchaser in execution of the property under a decree founded on the mortgage in favour of the defendant No. 1.

The allegations in the plaint alleged that the property formed the *stridhan* of Manikmani and passed on her death to her two daughters, the 2nd daughter's share reverting on her death to the original plaintiff, her sister. This is the title set up in the plaint and on which the present suit must stand or fall. No case was set up in the plaint nor was any issue framed as to whether or not the original plaintiff had obtained a title to the property by adverse possession. The original plaintiff, some time before her death, executed a deed of gift in favour of her grandsons, the present plaintiffs, the son and nephews of the defendant No. 2. The only question, therefore, that arises on the pleadings and issues is, assuming as the lower Appellate Court has found that the property was the *stridhan* of Manikmani, whether the plaintiffs are entitled to succeed in the present suit. The law is not open to doubt that *stridhan* inherited by female heirs does not become the latter's *stridhan*. The female heirs take only a Hindu woman's estate in the property. This was decided finally in the case of *Sheo Shankar Lal* v. *Debi Sahai* (1). The same view had been expressed in this Court in the cases of *Prankrissen Laha* v. *Sreemutty Noyanmoney Dassee* (2) and *Hari Doyal Singh Sarmana* v. *Grish Chunder Mukerjee* (3). In the present case, the present plaintiffs can only succeed if the original plaintiff took an absolute interest in the property. This the original plaintiff had not and the substituted plaintiffs cannot maintain this suit. In my opinion the judgment appealed against ought to be reversed and the plaintiffs' suit dismissed. The plaintiffs-respondents must pay to the appellant his costs in this Court and in the Courts below.

Teunon, J.—I agree.

V.B./R.K.

Appeal allowed.

(1) (1903) 25 All. 468=30 I. A. 202 (P. C.).
(2) (1880) 5 Cal. 222.
(3) (1890) 17 Cal. 911.

A. I. R. 1916 Calcutta 929

HOLMWOOD AND WALMSLEY, JJ.

Akbar Ali Khan and *others*—Defendants—Appellants.

v.

Syed Abbas—Plaintiff—Respondent.

Appeals Nos. 2549 to 2598 of 1912, decided on 20th April, 1915, from the Appellate Decrees of Dist. Judge, Patna, dated 22nd January, 1912.

Bengal Tenancy Act (8 of 1885), S. 105—Second Appeal lies when decision on question of incidents of holding is upheld by Special Judge.

A second appeal lies to the High Court from the decision of a Special Judge affirming the decision of an Assistant Settlement Officer on the question as to the incidents of the holding. [P. 930, C. 1.]

Sarat Chandra Bysack and *Ambica Pada Choudhury*—for Appellants.

Jogesh Chandra Ray and *Mahomed Mustafa Khan*—for Respondent.

Judgment.—These appeals are preferred by the tenants defendants. The landlord-respondent instituted cases against them under S. 105 of the Tenancy Act asking that their rent should be increased under Ss. 31, 32, 33 and 52. When the three cases came on for trial the landlord withdrew his claims under Ss. 31 and 52, and gave no evidence regarding improvements. The question that remained between the parties was whether the rents were liable to enhancements, for the tenants asserted that they held at fixed rates. The learned Special Judge has found that they did not hold at fixed rates, and has upheld the enhancement allowed by the Assistant Settlement Officer. The defendants prefer these second appeals. A preliminary objection is raised on behalf of the landlord-respondent that no appeal lies, but having regard to the cases of *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (1)

(1) (1910) 37 Cal. 30=3 I. C. 449.

and *Bisseswar Ray* v. *Rajendra Kumar Singha* (2), we think that an appeal does lie on the question as to the incidents of the holding.

The finding of the lower Courts is that the tenants-defendants are ordinary occupancy *raiyats*, and not, as they allege, *raiyats* holding at fixed rates. It was conceded that they were entitled to the presumption arising under S. 50 (2) of the Tenancy Act. The learned Special Judge, however, held that the presumption was rebutted by a *bandobost robkar* and its connected papers of the year 1841; in these papers all the lands in the villages where the holdings are situated are described as *bhaoli*. The inference is that the holdings in suit were *bhaoli*, and the landlord argues that the conversion from *bhaoli* to *nagdi* must have taken place since 1841, and that it must be a change in the rent, of such a nature as to rebut the presumption under S. 50 (2).

The tenants-defendants rely upon the case of *Miterjeet Singh* v. *Toondun Singh* (3), where the learned Judges held that the fixing of a cash-rent in lieu of what was paid in kind was

"tantamount to saying that that money rate of rent represented and was equivalent to what had been paid before in another way."

We may remark that there are other cases in which a contrary view was taken, but it is not necessary for us to consider them. It appears to us that the present appeals must be distinguished from *Miterjeet Singh's* case (3) in this way. The tenants here produced rent receipts for cash-rents and said that they had been always paying rent at the same rate: that amounts to an assertion that they had always paid a cash-rent, although, it is true, they do not seem to make such a statement in so many words. This assertion is disproved by the fact that in 1841 the lands were held on the *bhaoli* system, and, therefore, at some date since 1841 there was a change. Ordinarily conversion from *bhaoli* to *nagdi* is a very great change, and about this change the tenants in these cases have nothing to say. In *Miterjeet Singh's* case (3), however, the change was by written agreement, and the money rent was accepted in lieu of the produce rent. This difference we think a substantial one, and it prevents us from applying the principle laid down in *Miterjeet Singh's* case (3) to the present cases.

We hold, therefore, that there is no reason for interfering with the judgment of the lower Appellate Court, and we dismiss these appeals with costs.

V.B./R.K.

Appeals dismissed.

(2) A. I. R. (1914) Cal. 851 = 25 I. C. 228.
(3) (1869) 12 W. R. 14.

A. I. R. 1916 Calcutta 930

RICHARDSON AND MULLICK, JJ.

Ali Mahamad — Defendant — Appellant,

v.

Aftabuddin Bhuya and *another*—Plaintiffs—Respondents.

Appeal No. 4176 of 1913, decided on 11th February, 1915, from the Appellate Decree of Sub. Judge, Tipperah, dated 18th June, 1913.

(a) Bengal Validating Act (B. C. 1 of 1903)—Transfer of permanent tenure may be complete upon registration although landlord's fee is not paid—Bengal Tenancy Act (1885), O. 12.

Under the Validating Act (B C. I of 1903) a transfer of the whole or a portion of a permanent tenure may be complete upon registration, although the landlord's fee is not paid and no notice of the transfer is given to him. 16 Cal. 642; 19 Cal. 17; 12 C. W. N. 478 and 9 I. C. 1001, ref. to. [P. 931, C. 2.]

(b) Bengal Tenancy Act (8 of 1885), S. 12—Transfer of permanent tenure—Transferee allowing transferor to represent him to landlord—Decree for arrears of rent against original tenure-holder—Transferee cannot object to sale in execution of decree—Bengal Validating Act (1903).

But if a transferee of permanent tenure allows the transferor (the original tenure-holder) to represent him to the landlord, he cannot take exception to the sale of his interest in execution of a decree for arrears of rent in a suit brought by the landlord against the original tenure-holder without making the transferee a party thereto. [P. 931, C. 2.]

U. K. Roy—for Appellant.

Nuruddin Ahmed—for Respondents.

Judgment.—This appeal arises out of a suit for arrears of rent brought by the plaintiffs as owners of a separate three-annas share in a certain *dar-putni* tenure against the defendants as their tenants. The learned Munsif dismissed the suit, on the ground that the plaintiffs had failed to establish their title to the share of the *dar-putni* which they claimed. In the lower Appellate Court the learned Subordinate Judge has found on the facts that the plaintiffs have

made out their title and has given the plaintiffs a decree for arrears of rent at the rate admitted by the defendants.

Before us there is no dispute, and under the circumstances there could be no dispute, that plaintiff No. 1 at any rate is entitled to rent in respect of a two-annas share of the *dar-putni*. The argument which has been addressed to us by the learned Vakil for the defendant No. 1, the appellant before us, has been confined to the defence raised below that Charu, the predecessor of the defendants, purchased one anna out of the three annas in respect of which the plaintiffs claim rent and that in respect of that one-anna share no rent is due from the defendants. It appears that the three-annas share of the *dar-putni* was sold in execution of a decree for arrears of rent and was purchased by the plaintiffs' vendor. The latter sold two-annas to plaintiff No. 1 and one anna to plaintiff No. 2. *Prima facie*, therefore, on the facts found by the learned Subordinate Judge there appears to be no answer to the suit. The defendants, however, alleged that the one-anna share was sold to their predecessor before the institution of the rent-suit. The question, therefore, arises whether the sale in execution passed that one-anna share to the plaintiffs' vendor. It is common ground that Charu was not a party to the decree in execution of which the rent-sale was held. It has been further found that Charu, though he purchased by a registered instrument, did not pay the landlord's fee prescribed by S. 12 of the Bengal Tenancy Act. In the view taken by the learned Subordinate Judge the fee not having been paid and no notice of the transfer having been given to the superior landlord, the *putnidar*, the latter was competent to bring a suit against the original tenants without joining Charu.

In this appeal it has been contended that regard being had to the Validating Act (Act I. B. C. of 1903), the landlord was bound by the transfer although his fee was not paid and although no notice of the transfer was given to him. This contention is founded on the cases of *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1), *Chintamoni Dutt* v. *Rash Behari Mondal* (2), *Hamendra Nath Mukerji* v. *Kumar Nath Roy* (3) and *Girish Chandra Guho* v. *Khagendra Nath* (4). The authority of this series of cases is undeniable and the result seems to be that a transfer may be complete upon registration although the landlord's fee is not paid and no notice of the transfer is given to him. Upon this part of the case the judgment of the learned Subordinate Judge may be open to just criticism. But the argument addressed to us overlooks a further finding of the Subordinate Judge upon a question of fact.

By his purchase Charu became one of a number of co-sharers in the *dar-putni* and the Subordinate Judge finds that Charu and his heirs "allowed Asok to represent them to the landlords." Asok was Charu's vendor and the finding is based partly on the fact that subsequent to Charu's purchase he and his heirs paid rent in Asok's name. All that the Validating Act says is that a transfer is not to be deemed invalid

"merely on the ground that the landlord's fee prescribed by the said S. 12 or 13 has not been paid."

Here the subsequent conduct of Charu and his heirs introduces a new element into the case. We are concluded by the Subordinate Judge's findings on questions of fact, and on the facts as found, the superior landlords were at liberty to frame their suit for arrears of rent in the manner in which they did frame it and the appellant-defendant cannot now take advantage of the fact that Charu was not impleaded.

The result is that the conclusion at which the Subordinate Judge arrived cannot be successfully assailed in second appeal and the appeal must be dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1889) 16 Cal. 642.
(2) (1892) 19 Cal. 17.
(3) (1908) 12 C. W. N. 478.
(4) (1911) 9 I. C. 1001.

A. I. R. 1916 Calcutta 931

MOOKERJEE AND ROE, JJ.

Raj Mohan De—Defendant—Appellant.

v.

Mati Lal Saha Poddar—Plaintiff—Respondent.

Appeal No. 295 of 1912, decided on 12th May, 1915, from the Appellate

Decree of Dist. Judge, Dacca, dated 9th April, 1912.

(a) Landlord and Tenant—Forfeiture—Waiver—Rent receipt is evidence of admission of relation existing at time when rent accrued—Acceptance of rent accrued due before forfeiture is not waiver though accepted after forfeiture--Such acceptance is no admission of relationship existing on date of payment—Held further that it was not fit case for relief under S. 114 of Act 4 of 1882.

A receipt of rent is an admission that the lease was subsisting at the time when that rent became due. [P. 932, C. 2.]

Waiver of a forfeiture by receipt of rent only applies to rent accruing subsequent to the forfeiture, and, therefore, an acceptance of rent which accrued due before the forfeiture does not operate as a waiver of the forfeiture. Case-law discussed. [P. 933, C. 1.]

Where after a forfeiture had been incurred, the landlord received rent from the defendant which accrued due before the forfeiture and granted a receipt describing him as a tenant:

Held, that the landlord must be taken to have described the defendant as his tenant in respect of the period for which the rent was paid, and such description could not be taken as an admission of the subsistence of the tenancy on the date on which the payment was made. [P. 934, C. 1.]

Under the circumstances of the case, the High Court refused to relieve the tenant against forfeiture by exercising its discretion under the provisions of S. 114 of the Transfer of Property Act. [P. 934, C. 2.]

(b) Transfer of Property Act (4 of 1882), S. 112—*Quære*—Whether waiver by distress stands on different footing from waiver by acceptance of rent in view of S. 112.

Quære.—Whether in view of the provisions of S. 112 of the Transfer of Property Act, waiver by distress in this country stands on a different footing from waiver by receipt of rent. [P. 933, C. 1.]

Upendra Lal Roy—for Appellant.

Birendra Kumar Dey and *Gopal Chandra Das*—for Respondent.

Mookerjee, J.—This is an appeal by the defendant in an action in ejectment. On the 16th January, 1904, the defendant took a lease of homestead land from the plaintiff, at a rent of Rs. 35 per month, for a term of 10 years. The lease provided that the rent for each month would be paid on the last day of the previous month, and if default was made in respect of rent for three successive months the tenancy would be forfeited. It is not disputed that the rent payable on the 13th April, 14th May, 14th June and 16th July, 1906 was not duly paid. On the 19th July, 1906, the defendant paid Rs. 70 as the rent of the two instalments due on the 13th April and 14th May and took a receipt therefor. Default was thereafter made in respect of the rent due on the 16th August, 1906. The result was that this suit was instituted on the 31st August, 1906 for ejectment of the defendant, on the ground that the tenancy had been forfeited by reason of default in payment of the three successive instalments of rent due respectively on the 14th June, 16th July and 16th August, 1906. The defendant pleaded that acceptance of rent on the 19th July, 1906 operated as a waiver of the then existing forfeiture, and that consequently the suit is premature. This contention has been negatived by the Courts below and the suit has been decreed. On the present appeal, the view unsuccessfully urged in the Courts below has been reiterated by the defendant. In our opinion, there is no foundation for the contention that the suit is premature

S. 112 of the Transfer of Property Act, which is applicable to this case, provides that a forfeiture under Clause (*g*) of S. 111 is waived by acceptance of rent which has become due since the forfeiture or by distress for such rent or by any other act on the part of the lessor showing an intention to treat the lease as subsisting, provided that the lessor is aware that the forfeiture has been incurred and provided also that where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver. This provision is of no assistance to the defendant, because the rent accepted by the plaintiff had become due, not since but before forfeiture.

The appellant has urged that the legal effect of the acceptance of rent on the 19th July, 1906 was to condone the default which had happened prior to that date. There are two obvious answers to this ingenious argument.

In the *first* place, as pointed out by Lord Tenterden, C. J., in *Arnsby* v. *Woodward* (1), a receipt of rent is an admission that the lease was subsisting at the time when that rent became due. This accords with the principle recognised by Lord Mansfield, C. J., in the earlier

(1) (1827) 6 B. & C. 519=9 D. & R. 536=5 L. J. (O. S.) K. B. 199.

decision in *Goodright* d. *Walter* v. *Davids* (2), where it was ruled that an acceptance of rent to operate as a waiver of forfeiture must be in respect of rent which had accrued since the breach of the covenant which resulted in the forfeiture. The doctrine was applied subsequently in the cases of *Doe* d. *Griffith* v. *Pritchard* (3), *Doe* d. *Gatehouse* v. *Rees* (4), *Price* v. *Worwood* (5), *Pellatt* v. *Boosey* (6), *Miles* v. *Tobin* (7), *Griffin* v. *Tomkins* (8), *Bowser* v. *Colby* (9), *Walrond* v. *Hawkins* (10), *Clifford* v. *Reilly* (11) and *Dendy* v. *Nicholl* (12) The principle is emphasised in the case of *Ward* v. *Day* (13), affirmed in appeal in *Ward* v. *Day* (14) where attention was drawn to the distinction in principle between waiver by distress and waiver by receipt of rent. Waiver by receipt of rent only applies to rent accruing subsequent to the forfeiture there is no inconsistency in a man who has given notice to determine the tenancy receiving rent due before the supposed determination of it, and consequently there is no waiver by receiving that rent, as was expressly determined in *Green's* case (15). Waiver by distress, on the other hand, depends upon a different principle, namely, that at common law distress for rent can only be made during the existence of the tenancy. Whether in view of the provisions of S. 112 of the Transfer of Property Act, waiver by distress in this country stands on a different footing from waiver by receipt of rent need not be considered for our present purpose. But it is plain that in so far as waiver by receipt of rent is concerned, it applies only to rent accruing subsequent to the forfeiture.

(2) (1778) 2 Cowper 803=98 E. R. 1371.
(3) (1833) 5 B. & Ad. 765=2 N. & M. 489=3 L. J. K. B. 11.
(4) (1838) 4 Bing. (N.C.) 384=6 Scott. 161=1 Arn. 159=7 L. J. C. P. 184.
(5) (1859) 4 H. & N. 512=118 R. R. 581=28 L. J. Ex. 329.
(6) (1862) 3 L. J. C. P. 281=8 Jur. (N.S.) 1107.
(7) (1867) 17 L. T. 432=16 W. R. 465.
(8) (1880) 42 L. T. 359=44 J. P. 457.
(9) (1841) 1 Hare. 109=11 L. J. Ch. 132.
(10) (1875) 10 C. P. 342=44 L. J. C. P. 116=32 L. T. 119.
(11) (1870) 4 Ir. Com. L. R. 218.
(12) (1858) 4 C. B. (N.S.) 37=27 L. J. C. P. 220=6 W. R. 502.
(13) (1863) 136 R. R. 582=122 E. R. 486=33 L. J. Q. B. 3.
(14) (1864) 136 R. R. 598=33 L. J. Q. B. 254=10 L. T. 578.
(15) (1582) Cro. El. 3=78 E. R. 269.

If this principle is applied to the case before us, what is the position of the defendant? Default in payment of rent on the 13th April and 14th May, 1906 did not affect his position as a tenant. The subsequent default on the 14th July, 1906 operated as forfeiture of the tenancy, and he was liable to be ejected by the landlord with effect from the day following, the non-payment of rent on the 16th July, 1906 could not make the position of the defendant worse; in fact, if the tenancy be deemed to have been forfeited on the 14th June, no further rent would be payable by him. What, then, was the effect when on the 19th July, 1906, the landlord accepted rent due on account of the instalments of the 13th April and 14th May? Can it be maintained that he thereby took up a position inconsistent with that adopted by him for the purposes of this suit? Acceptance of rent on account of these two instalments implied, on the principle explained by Lord Tenderden, C. J., in *Arnsby* v. *Woodward* (1), that the defendant was his tenant on the dates on which the rent had accrued, that is, on the 13th April and 14th May, 1906. The defendant was, in fact and in law, tenant of the plaintiff on those dates. It is plain, therefore, that from this point of view there was no waiver of forfeiture by the acceptance of rent.

In the *second* place, the inference that there was no waiver of forfeiture by acceptance of rent, is strengthened when we remember that the default, which operated as forfeiture for the purposes of the present suit, did not take place till the 16th August, 1906. It was only after default had been made on the date last mentioned that the plaintiff was in this position of advantage that he had, as against the defendant, three successive defaults, made on the 14th June, 16th July and 16th August, 1906. These successive defaults entitled the plaintiff to treat the tenancy as forfeited and to institute a suit for ejectment of the defendant as he did on the 31st August, 1906. But reference has been made to the decision of this Court in *Dulli Chand* v. *Meher Chand* (16), which was affirmed on appeal to the Judicial Committee, *Duli Chand* v. *Meher Chand* (17), to show that the

(16) (1867) 8 W. R. 138.
(17) (1874) 12 B. L. R. 439=3 Sar. P. C. J. 215 (P. C.).

view we take is not consistent with that adopted therein. The question raised before us did not, however, arise for consideration before the Judicial Committee. In that case, there had been a default in payment of rent of six successive instalments. This led to forfeiture which was waived. Subsequently, there was default in payment of rent of many successive instalmants which entitled the landlord to maintain a suit for ejectment irrespective of the previous defaults. We are consequently of opinion that the view taken by the Courts below is correct.

It has been finally argued as a last resort that the entry in the receipt granted by the landlords to the defendant on the 19th July, 1906, wherein the defendant is described as his tenant, shows that he was treated as such on the date when the payment was made and as there has not been forfeiture since that date by reason of three successive defaults, the suit is premature. In support of this view, reliance has been placed upon *Green's* case (15). It is plain, however, that the receipt cannot reasonably be construed in the manner suggested by the defendant.

The plaintiff must be taken to have described the defendant as his tenant in respect of the period for which the rent was paid ; the question of the position of the defendant at the time when rent was paid and accepted was not in the mind of either party.

Finally, it has been contended that relief against forfeiture should be granted to the defendant under S. 114 of the Transfer of Property Act, and in support of this view reliance has been placed upon the decisions in *Megh Lal Pandey* v. *Raj Kumar Thakur Girdahri Singh* (18), *Duli Chand* v. *Meher Chand* (17), *Kumla Sahoy* v. *Ram Ruttun Neogy* (9), *Mahomed Ameer* v. *Peryag Singh* (20), *Mothooramohun Pal* v. *Ram Lall Bose* (21), *Vaguran* v. *Rangayyangar* (22), *Kottal Uppi* v. *Edawalath Thathan Nambudiri* (23) and *Naraina Naika* v. *Vasudeva Bhatta* (24). This equitable doctrine of relief against forfeiture, which will be found explained in the case of *Bowser* v. *Colby* (9), has no application to the circumstances of the present case. The defendant did not express a desire to avail himself of the benefit of this doctrine at any stage of this litigation in either of the Courts below, nor has the point been mentioned in the memorandum of appeal presented to this Court. But we would add that even if the defendant had complied with all the requirements of S. 114, which he has not done, we would not feel disposed to exercise our discretion in his favour in view of all the circumstances of this case, which indicate that he has successfully kept possession of this land for many years without even offer of payment of rent to his landlord.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(18) (1907) 34 Cal. 358.
(19) (1869) 11 W. R. 201.
(20) (1881) 7 Cal. 566.
(21) (1879) 4 C. L. R. 469,
(22) (1892) 15 Mad. 125.
(23) (1870-71) 6 M. H. C. R. 258.
(24) (1905) 28 Mad. 389.

A. I. R. 1916 Calcutta 934

JENKINS, C. J. AND WOODROFFE, J.

Sonai Chutia—Defendant—Appellant.

v.

Sonaram Chutia—Plaintiff—Respondent.

Letters Patent Appeal No. 18 of 1914, decided on 3rd May, 1915, against the Decree of Mullick, J., dated 21st January, 1914.

Transfer of Property Act (4 of 1882), S. 54—Oral sale of immovable property of less than Rs. 100, in value—Everything done that could be done to deliver possession—Delivery held to be sufficient to make sale valid.

Where, on the occasion of the oral sale of an immovable property of less than Rs. 100 in value by the owner to the mortgagee in possession, formal possession was delivered, boundaries were pointed out and the mortgage document was handed over to the mortgagee after endorsing on it, "as I have not been able to pay you the money, I make over the *jamai patta* to you. You have your name registered ;" in fact everything was done that could be done to deliver possession :

Held, that such delivery was sufficient for the purpose of S. 54 of the Transfer of Property Act and the sale was valid in law. 34 Cal. 207, ref.

[P. 935, C. 1.]

N. C. Burdoloi—for Appellant.

G. Sircar and *Probodh Chandra Roy*—for Respondent.

Judgment.—This is an appeal from a judgment of Mr. Justice Mullick. He

has reversed the decree of the lower Appellate Court, which had confirmed the decree of the Munsif. It appears to us that the determination of the lower Courts did substantial justice between the parties. And although there may be some difficulty in supporting the reasons by which they arrive at that conclusion, the record furnishes sufficient foundation for a decision in favour of the defendant. It is true that the defendant was a mortgagee and in possession. And, no doubt, in view of that fact we must have regard to what was decided in the case of *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1). But we have the additional fact in this case that it is in evidence that on the occasion of the subsequent oral sale there was a delivery of possession, the boundaries were pointed out, formal possession was delivered and a mortgage-document was endorsed and handed over to the defendant. Everything, therefore, was done that could be done to deliver possession. Under the circumstances we ought to hold that there was a delivery of possession. It is said that there is no finding of the lower Appellate Court of this delivery of possession. It is because in the view that it took it did not consider it necessary. Now, we in second appeal have powers to consider evidence and to determine any issue that might have been left undetermined by the lower Appellate Court. We consider that the evidence on the record justifies a finding of delivery of possession sufficient for the purpose of S. 54 of the Transfer of Property Act. We, therefore, restore the decree of the lower Appellate Court. Each party will bear his own costs in this Court.

V.B./R.K.

Appeal accepted.

(1) (1907) 34 Cal. 207.

A. I. R. 1916 Calcutta 935

GREAVES, J.

Ali Haffiz and *others*—Plaintiffs.

v.

Abdur Rahman and *another*—Defendants.

Preliminary Objection in Original Civil Suit No. 484 of 1914, decided on 17th March, 1915.

Civil P. C. (5 of 1908), S. 92 and O. 1, R. 3—Suit for removal of *mutwalli* on ground of unlawful alienation of trust property—Alienee may be made a party—In case of alienation being set aside alienee may be declared a trustee and directed to convey the property—(*Obiter*) in such suit no decree for ejectment of alienee can be passed.

In a suit under S. 92, Civil Procedure Code, for the removal of a *mutwalli* on the ground that he has committed a breach of trust by alienating a part of the trust property, the alienee may be made a party, and if the Court decides against him, he may be declared in that suit to be a trustee of the trust property and directed to convey the property. *Compania Sansinena De Carnes Congeladas* v. *Houlder Brothers & Co., Ltd.*, (1910) 2 K. B. 354, foll.

Obiter.—But against such an alienee no relief by way of a decree in ejectment can be given. 2 C. L. J. 431 and 33 Cal. 789, ref. to.

[P. 935, C. 2 & P. 936, C. 1.]

S. A. Ashgar with *P. N. Chatterjee*—for Plaintiffs.

S. R. Das with *A. Rasul* and *Z. R. Zahid Suhrawardy*—for Defendants.

Judgment.—In this suit the plaintiffs claim to remove defendant No. 1 from the *mutwallishipp*, on the ground that he has committed a breach of trust by alienating a part of the trust property to defendant No. 2, who is alleged to have taken the property with the knowledge that it was trust property. Defendant No. 2 alleges that the property alienated is not trust property and that in any case he had no knowledge of any trust. A preliminary objection was taken on behalf of defendant No. 2 that he is not a necessary party and that he cannot be joined in the suit, which is one under S. 92 of the Civil Procedure Code. In support of this objection two cases are relied on, namely, *Budh Singh Dudhuria* v. *Niradbaran Roy* (1) and *Budree Das Mukim* v. *Chooni Lal Johurry* (2). With regard to both cases I am quite in agreement with them in so far as they decide that relief such as is asked here against defendant No. 2, does not come within the purview of S. 539 of the Civil Procedure Code, Act XIV of 1882, which is now represented by S. 92 of the present Civil Procedure Code, but I see no reason why, having regard to the provisions of O. 1, R. 3 of the present Civil Procedure Code defendant No. 2 should not be made a party to the suit and, if my decision is against him, I see no reason why he should not in this suit

(1) (1905) 2 C. L. J. 431.
(2) (1906) 33 Cal. 789.

be declared to be a trustee of the trust property and be directed to convey the property. I should add that I am fortified in the view that I have expressed by a consideration of the provisions of O. 16, R. 4 of the English Procedure Rules: see *Compania Sansinena De Carnes Congeladas* v. *Houlder Brothers & Co., Ltd.* (3), and the notes in the English Annual Practice for 1915 at page 221. O. 1, R. 3 of the Civil Procedure Code is very similar in terms, in fact almost identical with O. 16, R. 4, of the English Procedure Rules and is probably founded thereon and consequently the opinions expressed in O. 16, R. 4 by the English Judges may well be considered in construing the provisions of O. 1, R. 3. I accordingly overrule the preliminary objection.

V. B./R. K.

Objection disallowed.

(3) (1910) 2 K. B. 354.

A. I. R. 1916 Calcutta 936

MOOKERJEE AND ROE, JJ.

Gobind Chandra Saha Sardar and *others*—Defendants—Appellants.

v.

Lalit Mohan Roy—Plaintiff—Respondent.

Appeal No. 2831 of 1913, decided on 19th May, 1915, from the Appellate Decree of Sub-Judge, Dacca, dated 2nd May, 1913.

Bengal Cess Act (9 of 1880), S. 41—Liability of landlord and tenant in respect of cesses is governed by S. 41 unless otherwise contracted.

The liabilities of landlords and tenants in respect of cesses under S. 41 of the Bengal Cess Act must be determined according to the Statute, unless there is a clear provision in the lease to show that the parties have contracted themselves out of the provisions of that section.

[P. 937, C. 1.]

Sarat Chandra Bysack and *Gopal Chandra Das*—for Appellants.

Basant Coomar Bose and *Rajendra Chandra Guha*—for Respondent.

Mookerjee, J—This is an appeal by the defendants in a suit for recovery of arrears of rent. The controversy relates to the liability of the parties in respect of cesses. The lease executed on the 2nd June, 1902 fixes the rent at an aggregate sum of Rs. 1,151-6-16-2 *krants* inclusive of cesses and the dues of the superior landlord; out of this sum, Rs. 600 is payable by the tenants direct to their grantor and the remainder to the superior landlord. There is also a provision that the tenants will every year deposit, in the name of their landlord, in the office of the *zemindar*, the *sudder* rent payable to the *zemindar* and the cesses thereupon payable by their landlord. It is finally stipulated that if any new tax be imposed by the Government in future and if the same be payable by the subordinate tenure holder, the tenants will successively remain bound to pay the tax separately in the office of their landlord in addition to the aforesaid fixed road cesses and public works cesses. The contingency which has happened is that for the years in suit the *zemindar* is entitled to a smaller amount on account of cesses than was contemplated by the lease, that is, Rs. 80 and odd instead of Rs. 86 and odd; in other words, the amount payable to the *zemindar* was reduced from Rs. 551 and odd to Rs. 545 and odd; notwithstanding this circumstance, the plaintiff has sued to recover only the annual sum of Rs. 600 on account of rent. The defendants contend that the plaintiff should claim more, because the plaintiff is entitled to the benefit of the reduction in the amount payable by the defendants to the *zemindar* on account of cesses. The plaintiff, however, feels shy of this apparently tempting offer and persists in his claim for Rs. 600 and no more. It is not difficult to see that the defendants anticipate a time when a larger sum may become payable to the *zemindar* on account of cesses, and they contend that the plaintiff is entitled to receive, not Rs. 600, but Rs. 600 increased or reduced by the reduction or increase in the amount payable as cesses. The question, consequently, requires examination, whether upon the terms of the lease, the plaintiff is entitled to an invariable sum of Rs. 600 regardless of the amount of cesses actually payable to the *zemindar* or whether he is entitled to a variable amount, that is, Rs. 600 either increased or reduced by the fall or rise in the amount of cesses payable by the defendants to the *zemindar*. Upon this point, the Courts below have expressed divergent opinions. We think the view adopted by the Subordinate Judge is correct.

It is plain that the concluding passage of the lease, whereon stress was laid by

the defendants, relates to a new tax not foreseen by the parties to the contract at the time the lease was granted and does not bear upon the solution of this question. It has no reference to the contingency which has happened and which may happen in an altered form in future, namely, an increase or decrease in the amount of cesses on account of revaluation of the estate. In such a contingency, as was pointed out in *Mohanund Sahay* v. *Saidunnessa Bibi* (1), *Krishna Chandra Basu* v. *Mohendra Nath Basu* (2), the liabilities of the parties must be determined according to the Statute, unless there is a clear provision in the lease to show that the parties have contracted themselves out of the provisions of S. 41 of the Bengal Cess Act. In the case before us, the lease plainly provides for the payment of a fixed sum of Rs. 600 by the defendants to their landlord, regardless of the amount actually paid as cesses. In this view, the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) (1908) 8 C. L. J. 525.
(2) (1911) 9 I. C. 704.

A. I. R. 1916 Calcutta 937

CHAUDHURI, J.

Administrator-General of Bengal — Plaintiff.

v.

A. D. Christiana—Defendant.

Original Suit No. 597 of 1915, decided on 9th June, 1915.

Succession Act (10 of 1865), Ss. 311 and 312 —Will silent as to interest—Interest payable on demonstrative legacies from time fixed for payment—Rate of interest is 4 per cent. per annum.

Interest is payable on demonstrative legacies, even though the will is silent as to it. 29 Mad. 155, appr. [P. 938, C. 1.]

A legacy payable at a future day carries interest only from the time fixed for payment. Where, however, no time is fixed for payment, but the amount is payable out of a particular fund, which is not to be got in until after a long interval, S. 311 of the Succession Act applies. *Lord* v. *Lord* (1867) 2 Ch. App. 782 and *Walford In re*, *Kenyon* v. *Walford*, (1912) 1 Ch. D. 219, rel. on. [P. 938, C. 1.]

The rate allowed on such legacies is 4 per cent. per annum. [P. 938, C. 2.]

M. Zorab—for Plaintiff.

R. C. Bonnerjee—for Defendant.

Judgment.—This suit relates to the estate of one Alexander Watson Christiana. He left a will, dated the 1st October 1897. On the 10th January, 1898, Probate was granted. The Administrator-General is now in possession of the estate. The following questions have arisen and the plaintiff is desirous to have them determined by this Court: (*i*) Whether interest is payable out of the estate of the testator, on the legacies of Rs. 1,000, to each of the surviving grandchildren named in the margin of the said will and the representative of a deceased grandchild, and, if so, from what date and at what rate? (*ii*) Amongst whom, in the events which have happened, is the residue of the estate of the testator, after payment of the aforesaid legacies of Rs. 1,000 each, and interest thereon, if any, divisible, and in what shares and proportions is it so divisible? The paragraphs in the will relating to the legacies run thus:—

"To my grandchildren named in the margin I leave Rs. 1,000 each from the sale of house No. 8, Lindsay Street, and my half share in house No. 4, Crooked Lane, that is, after the death of my daughter Mrs. Georgiana Harriett Russell, and the marriage of my granddaughter, Florence Elder."

These legacies are demonstrative legacies, and the question is as to whether any interest is payable upon these legacies. The Succession Act, S. 311, provides:

"Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.

There are certain exceptions to that section to which I need not refer at present. S. 312 deals with the question of interest where time has been fixed for payment of a general legacy. The first point argued in this case is that inasmuch as there is no specific provision for payment of interest for demonstrative legacies, no interest was payable in this case. It has, however, been held in the case of *Chinnam Rajamannar* v. *Tadikonda Ramachandra Rao* (1) that the Law in England relating to interest on a demonstrative legacy is applicable to Ss. 130 and 131 of the Probate and Administration Act, which correspond to Ss. 311 and 312 of the Indian Succession Act. The learned Judges held in that case that the absence of a distinct provision in regard to the payment of interest on demonstrative legacies

(1) (1906) 29 Mad. 155.

did not imply an intention to disallow interest in such cases. They approved and followed the case of *Mullins* v. *Smith* (2). I follow the decision of the Madras Court and hold that interest is payable on demonstrative legacies. The question is whether S. 311 or 312 is applicable to this case, that is to say, whether a time has been fixed for the payment of the legacy, or whether there is no fixed time for such payment. The principle applicable to cases of this kind has been laid down by Lord Cairns, L. J., in the case of *Lord* v. *Lord* (3) in these terms :

"The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval."

That principle has been upheld and followed in *Walford, In re Kenyon* v. *Walford* (4). Here there is no express direction fixing the date of payment. It seems to me to be a case covered by the ruling in *Lord* v. *Lord* (3), that is to say, that there is no time for payment fixed, although the amount is expressly made payable out of a particular fund, which was not to be got in until after a longer interval. The testator said that he was leaving Rs. 1,000 each to the grandchildren, that it was to be paid out of the sale of the premises, 8, Lindsay Street, and his share in 4, Crooked Lane, and that such sale was not to take place till after the death of Mrs. Georgiana Harriett Russell and the marriage of his granddaughter, Florence Elder. Mrs. Georgiana Harriett Russell died on the 13th February, 1915, and Florence Elder was married on the 30th June, 1909. Therefore it seems to me to be a case which is governed by the decision I have referred to, and in that view I think S. 311 of the Succession Act applies. It is necessary to refer to Exception (2) to that section. This is a case where the testator is not the parent, but a mere remote ancestor. I understand that the legatees, Elizabeth Christiana Swaries and Jessie Houston Russell, have attained majority, but it is unnecessary to refer to their case, because no distinction is made in the section in respect of adults and minors. Now about the rate of interest. The Act provides 4 per cent. which will be the rate allowed upon these legacies. The further question is about the division of the residue. The clause in the will dealing with it runs thus :—

"The remaining portion as well as the balance of the accumulated interest or any other money that may be due is to be equally divided among my sons and daughter."

I have examined the original will, and learned Counsel appearing for the parties have also seen it. There is no question that the expression "daughter" there is in the singular, and there is no mistake in the copy annexed to the plaint. The difficulty that has arisen is owing to the fact that the testator had two daughters, and the question is, to which of these daughters does this clause refer; and, if it is uncertain, can it have any effect so far as the daughters are concerned? It is clear to my mind that the daughter referred to in that clause is Louisa Amelia Sinclair. The residue is only to be divided after the payment of the legacies, which can be only ascertained after the death of the daughter Mrs Georgiana Harriett Russell, and, therefore, there is only one daughter left at the time of the division of the residue, and that daughter is Louisa Amelia Sinclair. Therefore, the residue is to be divided according to the ordinary rule, there being two sons and one daughter. Costs of this suit of all the parties to come out of the estate. The costs of the Administrator-General to come out of the estate as between attorney and client to be fixed on scale No. 2.

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(2) (1860) 1 Dr. & Sm. 204=8 W. R 739=62 E. R. 356.
(3) (1867) 2 Ch. App. 782=36 L. J. Ch. 533.
(4) (1912) 1 Ch. D. 219=81 L. J. Ch. D. 828.

A. I. R. 1916 Calcutta 938

N. R. CHATTERJEA AND MULLICK, JJ.

Shyam Lal Ghosh and *others*—Defendants—Appellants.

v.

Rameswari Basu and *others*—Plaintiffs—Respondents.

Appeal No. 178 of 1912, decided on 4th June, 1915, from the Original Decree of Dist. Judge, Rajshahye, dated 22nd April, 1912.

(a) Probate and Administration Act (5 of 1881), S. 51—Probate—Revocation of—No time fixed for application for revocation.

In this country there is no time fixed for an application for revocation of Probate. An executor of a will proved in common form may, therefore, be called upon, even thirty years after, to prove the will in solemn form, on the application for revocation by a person on whom no citation was issued in the Probate proceeding. 19 Cal. 48 and 33 Cal. 1001, foll. [P. 941, C. 2 & P. 942, C. 1.]

(b) Probate and Administration Act (5 of 1881), S. 51—Probate—Revocation of—Application after long delay—Effect of.

Obiter.—A person may be barred by long delay in making an application for revocation although there was no acquiescence on his part. [P. 949, C. 1.]

(c) Evidence Act (1 of 1872), S. 90—Presumption does not apply to in proving will more than 30 years old in Court of Probate.

The presumption, under S. 90 of the Indian Evidence Act, of the genuineness of ancient documents, does not apply in proving a will more than thirty years old in a Court of Probate. *Doe d. Oldham* v. *Wolley*, (1828), 8 B. & C. 22; ref. to and dist. [P. 942, C. 1.]

(d) Hindu Law—Widow—Decree against—Decree fairly obtained is binding on reversioners.

A decree fairly and properly obtained against a Hindu widow as representing the estate of her husband is binding upon the reversioners. [P. 942, C. 2.]

(e) Hindu Law—Widow—Consent decree—Compromise for benefit of estate—Consent decree against widow amounting to *bona fide* settlement of dispute is binding on reversioners.

A consent decree amounting to a *bona fide* settlement of disputes is quite as much binding upon the reversioners as a decree on contest, where the compromise was made *bona fide* for the benefit of the estate and not for the personal advantage of the widow. Case-law discussed. [P. 943, C. 1.]

(f) Probate and Administration Act (5 of 1881), S. 51—Probate — Revocation of — Applicant *pardanashin* lady—Will proved in common form without citation on her—Infants practically deprived of whole inheritance by will—Mere knowledge on part of applicant of proceedings is not sufficient ground for refusal to recall Probate.

Obiter.—The mere fact that the applicant for revocation of Probate of a Will, proved in common form without any citation upon her, had knowledge of the Probate proceedings, is not a sufficient ground for refusal to recall the Probate, where the applicant is a *pardanashin* lady and where the interests of infants are involved and they are practically deprived of the whole inheritance by the will. [P. 946, C. 2.]

(g) Probate and Administration Act (5 of 1881), S. 51—Probate—Proceedings—Compromise of—Compromise is binding only on parties to it.

Ordinarily a compromise of a Probate case is binding only upon the parties to it. [P. 947, C. 1.]

(h) Compromise—Family Settlement—Compromise between members of family to be by way of family Settlements—Conditions necessary.

In order that a compromise between the members of a family may be by way of family settlement, there must be *bona fide* claims on either side and an honest settlement after full disclosure of facts on either side. [P. 947, C. 2.]

(i) Acquiescence — Doctrine—Circumstances giving rise to inference of assent—Acquiescence in act while it is in progress amounts to quiescence—Evidence Act (1872), S. 115.

Acquiescence in an act while it is in progress is quiescence under such circumstances as that assent may be reasonably inferred from it. But acquiescence in an act after it is completed wtihout any knowledge or without any assent on the part of the person whose right is infringed, stands on a very different footing. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part after he acquired full knowledge had affected or altered the position of his opponent. 30 I. C. 161, foll. [P. 948, C. 2.]

(j) Probate and Administration Act (5 of 1881), S. 51—Probate—Revocation of—Will not genuine—Probate Court should not refuse to revoke Probate merely on ground of delay.

Semble.—A Probate Court, having found a will not to be genuine, should not refuse to revoke a Probate granted in common form on the ground of delay, 42 Cal. 480, ref. to and dist. [P. 949, C. 1.]

Rash Behary Ghosh and *Dwarka Nath Chakravarty*, *Krishna Kamal Moitra* and *Khetra Mohan Ghose*—for Appellants.

Sarat Chandra Roy Chowdhury, *Satya Charan Sinha*, *Bhudhar Haldar* and *Dhirendra Krishna Roy*—for Respondents.

Judgment.—This is an appeal against an order of the District Judge of Rajshahye revoking the Probate of the Will of one Ram Lal Ghosh, which was granted to his two younger brothers, the appellant Shyam Lal Ghosh, and Suk Lal Ghosh, since deceased (the father of the other appellants), so far back as the 20th March, 1878.

It appears that Ram Lal, Shyam Lal and Suk Lal were three brothers, members of a joint Hindu family governed by the Dayabhaga School of Hindu Law. They had a first cousin Basanta Kumar, who was also a member of the joint family. They had ancestral family dwelling house at Basuarih in the District of Jessore. They also had a residence at Rampore Boalia, the head-quarters of the Rajshahye District, where Basanta Kumar was a *mukhtear*, Shyam Lal was a revenue agent and Suk Lal served as a treasurer in the local Collectorate. Ram Lal Ghosh, the eldest, did not do any business at Rampore Boalia. The evidence is conflicting as to whether he ordinarily used to reside at Rampore Boalia or at

Basuarih, but there is no dispute that he lived at Basuarih for at least a year and a half before his death.

The family has substantial landed properties in the Rajshahye District, and some properties of small value in the Jessore District, the income of which in Ram Lal's share was Rs. 39 a year. They had also some money-lending business.

Ram Lal is said to have executed the will at the ancestral residence at Basuarih in the District of Jessore. At the time he was 39 years of age, and had his wife Haramoni and three daughters Kadambini, Rameswari and Parameswari. He had no son. The eldest daughter Kadambini was then about 13 years of age and was married, and the other two were about 6 and 3 years of age respectively and were unmarried.

The will gave away the whole of the properties in the Rajshahye District which constituted the bulk of the estate to the two brothers Shyam Lal and Suk Lal absolutely to the exclusion of his widow and daughters. So far as the widow was concerned, the will recited that although the brothers had

"promised to give her maintenance and help her in the performance of meritorious acts, it was necessary to make a separate provision for her maintenance and for the expenses for her performing meritorious acts (so that in case there is disagreement between her and my brothers' family there may not be trouble to her)"

and directed that she would get the *income* of his share of the ancestral and self-acquired properties in the District of Jessore, and on her death the daughters would continue to get the same, but that "so long as any of my said two brothers or any in the line of their sons is alive, my wife or my daughters or any other future heirs of mine besides getting the annual income of the said properties will not be entitled to bring the said properties into their possession or transfer them in any way."

The widow was to enjoy and possess the movable properties in the share of Ram Lal but after her death they would come to the possession and enjoyment of the two brothers. She was to have the right of residence with the daughters in the west facing building without any power of alienation but on her death, the same would go to the brothers and their successors.

The will then provides that the daughters would get a legacy of Rs. 50 each and the widow would also get Rs. 50 for 'performing meritorious acts' out of the money-lending business in the name of the testator and in the joint names of the testator and his brothers in the Districts of Rajshahye and Jessore, and they would not be liable for the debts due by the testator and his brothers. The brothers would be entitled to the remaining amount of the money-lending business due to the share of the testator, and the widow and daughters would not be entitled to claim any portion thereof.

With regard to the marriage of the two unmarried daughters, it is stated in the will that

"the brothers had promised to marry my said two daughters to suitable bridegrooms belonging to the same social rank as ours at suitable expenses and giving suitable gifts by way of ornaments and bedding, etc., to the bridegrooms. Particularly the eldest daughter was married by the said two brothers, therefore I do not make any separate provision for the marriage of my said two daughters."

The two brothers were appointed executors of the will.

The will is said to have been executed on the 26th July, 1876, and Ram Lal died on the 6th of December of the same year at Basharih. Application for Probate was made by Shyam Lal and Suk Lal for Probate of the Will on the 14th May, 1877 in the Court of the District Judge at Rajshahye. No mention was made in the application of Ram Lal having left a widow or daughters, nor was any citation issued upon them. No one appeared to contest the will. Two of the attesting witnesses to the will, *viz.*, Parbati Charan Datta and Ram Gopal Ghosh were examined to prove the Will and Probate was granted to Shyam Lal and Suk Lal on the 20th March, 1878.

It appear that shortly after Ram Lal's death, the brothers applied for registration of their names in the Collectorate under Land Registration Act, and their Application was allowed on the 15th July after Probate was obtained by them. Ram Lal's widow Haramoni and the daughters continued to live jointly with Shyam Lal and Suk Lal's family, Kadambini, the eldest daughter, became a widow about 13 months after Ram Lal's death.

On the 24th July, 1881 Haramoni for the first time made an application to the District Judge of Jessore for a Succession Certificate to recover certain debts alleged to be due to her

husband, the aggregate amount whereof was Rs. 91.

The application was opposed by Shyam Lal and Suk Lal who set up the Probate obtained by them, and Haramoni withdrew her application.

The second daughter Rameswari was married to one Durgadas Bose in 1883, and on the 29th April, 1884 Haramoni applied for revocation of Probate in the Court of the District Judge of Rajshahye. The case came on for hearing on the 1st August, 1884, and after one witness had been examined on her side the hearing was adjourned and on the 26th August, 1884 a petition was put in by Haramoni admitting the genuineness of the will, and the Court disallowed the application for revocation accordingly. On the previous day, however, two *ekrars* were executed one by Haramoni in favour of Shyam Lal and Suk Lal and the other by the latter in favour of Haramoni, under which Shyam Lal and Suk Lal agreed to pay Rs. 425 a year to Haramoni in addition to the income of the Jessore properties for her life and on her death to pay her daughters and their heirs Rs. 300 a year. There were some other provisions which will be dealt with later on.

Haramoni thenceforth lived separately from her brothers-in-laws' family in a portion of the dwelling house at Basuarih. There was some further litigation between Haramoni and her brothers-in-law subsequently in the District of Jessore which will be referred to later on.

The youngest daughter Parameswari was married to one Brojendra in April 1886. Haramoni died on the 3rd August, 1899 and the present application for revocation of the Probate was made by Rameswari and Parameswari on the 27th April, 1910, on the ground that the will was forged, that there was concealment of material facts in the application for Probate and there was no citation upon the petitioners or their mother.

Parameswari's husband Brojendra died in 1911 when the case was pending in the Court below, but both Rameswari and Parameswari have sons, and they alone are the heirs of Ram Lal on the death of Haramoni, as Kadambini became a sonless widow in her mother's life-time.

The application was opposed by Shyam Lal and the sons of Suk Lal (Suk Lal having died in 1906) on various grounds and it was tried as a contested suit. The learned District Judge overruled the contentions raised by the defendants, found that the will was not genuine and accordingly revoked the Probate.

The defendants have appealed to this Court.

It has been contended on behalf of the appellants, *first*, that an executor cannot be called upon to prove a will in solemn form thirty years after Probate is granted in common form; *secondly*, that even if the expiry of thirty years is no bar, the will should be presumed to be genuine after thirty years and the onus is upon the plaintiff to prove that the will is not genuine; *thirdly*, that the present application for revocation is barred by the dismissal of Haramoni's application for revocation; *fourthly*, that the compromise entered into by Haramoni was a *bona fide* one and was by way of family settlement, and is binding upon her daughters, the plaintiffs; *fifthly*, that the plaintiffs are precluded by long delay and acquiescence from challenging the will; and *lastly*, that the will is genuine. The above contentions except the *first* and *second* were raised before the Court below and were overruled by it.

As regards the *first* contention, we have been referred to a passage in Williams on Executors, 10th Edition, at page 242, which runs as follows :—

"The difference between the common form and the solemn form with respect to citing the parties interested works this diversity of effect, *viz.*, that the executor of the will proved in common form may, at any time within thirty years, be compelled by a person having an interest to prove it *per testes* in solemn form."

But it appears from the cases cited in the notes in the same page that there is no such fixed rule. For instance in *Hoffman* v. *Norris* (1), reported in a note to *Newell* v. *Weeks* (2), Sir William Wynne said,

"I do not know that there is any specific time that limits a party,"

and in *Merryweather* v. *Turner* (3) Sir Henry Jenner Fust recognised the

"full right of the next of kin to call upon executors to prove a will in solemn form notwithstanding there shall have been lapse of time, notwithstanding acquiescence, notwithstanding the receipt of legacy."

In this country it has been held that an application for revocation is not

(1) (1805) 2 Phillim. 230 *note*.
(2) (1814) 2 Phillim. 224.
(3) (1844) 3 Curt. 802.

governed by Article 178 of the Limitation Act: see *Kashi Chundra Deb* v. *Gopi Krishna Deb* (4) and though we have not been able to find any case in which an application for revocation was made after 30 years, in the case of *Durgagati Debi* v. *Saurabini Debi* (5) the application for revocation was made 27 years after Probate was granted, and the application was disallowed not upon the ground of delay, but upon other grounds.

We are of opinion that there is no time fixed for an application for revocation of Probate.

As regards the *second* contention, we were referred to *Doe d. Oldham* v. *Wolley* (6). In that case it was held that a will more than 30 years old may be read in evidence without proof of its execution, although the testator has died within 30 years and some of the subscribing witnesses are proved to be still living. In that case, however, the question was whether the will could be used as evidence of a certain fact in a suit for ejectment, without proof of its execution. It was not a case of proving a will in a Court of Probate. If the rule were applicable to a Probate Court, it would not be necessary to prove wills executed 30 years before the death of the testator, nor in cases where 30 years have elapsed from the death of the testator. We are unable to hold, therefore, that the rule applies to proof of a will in the Probate Court. Besides S. 90 of the Evidence Act merely says that in the case of a document 30 years old, the Court *may* raise presumptions mentioned in it, not that it must do so. Where the genuineness of the document is for any reason doubtful it is open to the Court to reject it, however ancient it may be. In the present case the Court has referred to suspicious circumstances and has found that the will is not genuine.

The *first* and *second* contentions must accordingly be overruled.

The *third* contention is that the present application for revocation is barred by the dismissal of Haramoni's application for revocation. It is not disputed that the plaintiffs as the daughters of Ram Lal had the right to call upon the executors to prove the will in solemn form in their presence, but what is contended for is that the widow having made an application for revocation and the application having been dismissed, it is no longer open to her daughters, the plaintiffs, to make a similar application again. No doubt Haramoni as a Hindu widow represented the estate of her husband and the plaintiffs as the reversioners would be bound by any decree fairly and properly obtained against her. But there was no trial of the revocation case and no decision by the Court. Haramoni admitted the genuineness of the will and prayed that the Probate might be upheld under circumstances which we will presently discuss. Behind the application there was a compromise effected by the *ekrarnamas* and the learned Pleader for the appellants relies more upon the compromise than upon the order dismissing the application for revocation, and this brings us to the *fourth* contention, *viz.*, whether the compromise arrived at between Haramoni and Shyam Lal and Suk Lal is *bona fide* and binding upon the plaintiffs. A number of cases were discussed before us, upon the question whether a compromise entered into by a Hindu widow is binding upon the reversioners. Most of the earlier decisions are in favour of the respondents' contention, that a compromise effected by a Hindu widow is not binding upon the reversioners, but having regard to the recent decisions of the Judicial Committee in *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (7) and *Musammat Hiran Bibi* v. *Musammat Sohan Bibi* (8), the ealier view, we think, cannot be maintained. It is true the Judicial Committee in an earlier case, *Imrit Konwur* v. *Roop Narain Singh* (9), held,

> "it is clear that the daughters could not be bound by a compromise made by the widow under any circumstances,"

but it seems to us that those observations must be taken to have been made with reference to the particular facts of that case. We have considered the cases on the point; and we are unable to hold that a compromise made by a Hindu widow is not binding upon reversioners under any circumstances, as contended for on behalf of the respondents.

(4) (1892) 19 Cal. 48.
(5) (1906) 33 Cal. 1001.
(6) (1828) 8 B. & C. 22.
(7) (1911) 33 All. 356 = 10 I.C. 477 = 38 I.A. 87 (P. C.).
(8) A. I. R. (1914) P. C. 44 = 24 I. C. 309 (P. C.).
(9) (1880) 6 C. L. R. 76.

The latest case on the point in our Court is that of *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (10), which states the result of the authorities.

In dealing with the contention in that case, *viz.*, that the withdrawal of an appeal from a decree dismissing the suit of the female holding Hindu widow's estate was in the nature of a compromise and destroyed the conclusive character of the original decree which thereupon ceased to be operative as a contested decree, Mookerjee, J., observed as follows :—

"This view cannot possibly be sustained for, as was pointed out by the Judicial Committee in *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (7) and *Musammat Hiran Bibi* v. *Musammat Sohan Bibi* (8) a compromise amounting to a *bona fide* setllement of disputes will bind the reversioner quite as much as a decree on a contest; in other words, that the principle laid down in *Katama Natchier* v. *Srimat Rajah of Shivagunga* (11) is not limited to decress in suits contested to the end. This rule is subjecf to the qualification that the compromise was made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner: *Tarinee Churn Gangooly* v. *Watson* (12), *Indro Koer* v. *Abool Barkat* (13), *Upendra Narain Myti* v. *Gopee Nath Bera* (14), *Sambasiva Ayyar* v. *Venkataswara Ayyar* (15), *Kambinayani Javvaji Timmaji Amma Garu* v. *Kambinayani Javvaji Subbaraju Nayanivaru* (16) and *Rajlakshmi Dasee* v. *Katyayani Dasee* (17). The view cannot be defended on principle that a qualified owner like a Hindu widow, daughter or mother is bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal and she cannot *bona fide* effect a settlement of the matter in controversy, even though such compromise be in the best interests of the estate."

We have, therefore, to see whether the principles relating to compromise by a Hindu widow stated above are applicable to the facts of the present case, and we accordingly proceed to consider the relative positions of the parties, the circumstances under which the compromise in the present case was effected and the history of the case leading up to it.

Ram Lal was a member of a joint family possessed of immovable properties of substantial value, the bulk of which was situated in the District of Rajshahye. The defendants, who are in possession and enjoyment of the properties, have not produced any papers to show what the income of the properties was. The plaintiffs have produced certain road-cess papers submitted by Shyam Lal and Suk Lal in 1902, from which it would appear that the income of *some* of the properties in the Rajshahye District was Rs. 10,000 a year. It is said that the same included properties acquired after Ram Lal's death. Two of the properties, however, admittedly belonged to the family at Ram Lal's death, and the income thereof amounted to Rs. 6,000 a year. As Basanta had a half share in the family properties, the three brothers had an income of Rs. 3,000 a year. The income in Ram Lal Ghosh's share was thus about Rs. 1,000 a year. The very fact that Shyam Lal and Suk Lal agreed to pay Rs. 425 a year to Haramoni by the ekrar indicates that the income must have been substantial. The family had also some properties in the Jessore District the income whereof in Ram Lal's share was only Rs. 39 a year. They had a money-lending business, but the defendants have not produced any papers to show the amount of money invested in that business. They had also movable properties and residential houses at Basuarih and Rampore Boalia. If there were no will, Ram Lal's widow Haramoni would have been entitled to one-sixth of the entire estate and after her death, her daughters and after them their sons, if any, would be entitled to that share. Now under the will the widow and after her death her daughters were to get the income only of the Jessore properties which amounted to Rs. 39 a year, the *corpus* of those properties even having been given to the brothers (Shyam Lal and Suk Lal). Haramoni was to enjoy the movables and to have the right of residence in a portion of the family dwelling house at Basuarih without power of alienation, but they were to go to the brothers on her death. The daughters, therefore, were to get under the will only an annuity of Rs. 39 a year and a legacy of Rs. 50 each. They had no right to the movables, or any portion of the money-lending business, nor even any right of residence in the family dwelling house. But although the widow and daughters thus were practically deprived of their inheritance, the Probate was applied for,

(10) (1915) 27 I. C. 954.
(11) (1865) 2 W. R. 31=9 M.I.A. 539 (P. C.).
(12) (1869) 12 W. R. 413.
(13) (1870) 14 W. R. 146.
(14) (1883) 9 Cal. 817.
(15) (1908) 31 Mad. 179.
(16) (1910) 33 Mad. 473=5 I. C. 640.
(17) (1911) 38 Cal. 639=12 I. C. 464.

without citing them. In the application for Probate it was not clearly stated where Ram Lal died. Ram Lal, even according to the defendants, resided at Basuarih for 18 months before his death, but the wording of the application for Probate suggested that the usual place of residence of Ram Lal was Rampore Boalia. The value of the assets was not mentioned in the application, and as already stated the existence of the widow and the daughters was ignored.

The evidence is conflicting as to whether Haramoni and her daughters were at Basuarih or at Rampore Boalia at the time of the application for Probate. The plaintiffs have adduced evidence that they were at Basuarih and went to Rampore Boalia about a year after the death of Ram Lal, *i.e.*, after the *sapindikaran* (the first annual *shradh*) of Ram Lal took place, while the defendants have adduced evidence to show that they were taken to Rampore Boalia shortly after Ram Lal's first *shradh* by Basanta Kumar, who had been to Basuarih in consequence of his mother's illness sometime before Ram Lal's death. The Court below says,

"It seems that she was in the same house at the time when the notices were issued but that no steps were taken to give the widow any notice of the Probate proceedings."

We are inclined to agree with the Court below. It was contended on behalf of the defendants that if the brothers applied for Probate of a forged Will, they would have never taken the widow to Rampore Boalia at the time. But if the intention of the brothers was to obtain Probate fraudulently they might have taken Haramoni to the Rampore Boalia residence purposely, so that if she sought to revoke the Probate, her presence at Rampore at the time might be relied upon as showing her knowledge of the Probate proceedings. However that may be, Haramoni, being a *pardanashin* lady, would not ordinarily get any notice of the general citation unless she was informed of it by the male members of the family, and there is no doubt that she had no knowledge whatever of the Probate proceedings. She lived with her daughters for some time at Rampore, and then went back to Basuarih, where they lived jointly with the brothers' family in the ancestral house there. Sometime afterwards she must have come to hear of the will and in 1881 she applied for a Succession Certificate in the Jessore Court. The brothers opposed it and set up the Probate, and she had to withdraw the application. Matters remained in the same state for sometime. Her second daughter Rameswari was married to Durga Das Bose in 1883, and in 1884 she applied for revocation of Probate in the Rajshahye Court, so that it was about 6 years after the grant of the Probate that the application was made. This delay in making the application has been commented upon on behalf of the defendants. But although we do not believe that Haramoni first came to know of the will in the Succession Certificate proceeding as stated by her in her application for revocation, the explanation for the delay as given in her affidavit dated the 22nd April, 1884 sworn in the Jessore Court prior to her application for revocation appears to be reasonable and should be accepted. In her affidavit she stated (after referring to the Succession Certificate proceedings),

"since then I intended to apply for revocation of the said Probate but I am a lady belonging to a respectable family. Particularly I had no means to pay the necessary expenses of the litigation. The opposite party are very influential men in this district. No one ventured to act on my behalf for fear of them. I could not make this application so long. Now having given away one of my daughters in marriage I am making this application with the help of my son-in-law."

In her application for revocation of the Probate, she stated that her husband had not executed any will, that the opposite party had caused a forged will to be made to deprive her and her daughters of the properties, that the Probate had been obtained secretly without her knowledge and without service of notice upon her, and the reasons for the delay in making the application were that the opposite party were very powerful men and had great influence in Rajshahye, and the petitioner not having had sufficient funds in hand could not apply earlier.

Shyam Lal and Suk Lal were in possession of the entire estate to the exclusion of Haramoni. They had influence at Rajshahye: their father had been a *mukhtear* of Robert Watson & Co., their uncle (the father of Basant Kumar) a Police *daroga*, Basanta Kumar (their cousin) was a *mukhtear* and acted for Watson & Co., Shyam Lal himself was also a Revenue Agent and Suk Lal held service in the Collectorate. Under

the circumstances we fully accept the explanation for the delay in making the application for revocation as given by her.

It may be conceded that the application for revocation was made by Haramoni not merely in her own interest but also in the interest of the daughters, but we have to see how it was disposed of.

The application for revocation came on for hearing on the 1st August, 1884 and one witness Satish Chandra Ghosh was examined on her behalf and the case adjourned to the 26th August, 1884. On that date an application was put in by Haramoni stating,

"I have now come to know on special enquiry that the will, dated the 12th *Sraban* 1283, executed by my husband, in accordance with the terms of which Srijukta Shyam Lal Ghose and Suk Lal Ghose have become entitled to some of the properties left by my husband in absolute right, and are executors with regard to some, is genuine and was duly executed by my husband. It is, therefore, prayed by making this application that the said will may remain in force and in accordance with the order of your honour, dated the 20th March, 1878, the Probate obtained by the said two Ghosh Mahashayas and the said order granting Probate may remain in force."

The Court thereupon recorded the following order,

"Upon being brought up before us it was certified by the production of a petition of compromise that the case was settled. It is, therefore, ordered that the objection be disallowed without costs, and a decree be drawn up according to the terms of the compromise."

These two *ekrars* however, one executed by Haramoni in favour of Shyam Lal and Suk Lal and the other by the latter in favour of the former executed on the previous day (the 25th August, 1884), were not mentioned in the application to the Court. It was stated in the *ekrarnamas* that Haramoni was being maintained as a member of the joint family by her brothers-in-law in accordance with the terms of the will of Ram Lal, but that owing to differences between her and the members of the latter's family, she was desirous of living separately: that as the income of the Jessore properties would be insufficient for her maintenance if she were to live separately, and it being the duty of her brothers-in-law to make suitable provision for her maintenance and that of her unmarried daughter, and for the performance of religious and meritorious deeds, they agreed to pay her, in addition to the income of the Jessore properties, Rs. 300 a year for her maintenance and Rs. 125 for her religious expenses, total Rs. 425 a year for her life, and on her death Rs. 300 a year to her widowed daughter Kadambini, so long as she lived, and to the other two daughters Rameswari and Parameswari and their heirs in succession in equal shares. The said amount of maintenance was charged upon certain properties and Shyam Lal and Suk Lal agreed to pay Rs. 300 to Haramoni for the marriage expenses of the youngest daughter Parameswari. Neither Haramoni nor her daughters nor their heirs would be entitled to make any claim for the movable or immovable properties left to her brothers-in-law by the will, and if any such claim were preferred in future the terms of the *ekrar* would be void and inoperative.

There cannot be any doubt that the arrangement was arrived at with the knowledge and consent of Haramoni, specially having regard to the fact that Kalidas Bose, the elder brother of Durgadas, looked after that case on her behalf and was an attesting witness to the *ekrars*. It cannot also be said that Haramoni entered into the compromise with the object of defrauding her daughters, although it had the effect of defeating the rights of the daughters if it is binding upon them.

The learned District Judge says:

"It does not appear that she was a suitor for the compromise. On the other hand the evidence points to the fact that she was pressed to effect the compromise. She was an illiterate *pardanashin* widow, and it does not appear that she had friends among persons dwelling in Rajshahye. She executed powers-of-attorney in favour of four persons in Jessore, including a Pleader of that district, in order to fight out her cause here. She was poor and it was due to the pecuniary assistance which she obtained by marrying her second daughter Rameswari that she was able to institute the case for revocation of the Probate in Rajshahye."

There is no direct evidence to show that Haramoni was pressed to compromise the case. Kadambini says that Haramoni told her that at the "entreaties" of her brothers-in-law and "at the request of the gentlemen" she had compromised the case, and there is a similar statement made by Haramoni in her plaint in a suit which will be referred to later on. The plaintiffs, however,

have not examined Kali Das Bose or Satish Ghosh, and that fact has been strongly commented upon, and we think justly. But the very fact that Shyam Lal and Suk Lal agreed to pay Rs. 425 a year in addition to the income of the Jessore properties to Haramoni, when the will itself, said to have been executed by her husband, gave her an annuity of only Rs. 39 a year, in other words, that they agreed to pay more than ten times what her husband himself provided for her by his will, indicates that Shyam Lal and Suk Lal wanted to avoid proving the will in Court. There is no doubt that Haramoni herself was poor, whereas Shyam Lal and Suk Lal were rich and had influence at Rajshahye. Haramoni had the pecuniary assistance from Rameswari's husband's family and had Kali Das to look after the case, but so long as Haramoni was alive Rameswari's husband had not the same interest as he has in the present litigation, because Rameswari might not have succeeded to the estate of her father if she died during the life-time of her mother. The learned District Judge says,

"it is not unnatural that she, straitened as she was in her circumstances, agreed to have the case amicably settled for what she was provided rather than wait for what she might or might not have obtained in a fight with Shyam Lal and Suk Lal."

However that may be, there was the youngest daughter Parameswari, an infant of about 11 years of age whose interests were also involved in the case. It is true it cannot be said that the compromise was wholly regardless of the interests of the daughters, but Haramoni whose wants as a Hindu widow were limited was to get Rs. 425 a year for her maintenance and religious expenses and under the will she had a right of residence in the family house and a right of enjoyment of movables for her life. Rameswari and Parameswari, however, (who might give birth to sons, as in fact they have) were to get only Rs. 100 a year each, they had no right of residence in the family dwelling house nor the right to enjoyment of the movables under the will. Parameswari then was unmarried, Shyam Lal and Suk Lal agreed to pay only Rs. 300 for her marriage expenses, and she might not have been married into a family in affluent circumstances. The compromise thus was more beneficial to Haramoni than to her daughters. It is to be noticed that the *ekrar* was to be void in case the widow or her daughters preferred any claim to the estate. The question is whether under these circumstances, the compromise is binding on the plaintiffs. In the cases in which compromises made by Hindu widows were held binding upon the reversioners, there were disputes relating to properties, there were *bona fide* settlements of the disputes, and to settlements were brought to the notice of the Court which gave effect to them. In some of the cases, the compromise was based on the assumption that there was an antecedent title of some kind in the parties, and the compromise merely acknowledged and defined what that title was. Here the questions involved in the revocation case were, whether the Probate should be recalled and whether the will was genuine. It was exclusively the province of the Judge to come to a decision on the question whether the will was genuine, and Shyam Lal and Suk Lal and Haramoni could not decide that issue by agreement or compromise between them specially when the reversioners, the daughters, were no parties to the proceedings.

It is true the will had been proved in common form, and Probate had already been granted. But Haramoni had applied for revocation of the Probate, and she was entitled to have the Probate recalled and the will (which she had challenged as forgery) proved in her presence, as she had not been cited in, and had no knowledge of the Probate proceedings. Even if Shyam Lal and Suk Lal succeeded in proving her knowledge of the Probate proceedings (which is not at all likely), we do not think that the Court, having regard to the facts that she was a *pardanashin* lady, that the interests of infants were involved and that they were practically deprived of the whole of the inheritance would have refused to recall the Probate on that ground. Had the attention of the Court been drawn to the fact that the interests of infants were involved, the vigilance of the Court would have been roused, and having regard to the terms of the will, the circumstances under which it is said to have been executed, the nature of the witnesses, the conduct of the propounders of the will in the matter of obtaining probate, the fact that the existence

of the widow and daughters had been suppressed in the application for Probate and the other circumstances of the case, the Court might have insisted upon a strict proof of the will, and refused to uphold the will unless quite satisfied as to its genuineness. It seems to us that in order to avoid these difficulties that the compromise was effected out of Court by the *ekrarnamas* and admission was obtained from Haramoni that the will was genuine. It is apparent that she did not put in the application because she was satisfied of the genuineness of the will by "special enquiry," but because her brothers-in-law agreed to pay a larger annuity by the *ekrar*. Had the interests of Haramoni alone been concerned, it did not matter how she proceeded with the case, or how or on what terms she settled it. Ordinarily a compromise of a Probate case is binding only upon the parties to it. But Haramoni as a Hindu widow represented the estate, and it is the contention of the appellants themselves that she represented the interests of her infant daughters though they were no parties to the case. The compromise was arrived at in connection with the revocation case pending in Court, but the *ekrarnamas* which embodied the terms of the compromise were withheld from the Court, and all that was represented to the Court was that Haramoni was satisfied 'on special enquiry' that the will was 'genuine' and that the Probate might be upheld. There can be no doubt that these statements were made at the instance, and in the interests, of Shyam Lal and Suk Lal, suppressing the real facts of the case and the terms of the compromise from the Court for the purpose of avoiding a trial of the revocation case which involved the interests of the infant daughters.

We have seen that though the interests of the daughters were not entirely disregarded, the compromise was not a fair one so far as the daughters were concerned and cannot be said to be beneficial for the estate which was ultimately to devolve upon the daughters' sons.

Under these circumstances, and those already referred to, we are unable to hold that the principles upon which a compromise effected by a Hindu widow may be held binding upon the reversioners, apply to the present case, or that the compromise was *bona fide* or binding upon the plaintiffs.

It is contended that it was a family settlement, but a family settlement presupposes that there are *bona fide* claims on either side and an honest settlement after full disclosure of facts on either side. Here one party secretly and fraudulently obtained Probate of a will and when the other party wanted to have it revoked, the former agreed to pay a larger annuity, and obtained an admission of the genuineness of the will which might be used against the reversioners. We do not think that in these circumstances the principle of family settlement applies.

The *fifth* point relates to the question of delay and acquiescence. At the time of the compromise in the revocation case the plaintiffs Rameswari and Parameswari were about 13 and 11 years of age respectively. No question of acquiescence on their part at that time could arise. An attempt, however, has been made to show that before the compromise was arrived at, a messenger was sent by Haramoni to inform and consult Rameswari and her husband Durga Das about the compromise. One Behary Lal, a witness for the defendants, professes to have taken the message to Sankarpasha, the residence of Rameswari's husband. But Rameswari was then a girl of 13 and her husband Durga Das was a mere youth, and his father was alive. We are unable to place any reliance upon the evidence of Behary Lal, and agreeing with the Court below, we hold that the attempt to prove that the compromise was effected with their consent has failed. It is true Kalidas, the elder brother of Durga Das, was present at the compromise and was an attesting witness to the *ekrars*, but that cannot be taken as acquiescence on the part of Rameswari who was then a minor. As for Parameswari, she was not married and was a girl of 11 years of age. There could be no question of consulting her and no such suggestion has been made.

Haramoni received the legacy of Rs. 50 each given by the will to her and her three daughters, as appears from the statement contained in her plaint in a suit in the Small Cause Court filed in 1887 against Shyam Lal and Suk Lal.

The defendants' witness Behary Lal Bose says that out of that money Haramoni

paid Rs. 50 in cash to Kadambini and gave ornamants to the value of Rs. 50 each to Rameswari and Parameswari and appropriated Rs. 50 to herself and that he (the witness) got the ornaments prepared for them. The story is wholly unreliable, and has been rightly disbelieved by the Court below. There is no reliable evidence that either Rameswari or Parameswari herself ever obtained the legacy of Rs. 50. Shyam Lal admits that after Rameswari and Parameswari attained puberty, no money as provided by the will was given to them by him, Rameswari or Parameswari never admitted the genuineness of the will.

The defendants, however, relied upon the draft of an *ekrar* executed by Haramoni in favour of Shyam Lal and Suk Lal by which a suit brought by her against them was compromised. Rameswari and Parameswari were no parties to the suit or the *ekrar*, but it is said that Parmeswari's husband Brojendra took an active part in effecting the settlement and corrected the first paragraph of the draft *ekrar*, which contains an admission of the will. It is stated that the amended first paragraph was written by Brojendra on a slip of paper, and that slip was pasted on the first paragraph of the draft *ekrar*, as it originally stood. The witness Nibaran Chandra Bose made a note that it was written by Brojendra, son-in-law (of Haramoni), an inhabitant of Nowapara, in the presence of certain persons whose names appear in the note. Nibaran admits that he was not in the service of the defendants at that time, but happened to be present on some other business. A portion of the writing (of the note) admittedly looks drfferent from the other, which Nibaran says might be due to difference of pen and ink. Shyam Lal admits that he directed Nibaran to make the note.

The defendants have adduced evidence to prove that the slip was written by Brojendra and several witnesses have been called by them to prove Brojendra's handwriting. On the other hand, Brojendra's son denied that it was his father's handwriting. The learned District Judge says :

> "It does not seem to me to be established that the slip was in the handwriting of Brojendra. Even if it were I do not think that the recitals in the slip can affect his wife or his sister-in-law."

We agree with the Court below in the view it has taken. Haramoni was bound by the *ekrarnama* which she had executed in the revocation case, and the fact that one of her sons-in-law. Brojendra, took part in effecting a compromise between her and Shyam Lal and Suk Lal or wrote out a paragraph of the draft *ekrar* in which Haramoni admitted the will or stated that she was in enjoyment of the income of the Jessore properties in accordance with the said will, cannot be construed as an acquiescence on the part of her daughters. Brojendra, if he did what is ascribed to him, did so on behalf of Haramoni, and not on behalf of his wife Parameswari who was no party to the *ekrar*.

Nor do we think that the fact that Surendra, one of the sons of Rameswari, lived with his grandmother Haramoni, or signed some receipts for the money received by her for her maintenance, constitutes acquiescence on the part of the plaintiffs. Haramoni so long as she was alive was certainly bound by the *ekrarnama*, and the fact that one of Rameswari's sons lived with Haramoni or signed the receipts for her does not show that her daughters acknowledged or acquiesced in the *ekrar*.

The acts and conduct relied upon thus do not, in our opinion, amount to acquiescence on the part of the plaintiffs. Besides, as pointed out in a recent case in this Court, *Shyama Charan Baisya* v. *Prafulla Sundari* (18), there is a distinction between a case where the acquiescence alleged occurs while the act acquiesced in is in progress, and another where the acquiescence takes place after the act has been completed. In the former case the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined obviously on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such preceedings, unless the delay on his part, after he acquired full knowledge, had affected or altered the position of

(18) (1915) 30 I. C. 161.

his opponent. All that can be said in the present case is that there has been delay in making the application, as Rameswari and Parameswari being at the time of the compromise 13 years and 11 years of age respectively, there could be no question of assent or acquiescence on their part at that time.

But although we do not think that the above acts amounted to acquiescence on the part of Rameswari and Parameswari and although there may not be a fixed time within which an application for revocation may be made, yet a person may be debarred by long delay in making such an application. As stated in Williams on Executors, 10th Edition, Vol. I, page 244.

"Long acquiescence unaccompanied by any special circumstances and acts done by next-of-kin under the provisions of the will may (if no fact appears which excites a reasonable suspicion of the genuineness or validity of the will) amount to such a waiver of his rights as to preclude him from putting the will in suit."

We have, therefore, to see whether there were special circumstances in the case so as to take it out of the above rule. It is true that at the date of the compromise of the revocation case (in 1884) both Rameswari and Parameswari were minors, but they attained majority about 20 years ago. They had no right to the estate so long as Haramoni was alive, but they could have as reversioners during her life-time, applied for revocation of the will. Their right, however, to succeed to the estate was contingent upon their surviving their mother Haramoni. They had no money of their own, and were dependent upon their husbands. The evidence of Rameswari shows that her husband was not willing to incur the costs of an expensive litigation which would be wholly infructuous if she died during the life-time of Haramoni, and told her to wait until Haramoni's death. The evidence of Parameswari is to similar effect, and we have no reason to disbelieve this evidence.

Then there are various facts which excite not only reasonable but grave suspicion about the genuineness of the will, and the Court below has found upon the evidence that the will is not genuine. We have not been referred to any case in which the Court, having found the will not to be genuine, has refused to revoke a Probate granted in common form on the ground of delay.

Haramoni died on the 22nd July, 1909, and the application for revocation was made by the plaintiffs on the 27th April, 1910, about 9 months after the death of Haramoni. Having regard to all the circumstances, we are of opinion that the plaintiffs are not precluded by acquiescence or delay in making this application for revocation.

The case of *Manorama Chowdhurani* v. *Soshi Mohan Das Majumdar* (19) was relied upon. In that case Probate was sought to be revoked after 17 years and the application was refused, but it was found that the petitioner for revocation herself had, for a series of years after attaining majority, received the allowance provided for by the will and gave receipts for the same, and no reasonable account was given of the circumstances which entitled the petitioner to re-open the Probate after so many years. On the other hand in the unreported case of *Srimati Rani Kadambini* v. *Srimati Rani Dikbasini* (20) a Probate which was granted in 1882 was revoked in 1901. In that case reliance was placed on a long series of deeds from 1882 to 1897 in which there was reference to the will in which the petitioner for revocation took no part, but in the execution of which other members of the family including females joined. The learned Judges held,

"this no doubt is a strong point against the plaintiff's case, but it is not, we think, fatal to it."

The Court found her explanation to be correct, and having found the will to be a forged one, revoked the Probate.

It is no doubt hard upon the defendants that they have to prove a will 32 years after Probate was granted when some of the witnesses are dead. But they had opportunities of proving the will in solemn form, and they did not avail themselves of the opportunities. If it was a genuine will, the executor should have in prudence and for greater security proved the will in the first instance *per testes*. But in the first place they obtained Probate in common form without citing Haramoni or the daughters and did not even mention their existence in the application for revocation. Then when Haramoni six years afterwards applied for revocation, they had another opportunity of proving the will, but they

(19) (1915) 42 Cal. 480=28 I. C. 886.

(20) Appeals from Original Decrees Nos. 317 and 334 of 1901 decided on the 10th May, 1904—Un-reported.

avoided it by agreeing to pay her an annuity more than ten times the amount which her own husband had provided for her by his will (if it was genuine). They knew that on the death of Haramoni her daughters, and on their death their sons, would be the heirs and they apprehended that the daughters or their sons might challenge the will, as would appear from the condition in the *ekrarnama* that it will be void and inoperative in the event of the daughters or their heirs challenging the will. In acting in that way they took the risk of proving the will in solemn form when the daughters applied for revocation.

Under the circumstances, the hardship was to a large extent their own creation, and although, having regard to the long time that has elapsed, we must make due allowance in considering the evidence about the genuineness of the will, we are unable to hold that the plaintiffs are precluded from having the question of genuineness of the will tried out in this case.

We now come to the *last* question in the case, *viz.*, whether the will is genuine.

[Their Lordships after discussing the evidence on the point concluded as follows :—]

The will is said to have been executed on the 26th July, 1876 and Ram Lal died on the 6th December, 1876, *i. e.*, more than four months after. There is a registration office at Bagharpara only 5 miles off from Basuarih and the will was not registered. Ram Lal, it is true, was suffering from illness, but it could have been easily arranged to get the Sub-Registrar of Basuarih to register the will, on payment of a few rupees for his commission fees and travelling charges. Basanta Kumar, the *karta* of the family, was there and it was to him that the will is said to have been delivered. He was an experienced *mukhtear* and had the will been really executed by Ram Lal, and made over to him, we have no doubt that Basanta Kumar could have got it registered. No explanation has been given as to why the will was not registered although there was ample time to get it registered.

We have already dealt with the provisions of the will. The learned District Judge has held that the provisions of the will are "unreasonable and unnatural" and that "in its cruel disregard of the interests of his widow and three children, the will appears to be unworthy of Ram Lal and of the reputation which he enjoyed for his wisdom and kindness of heart."

We agree with the learned Judge in the view he has taken of the will. No doubt if Ram Lal did execute such a will, the Court cannot reject it on the ground that the terms are unreasonable. All that we mean to say is that taking the will by itself it is certainly an inofficious will, Ramlal was living with his wife and three daughters. The evidence shows that he loved them, and there is no suggestion to the contrary. The wife and the eldest daughter nursed him in his illness which extended for a long period. The evidence does not show that the brothers cared much (if at all) about Ramlal so long as he was at Basuarih. He was a person of a benevolent disposition and used to do good to the needy and the poor. He had an income at the lowest estimate of Rs. 1,000 a year besides share in a money-lending business ; and by his will gave an annuity of only 39 rupees a year to his wife and three daughters two of whom were unmarried, and the latter were not even given the right of enjoyment of the movables and the right of residence in the family dwelling house. It was contended that the provisions of the will might not be considered unnatural by an orthodox Hindu, that the family gods have to be worshipped and *pindas* and libations of water have to be offered to ancestors, and the daughters when married would cease to be members of the father's family. No doubt the family gods have to be worshipped and *pindas* and libations have to be offered to the ancestors, but it is going too far to say that provision cannot be made for them except by depriving the widow and the daughters practically of the whole of the inheritance. One of the daughters was married, the other two were to be married. The daughters might give birth to sons, as in fact both the plaintiffs have, and the daughters' sons would offer *pindas* not only to the deceased (their maternal grandfather) but also to his two paternal ancestors. In this connection it may be pointed out that the will makes no provisions for the *adya* (the first) *shradh* or the annual *shradh* of Ram Lal himself which an orthodox Hindu would obtain promise for, if he were giving away his estate to persons other than his heirs, although the will refers to religious duties towards ancestors which it was the duty of Sham Lal and Suk Lal as much as that of Ram Lal to perform. Under the Dayabhaga the widow, the daughter, and the daughters' son are preferential heirs to the brother and even under the Mitakshara they are so with

respect to the separate property of the deceased.

The 6th paragraph of the will, which provides that the fruits of certain fruit trees planted by Ram Lal were to be enjoyed by his widow and daughters so long as they lived at Basuarih and that the fruits of three cocoanut trees planted by him were to be set apart for guests, were relied upon as affording material evidence of the genuineness of the will. But if the will was manufactured it was not very difficult to insert such a provision in order to show that the will was a genuine one.

Some arguments were based upon a passage in the will, and in the deposition of Sham Lal already referred to, that there were debts of the family for which Ram Lal also was liable, and that Ram Lal was anxious that his wife and daughters should not be liable for such debts, and he, therefore, proceeded that his share of the money-lending business would go to his brothers to the exclusion of his widow and daughters, who were to get a legacy of Rs. 50 each and were not to be liable for the debts. But we have no evidence as to whether there was any debt for which Ram Lal or his brothers were liable. Reliance is placed on an *ekrar* dated the 18th March, 1884, by which Basanta Kumar made a gift of a 2-annas share of the family properties to Sham Lal and Suk Lal and by which it was agreed that the latter should pay a ten-annas share of the debts of the *ijmali* time entered on a separate list signed by Sham Lal and Suk Lal and Basanta Kumar and that Basanta would pay a six-annas share. The same *ekrar* also provided that an eight-annas share of the amounts due on account of paddy and other money-lending business when realised would belong to Basanta and the other half to the two brothers. So that there is no doubt that the family had money-lending business and the fact appears from the will itself. Now the defendants, who are in possession of the estate, have not produced either the list of debts of *ijmali* time signed by Sham Lal and Suk Lal and Basanta or the papers relating to the paddy and other money-lending business belonging to the family, and there is in fact no evidence except the bare statement of Sham Lal what the extent of the debt was. Sham Lal did not even offer any explanation as to the non-production of these papers. Kishori Mohan said that he searched for papers, deeds and *jama kharach* but could not find any previous to 1286. We are unable to accept this statement or to attach any weight to the argument based on the existence of debts in connection with the provision of the will.

Certain bonds executed by Basanta Kumar were referred to as showing the existence of debts, but the bonds were executed by Basanta Kumar not as *karta* of the family and only his own share (8 annas) of the family properties was mortgaged. Sham Lal admits that Ram Lal did not execute any bond. Certain endorsements of payments made on behalf of Sham Lal and Suk Lal on one of these bonds were relied upon to show that the debts were family debts, but such payments were made after the date of the *ekrar* executed by Basanta by which he made a gift of a portion of his share of the family properties to Sham Lal and Suk Lal, on condition that they would pay a proportionate share of debts. The very fact that the will provided that the widow and the daughters would not be liable for debts, and would get a legacy of Rs. 200 out of the money-lending business in Ram Lal's share which would go to the brothers, indicates that the assets of the money-lending business exceeded the debts, if any.

It was suggested that as Basanta Kumar, Sham Lal and Suk Lal were the earning members of the family, the Rajshahye properties were very probably acquired by them and that might have been the reason why Ram Lal left the Rajshahye properties to Sham Lal and Suk Lal. There is, however, no evidence that the properties were acquired by those three, and had there been any truth in the suggestion it would have been so mentioned in the will, at any rate in Sham Lal's deposition. On the other hand the fact that Ramtanu, the father of Ram Lal, Sham Lal and Suk Lal, was a *mukhtear* of Watson and Co. and Basanta's father was a Police *daroga* at Rajshahye suggests in the absence of evidence to the contrary, that the Rajshahye properties were acquired by them, and the will refers to " ancestral and self-acquired properties."

It was contended on behalf of the defendants that the fact that Harmoni did not apply for revocation of the Probate until Durga Das appeared on the scene, and her conduct before and after the revocation case, are cogent evidence of the genuineness of the will.

The application for revocation was, no doubt, made about 6 years after the Probate

was granted. She at first applied for a Succession Certificate in the Jessore Court in 1881 and withdrew it when the executor set up the Probate. The application was, in respect of debts the aggregate amount whereof was only Rs. 91, made more than three years after Ram Lal's death by which time the debts were barred by limitation. There is no doubt that the application was the outcome of some misunderstanding between Haramoni and her brothers-in-law, and was merely a preliminary skirmish to the real fight about the will. We have already held that Haramoni must have become aware of the existence of the will sometime before she applied for the Succession Certificate in the Jessore Court ; but that the explanation given by her for the delay in making the application for revocation is a reasonable one and should be accepted. It is true she did not object to the registration of the names of Sham Lal and Suk Lal under the Land Registration Act based upon the will, nor did she apply for registration of her own name as heiress of Ram Lal. But there is nothing to show that she had any knowledge of the land registration proceedings. She admittedly lived as a member of the joint family, and no inference can be drawn under the circumstances against her for not applying for registration of her own name.

After the revocation case was over, she had other litigation with Sham Lal and Suk Lal. In 1887 she brought a suit in the Small Causes Court for recovery of Rs. 135 against Sham Lal and Suk Lal, and it was alleged in the plaint that the defendant had agreed to pay Rs. 135 for constructing a verandah of the room in which she resided and being unable to pay the same and the legacy of Rs. 200 payable under the will, the defendant had executed a bond in her favour and had paid the Rs. 200 but Rs. 135 was due. A *solehnama* was filed in this case and the defendant was directed on the 6th February, 1888, to pay Rs. 135 within seven days.

Then on the 15th April, 1890, she brought another suit against Sham Lal and Suk Lal for the recovery of the income of the Jessore properties from 1291 to 1296 (1884 to 1889). She stated in the plaint that Probate had been obtained by the defendants without her knowledge, that she had applied for revocation of the Probate alleging that the will was not genuine and many respectable gentlemen intervened and the matter was settled between the parties, to the effect that the plaintiffs would admit the will to have been executed by her husband, that the properties in the district of Rajshahye were to remain in the possession of defendants, that she would get the income of the Jessore properties and 1/6th share of the fruits of the garden and of the fish of the tanks in *khas* possession and a portion of the dwelling house at Basuarih, and that over and above the same she would get Rs. 300 annually for her maintenance and Rs. 125 for religious expenses, that after the terms were embodied in *ekrarnamas* a *solehnama* was filed in that case admitting the will, that the defendant had been paying the amounts fixed by the *ekrar* but had not paid the income of the Jessore properties and accordingly prayed for recovery of the same.

It appears, therefore, that since the disposal of the revocation case in 1884 to 1889 the brothers did not pay Haramoni the income of the Jessore properties and hence the suit was instituted by her. This suit was also compromised. Defendants made over the entire tank called Haritakitolla to Haramoni for her life, the income of her husband's share in the Jessore properties was settled at Rs. 39 a year, and she was to have the same from the year 1297 (1890), and the defendants agreed to pay the amount due to her for the period in suit in two instalments Haramoni admitted that her husband had of his own free will executed the will, that the defendants had taken Probate of the same and were in possession of the properties covered by the will, and she withdrew the statements made in the plaint with regard to the said will and agreed that she and her heirs would not be competent to raise any objection to the same at any time.

It appears that Haramoni brought another suit under S. 9 of Act I of 1877 for possession of the Baitakkhana in the family dwelling house at Basuarih. This case too was compromised, the defendants having agreed to pay Rs. 350 to her for construction of a *dardalan* in front of the room occupied by her. In the *ekrar* by which the case was compromised she admitted the will. But all these admissions were made by Haramoni after she had put in the petition and executed the *ekrar* in connection with the revocation case. She was bound by her petition and *ekrarnama* in which the will was admitted, and we do not see how these admissions made by Haramoni of the will advance the case for the defendants any further than the admission made

by her in the revocation case and in the *ekrar*, or show that the will was genuine. On the other hand, it is contended on behalf of the plaintiffs that whenever Haramoni said anything affecting the genuineness of the will or the *ekrar*, she was given something which she was not entitled to under the will or the *ekrar*. For instance in the second case referred to above, she was given the entire Haritakitolla tank, and in the third the defendants agreed to pay her Rs. 325 for constructing a *dardalan* to none of which was she entitled under the will or the *ekrar*, and each time an admission was taken from her that the will was genuine and that she and her heirs would not be entitled to challenge it. We think having regard to the circumstances, there is a good deal of force in this argument. In any case, we do not think that these admissions of Haramoni, having regard to the circumstances under which they were made, prove the genuineness of the will.

There was one more contention raised before the Court below and also in this Court, *viz.*, that the present application for revocation is not *bona fide*. The Court below overruled it for the reasons stated in its judgment. We entirely agree with the Court below on the point.

We have given our anxious consideration to this case as the Probate is sought to be revoked after an unusual length of time. The learned District Judge had the witnesses before him, and he has come to the conclusion that the will is not genuine. On a consideration of all the evidence and circumstances of the case, we agree with him in holding that the will is not genuine. The result is that the appeal is dismissed, but having regard to the long delay in making the application for revocation we direct that each party do bear his own costs in both Courts.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Calcutta 953

HOLMWOOD AND MULLICK, JJ.

Anila Bala Dasi—Petitioner.

v.

Rajendra Nath Dalal and *another*—Opposite Parties.

Civil Rule No. 932 of 1915, decided on 25th November, 1915, against the Order of Dist. Judge, 24 Parganas, dated 6th August, 1915.

(a) Civil Procedure Code (5 of 1908), O. 9—O. 9 applies to probate proceedings and executors can be called upon to make full discovery of assets of testator—Probate and Administration Act (5 of 1881), S. 55.

O. 11 of the Code of Civil Procedure applies to proceedings in Probate and a Probate Court can, on submission of interrogatories, direct the executors to make a full discovery of the assets of the testator by an affidavit sworn by them. [P. 953, C. 2.]

But until the interrogatories are filed, the Court is absolutely without any power in the matter. [P. 954, C. 1.]

(b) Civil Procedure Code (5 of 1908), O. 9—Probate proceedings—Strictest relevancy in the interrogatories is not required (*Semble*)**—Probate and Administration Act (5 of 1881), S. 55.**

Semble.—In matters of Probate the strictest relevancy in the interrogatories may not be required, but the Court should exclude whatever is offensive or improper. [P. 954, C. 1.]

Dwaraka Nath Mitter and *Satis Chandra Ghatak*—for Petitioner.

Jogendra Nath Mukherjee, *Sarat Chandra Mukherjee* and *Paresh Nath Mukherjee*—for Opposite Parties.

Judgment.—This was a Rule calling upon the opposite party to show cause why the order of the Court referred to in the petition should not be set aside and the opposite party directed to make a full discovery of the assets of the deceased by an affidavit sworn by them personally in the form required by law.

It appears that a petition was filed before the learned Judge, averring that the inventory filed by the other side as executors to her husband's estate, which alleged that only forty-seven thousand Rupees came into their hands in cash, was erroneous and that as a matter of fact they obtained a lakh of Rupees or more and it asked the District Judge to direct the opposite party to make a full discovery of the assets of the deceased by an affidavit sworn by the opposite party personally. The learned Judge refused the application, on the ground that there appeared to him to be nothing in the Probate Act which would enable him to make any such discovery. He apparently did not have it brought to his notice that S. 55 of the Probate and Administration Act lays down that "The proceedings of the Court of the District Judge in relation to the granting of Probate and Letters of Administration shall, except as hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit by the Code of Civil Procedure." There is, therefore, no doubt that O. 11 of the present Code of Civil Procedure applies to proceedings in Probate

Under that order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side. The affidavit which the petitioner desires to obtain can, therefore, only be obtained by the first method, namely, by interrogatories; and it is laid down clearly in O. 11, R. 2, that on application for leave to deliver interrogatories the particular interrogatory proposed to be delivered shall be submitted to the Court; and in the case before us no interrogatories whatever were submitted to the Court; and it has been held in England, and the same rule applies in this country, that under this rule the Judge has not any power to settle interrogatories, but he can only decide what should be administered. Until the interrogatories are filed it is impossible for him to settle whether there is anything offensive, improper or irrelevant in those interrogatories: and the Dicta that have been laid before us from English cases with regard to the more extensive powers of the Court in matters of Probate, seem to us to imply that possibly in such matters the Judge would not be astute to insist upon the strictest relevancy, but he certainly would be obliged to exclude anything offensive or improper in the same way as in any other case. It may be that in matters of Probate the strictest relevancy in the interrogatories may not be required, but this is a matter for the Judge to decide when the interrogatories are filed before him. Until the interrogatories are filed he is absolutely without any power whatever in the matter.

We are, therefore unable to help the petitioner upon the present Rule. As there is no provision of limitation applying to such proceedings, we can see no reason why he should not file a proper petition with proper interrogatories as laid down in O. 11 of the Code of Civil Procedure, and we have no doubt that if he does so, the Judge will give them the proper attention in the exercise of his judicial discretion and administer such as may be according to law.

With these remarks the Rule is discharged. The opposite party is entitled to his costs of this hearing, which we assess at one gold *mohur*.

V.B./R.K.

Rule discharged.

A. I. R. 1916 Calcutta 954

N. R. CHATTERJEA AND NEWBOULD, JJ.

Chandradaya Sen — Defendant—Appellant.

v.

Bhagaban Chandra Sen and *others*—Plaintiffs and Defendants – Respondents.

Appeal No. 1472 of 1914, decided on 22nd December, 1915, from the Appellate Decree of Addl. Dist. Judge, Tipperah, dated 28th February, 1914.

(a) Contract Act (9 of 1872), S. 69—Person to whose land liability is attached is person "bound by law to pay."

One who is not personally liable to pay but to whose land liability is attached, is a person "bound by law to pay" within the meaning of S. 69 of the Contract Act. [P. 955, C. 2.]

(b) Contract Act (9 of 1872), S. 69—Person whose land would have been sold but for the payment is person "interested in payment of money."

A person whose land would have been sold had he not made a payment, is "interested in the payment of money" within the meaning of S. 69 of the Contract Act. 4 Cal. 369, foll. [P. 956, C. 1.]

(c) Decree—Execution—Purchase of tenure at execution-sale—Purchaser takes it charged with rent due at time of purchase—Purchaser cannot recover the amount from judgment-debtor.

Rent is, by operation of law, the first charge on a tenure and the person who purchases the same at an execution-sale must, in the absence of anything to denote the contrary, be taken to purchase it charged with the rent due at the time of its purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due. 1 C. W. N. 458, appld.; 6 C.W.N. 794 and 32 Cal. 643, foll.: 4 C. W. N. 590 and 3 C. W. N. 384, ref. to and expl. [P. 956, C. 1.]

(d) Contract Act (9 of 1872), S. 69—*A* and *B* co-sharers of *taluk*—*B's* share purchased by *C* in execution of mortgage-decree—Landlord putting property to sale in execution of rent-decree—*A* depositing amount to save *taluk*—Suit for contribution by *A* against *B* and *C*—Held *A* was entitled to decree against *C*.

A and *B* were co-sharers of a *taluk*. The share of *B* was purchased by *C* in execution of a mortgage-decree. Prior to the purchase of *C* the landlord had obtained a decree for arrears of rent, and after the purchase by *C* put up the *taluk* to sale in execution of the rent-decree. *A* deposited the entire amount due to the landlord and saved the *taluk*. He then brought a suit for contribution against *B* and *C*.

Held, that *A* was entitled to a decree for contribution against *C* and *C* could not raise the question of the liability of *B* for *A's* claim when *A* did not insist upon his claim against *B*. [P. 956, C. 2.]

Sarat Chandra Roy Chowdhury and *Sasadhar Roy*—for Appellant.

Birindra Chandra Das and *Upendra Kumar Roy*—for Respondents.

Judgment.—This appeal arises out of a suit for contribution.

A preliminary objection has been taken to the hearing of the appeal on the ground that the suit is of a nature cognizable by the Court of Small Causes, and does not come within Article 41 of the Second Schedule of that Act. It is pointed out that the plaintiff's case was that he was a tenant under the defendant No. 1, and he sued to recover from the defendants the whole amount paid by him to save the property a portion of which was held by him as a tenant under the defendant No. 1; in other words, he denied any common liability with the defendants which is the foundation of a suit for contribution. That no doubt was the plaintiff's case, but there was an alternative case, *viz.*, that if the plaintiff was held liable to contribute then a decree for proportionate amounts might be passed against the defendants.

The Court of first instance held that the plaintiff was a co-sharer and liable to contribute and on that footing gave a modified decree to the plaintiff. The plaintiff did not appeal against that decree. Under the circumstances we are of opinion that the suit is one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, and is exempted from the cognizance of Small Cause Courts under Article 41 of the Second Schedule of Act IX of 1887. The preliminary objection is accordingly overruled.

As regards the merits of the case, it must be held upon the findings arrived at that the plaintiff and the defendant No. 1 were co-sharers of a *taluk*. The share of the defendant No. 1 in the *taluk* was purchased by the defendant No. 2 in execution of a mortgage-decree in 1908. Prior to the purchase of the defendant No. 2 the landlord of the *taluk* had obtained a decree for arrears of rent of the *taluk* and after the purchase by defendant No. 2 put up the *taluk* to sale in execution of the rent-decree, when the plaintiff deposited the entire amount due to the landlord and saved the *taluk*. He then brought the present suit for contribution. The Court of first instance passed a decree against the defendant No. 2 and the other co-sharers and that decree was confirmed on appeal.

The defendant No. 2 has appealed to this Court and it is contended on his behalf that as the rent-decree obtained by the landlord was for a period prior to the date of his purchase, he was not a person "*bound by law to pay*" (any share of the rent) within the meaning of S. 69 of the Contract Act. It is true he was not personally liable for the rent for the period prior to his purchase, but the *taluk*, a share of which was purchased by him, was liable to be sold in execution of the decree. In *Mothooranath Chattopadhya* v. *Kristo Kumar Ghose* (1), it was contended that the section applied only to cases where there was a personal liability for the debt, and did not apply whereas in the present case the liability attached to the land only. Markby, J., in overruling the contention said as follows:—

> "Now, I think it is rightly argued that taking that section by itself, it is possible to say that that section only applies to cases where the person who is there called 'the other' was personally liable for the debt, but it is clear from the illustration that that is not the intention of the Legislature. The illustration gives the case of a lessee paying off revenue due to Government; but the liability to pay revenue due to Government is not a personal liability of the *zemindar*, but a liability which is imposed upon the *zemindar's* land. It is, therefore, clear that that section was intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the lands held by them."

We agree with the view taken in the above case, and hold that the defendant No. 2 is a person who is "bound by law to pay" within the meaning of S. 69 of the Contract Act.

The learned Pleader for the appellant sought to distinguish the case upon the ground that there was no personal liability of either of the parties to the case, and that the plaintiff in the present case personally as well as his share of the *taluk* was liable for the rent, and the defendant No. 2 was not personally liable but only his share of the *taluk*. If, however, a person is "bound by law to pay" by reason of the liability attaching to the land, the defendant No. 2 comes within the purview of the section although his liability is not a double liability like that of the plaintiff. Besides in the present case the landlord did not proceed against the tenants personally.

It was further contended that the plaintiff was not "a person interested in the payment of money" but was himself bound by law to pay and that as such he cannot

(1) (1879) 4 Cal. 369.

come under the section. But the plaintiff in the case cited above was also "bound by law to pay" by reason of the liability attaching to the land and that did not prevent him from coming under the section. The learned Judges held that he was "interested in the payment" of the money because if he had not paid it his land would have been sold, as in the present case. The first contention of the appellant is accordingly overruled.

It is next contended that as between the defendant No. 1 and the defendant No. 2, the former ought to have been made liable for the plaintiff's claim as the decree for rent was for a period prior to the date of the purchase by the defendant No. 2 in execution of his mortgage-decree, during which the defendant No. 1 was in possession, and that the Courts below are wrong in making a decree against the defendant No. 2. But as pointed out in the case of *Srimati Moharanee Dasya* v. *Harendra Lal Roy Chowdry* (2), rent is, by operation of law, the first charge on a tenure and the person who purchases the same at an execution-sale must, in the absence of anything to denote the contrary be taken to purchase it charged with the rent which is due in respect of it at the time of its purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of the purchase.

The case has been followed in *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (3) and *Manindra Chandra Nandy* v. *Jamahir Kumari* (4).

We have been referred to the cases of *Sreemutty Jogemaya Dassi* v. *Girinder Nath Mukherjee* (5) and *Gobindo Chunder Chukerbutty* v. *Basant Kumar Chukerbutty* (6). But all that was laid-down in the first case was that a purchaser of a tenure is not personally liable for its rent which fell due before the date of purchase, although the tenure may be liable for such rent. In the second case the appellant, an unrecorded co-sharer of a tenure, was held liable to contribute to the rent paid by a recorded co-sharer to save the tenure, although the share of the former had been sold away and purchased by another at the date of the sale in execution of the rent-decree. Reliance is placed upon a passage in the judgment in that case which runs as follows :—

"It may be that the purchaser of . . . the share could not have come down upon the appellant for any rent which had become due before the purchase, but the question here is not between the appellant and the purchaser, but between the plaintiff and those who were the co-owners with him of the *taluk* during the period for which the rent became due."

In the present case, however, the plaintiff does not insist upon his claim against the defendant No. 1, and it is the defendant No. 2 who raises the question of the liability of the defendant No. 1. It is found that the defendant No. 2 purchased the share of the defendant No. 1 at a low price, which in the opinion of the Court below indicated that he purchased the share subject to the liability to contribute. No equitable consideration, therefore, arises in favour of the defendant No. 2.

It is unnecessary to consider whether the defendant No. 1 could be held liable on the basis of the contract (of mortgage) as between him and the defedant No. 2, because the latter never set up such a case. The case of the defendant No. 2 simply was that the debt was a personal liability of the defendant No. 1 and he was bound to pay it, by reason of his having been in possession and in enjoyment of the profits of the share during the period for which the rent was due.

The defendant No. 2 is liable only to the extent of the share purchased by him. But no question was raised in the Courts below that the amount decreed against him exceeds the value of the share purchased by him.

We are of opinion that the decree appealed from should be confirmed and this appeal is accordingly dismissed with costs, one set of Pleader's fees will be divided between the plaintiff and defendant No. 1, respondents.

V.B./R.K.

Appeal dismissed.

(2) (1897) 1 C. W. N. 458.
(3) (1902) 6 C. W. N. 794.
(4) (1905) 32 Cal. 643.
(5) (1900) 4 C. W. N. 590
(6) (1899) 3 C. W. N. 384.

A. I. R. 1916 Calcutta 956

MOOKERJEE AND ROE, JJ.

Baikuntha Nath Rai Chaudhuri and *others*—Plaintiffs - Appellants.

v.

Basanta Kumari Dasi and *others*—Defendants—Respondents.

Appeal No. 68 of 1905, decided on 26th August, 1915, from the Original Decree of Sub.-Judge, Barisal, dated 5th September, 1904.

Landlord and tenant—Government Revenue—Revenue sale—Rights of purchaser—Suit for ejectment—Burden of proof—Adverse possession of part of an estate sold at revenue sale.

The purchasers of an estate at a revenue sale are entitled to all lands included in the estate at the time of the Permanent Settlement; they cannot have the advantage of, any more than they can be prejudiced by, adverse possession subsequent to that date. [P. 961, C. 2.]

The plaintiff in an action in ejectment must succeed on the strength of his own title and, therefore, the purchaser of an estate at a revenue sale cannot by suit oust the defendants from lands which, though not included in the estates claimed by them, are equally outside the estate purchased. [P. 962, C. 1.]

Jogesh Chandra Ray and *Surendra Nath Das Gupta*—for Appellants.

Nilmadhab Bose, *Surendra Chandra Sen*, *Shib Chandra Palit*, *Gunada Charan Sen*, *Rajendra Chandra Guha*, *Sarat Chandra Sen* and *Hemendra Chandra Sen*—for Respondents.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for recovery of possession upon declaration of title, instituted so far back as the 27th February, 1899. There were more than 100 defendants in the suit, with the result that frequent deaths amongst the parties litigants have delayed the trial of the suit both here and in the Court below. The Trial Court was not able to dispose of the suit till the 5th September, 1904, and although the appeal was lodged in this Court on the 13th February, 1905, it could not be finally heard till more than ten years later.

The plaintiffs claim the disputed lands as included in *Kismat* Baldia, which they allege is comprised in estate No. 3846 purchased by them at a sale held for arrears of revenue on the 25th March, 1897. This estate constitutes a 12¼-*gandas* share of *Perganah* Selimabad. Three of the defendants Nos. 58, 59 and 60, are the recorded proprietors of estate No. 3847, another No. 61 is the proprietor of estate No. 3848, and three others Nos. 62, 63 and 64 are the proprietors of estate No. 3849. These three latter estates constitute a 9¼ *ganda* each of *Perganah* Selimabad, so that the four estates taken together constitute a 2-annas share of Selimabad. The case for the plaintiffs is that the lands in dispute are comprised exclusively in estate No. 3846 and that the defendants are unlawfully in possession thereof under the colour of tenures and under-tenures which are either fictitious, or, if real, do not bind the plaintiffs as purchasers at a sale for arrears of revenue. The Court below has found that these under-tenures do not bind the property in the hands of the plaintiffs and as the first defendant who is affected by this adverse finding has not taken exception to it, either by an independent appeal or by way of cross-objections, the question does not directly arise for consideration in this appeal. The Subordinate Judge has further held that as the plaintiffs have failed to prove that the disputed lands are comprised exclusively in estate No. 3846, they must be deemed to be the joint lands of the entire original estate Selimabad, out of which the different estates claimed by the parties as also other estates have been carved out. In this view, the plaintiffs would be entitled to a decree for possession of 12¼-*ganda* share of the disputed lands; but the Subordinate Judge has given the plaintiffs a decree for 16¾-*ganda* share, because the *thak* map shows that estate No. 3846 comprises such share of the lands in question. The plaintiffs are dissatisfied with this decree and have appealed to this Court. On their behalf three alternative aspects of the case have been put forward, namely, *first*, that the first defendant had acquired a good title to all the disputed lands by adverse possession as against all the other defendants and that as the first defendant had no substantial defence against the plaintiffs, the latter were entitled to a decree for all the land claimed; *secondly*, that as the two contesting defendants Nos. 58 and 59, the purchasers of estates Nos. 3842 and 3847, had title to 1 anna 7¼ *gandas* (or 1 anna 11¾ *gandas* according to the Thak Map), the plaintiffs were entitled to a decree for the remaining share; and *thirdly*, that the lands are the joint lands of the two-annas share of the original *zemindari* Selimabad and that the plaintiffs are entitled to a decree on that basis.

Before we deal with these questions, we may advert to two preliminary points. It is clear, in the first place, that *Perganah* Selimabad was partitioned before the Permanent Settlement. This is conclusively shown from a letter addressed by Mr. G. Thompson, Collector of Dacca, on the 28th December, 1793 to the President and Members of the Board of Revenue. This letter was not produced before the Subordinate Judge; in fact its existence was traced out from a passage in the history of Backerganj by

Mr. Beveridge. The letter has been produced in this Court and has been admitted in evidence by consent of all the parties. As the letter contains the early revenue history of *Perganah* Selimabad, which is essential for the proper appreciation of the evidence in this case, we set it out below, though it is expressed in quaint phraseology :—

"To

W. COWPER, ESQ.,

President and Members of the Board of Revenue.

"GENTLEMEN,

"I now beg leave to address Your Board on the subject of *Perganah* Selimabad and to lay such information before you regarding it as will, I trust, enable you to furnish me with your final instructions on the mode to be adopted for concluding the settlement of it.

On a view of my predecessor's correspondence with your Board respecting this *mehal* I find in his letter of the 8th October, 1791 he states, as the cause of the decline of the public revenue in it, that it is the joint property of the several numerous sharers without any separation or division of the land composing it, consequently that every petty *talookdar* or *ryot* is subject to be harassed by being under the control and subject to the vexatious demands of 18 rapacious masters : and for the removal of this grevious evil, he proposes that a general division of the *perganah* shall be made, observing further that another essential benefit would result from the adoption of this plan in the ascertainment of the actual quantity of land possessed by the Salt Byparee *Talukdars*, many of which he states he has every reason to believe, from the information given him, hold their land at a very low rate, owing to the dishonesty of the *mofussil* servants, and Your Board relying on the information submitted by him respecting the state of the property in the *perganah* approve his proposal, and at your recommendation the Governor-General-in-Council was pleased to direct under date the 20th June, 1792 that the whole of the *mehal* should be held *khas* for the purpose of making a general division of it between the several proprietors, so that each should have his share of the land composing it allotted to him,

"After such information furnished by the late Collector when he had been in the office nearly three years, and in this period it was to be presumed he had accurately informed himself of the state of the property in the *mehal*, it will no doubt be with some surprise, the Board are now informed that the division recommended was totally unnecessary, the *perganah* having undergone a complete division and each share being separate and distinct from the other with the exception of the Jabberaumul and which, being disputed property between the proprietors of the 11½ annas and some of those holding the property of the 4½ anna division, must necessarily undergo a judicial enquiry for the adjustment prior to any division of it being made.

"In order to show your Board that the *perganah* has undergone the complete division stated by me, I shall beg leave to state the periods when the various divisions were made and the causes which gave rise to them. The whole property in the *perganahs* having been usurped by Aga Backer during the period he held the Waddahdharee of it, the dispossessed proprietors in the year 1156 B. S. preferred a complaint to the Soubah of Bengal, who restored them to the possession of a 4½ anna proportion of it; and in that year the division of it both of land and *jumma* was made by Uzmuttoollah *Ammeen* appointed by the Soubah for the purpose, and sometime afterwards the 4½ anna division underwent a sub-division into ten shares between the respective proprietors of it and now stand as follows :—

		G.	C.
Shibnarain Roy	...	12	1
Odoynarain Roy	...	9	1
Doolabnarain Roy	...	9	1
Luckinarain Roy	...	9	1
Joychand Roy	...	17	2
Raj Chandra Roy	...	5	0
Kishenram Roy	...	10	1
Ram Ram Roy	...	7	0
Pertabnarain Roy	...	6	1
Kissen Ram Roy	...	4	0

"From the period of the above divisions the 11½ and 4½ annas shares as well as the sub-division of the latter have been separate and distinct and have had no connection with each other. Aga Backer remained in possession of his 11½ annas proportion until the year 1160 when he suffered the punishment of death for the crime of rebellion, and Raja Ranje Ballav was appointed to attach the whole of his property and effects which became forfeited to the State, the latter were disposed of by the reigning

Government but the land, the family of Rajbollav had sufficient influence with the Court to retain in their possession until the end of the Bengal year 1164, when in the Government of Mr. Nerulst (*illegible*) Sheevnarain, the son of Joynarain, one of the original proprietors assisted with the influence and patronage of Gocool Ghosaul, obtained restoration of the share of which the family had been unjustly deprived by the usurpation of Aga Backer, and for the assistance afforded by Gocool Ghosaul he was presented with a moiety of the recovered property or a 5 annas 15 *ganda* proportion of it and had it recorded in the *zemindary sheristah* in the name of Bowannay Charan Roy. Thus the 11½ annas share of the *perganah* became the joint property in equal proportions of Joynarain Roy and Gocool Ghosaul and they jointly possessed it in these proportions until the Bengal year 1179, when at their mutual request to Mr. Barwell the division of it between them was made and each had his share of the land allotted to him. Gocool Ghosaul's share continues complete as allotted him in this division and is now the property of Cassinaut in consequence of the public sale made of it to him in the Bengal year 1196. The other share of 5 annas 15 *gandas* remaining with Joynarain Roy falling in arrear to Government the sale of a moiety or 2 annas 17 *gandas* 2 *kara* division of it was made in 1189, B.S. of the liquidation of the balance and in the following year the division of it was made between the purchaser Joynarain Ghosaul in the name of his son Colly Sankar Ghosaul, and Joynarain, whereby each had his proportion of the land allotted to him and in the same year, the heirs of the latter made a sub-division of their share of 2 annas 17 *gandas* 2 *kara* in the following proportions :—

	G.	C.
Shibnarain ...	18	2
Doolabanarain ...	13	0
Odoynarain ...	13	0
Luckinarain ...	13	0

"The Board will perceive from the above that so far from the *perganah* being the joint undivided property of the several shares as stated by my predecessor it has undergone the most perfect and complete division practicable, into sixteen portions which accord with the number of the present proprietors, as well as with the number of shares stated in the public Rent Roll of the District, and from the information obtained on the fullest enquiry, I can with confidence assure the Board a more perfect division of it between the numerous sharers cannot be made than the one which now stands. The late Collector must, I apprehend, have been led into the error of stating it as the joint undivided property of the numerous proprietors from the representations of some of the *talukdars* stating the inconveniences which they suffer from having their Revenue to pay to three or more sharers; this is an inconvenience which I admit some of them do labour under, but I submit it to the Board whether it could have been avoided in the division of a *perganah* among so many proprietors, and whether it was not the less to be avoided in the one in question where many of the *talukdars* hold land paying a Revenue exceeding several of the proprietors' proportion in the *perganah* and which consequently rendered the division of it between them unavoidable, and although the instances where a *talukdar* pays his Revenue to plurality of sharers are many in Selimabad, yet I must observe there are few where the lands composing the *taluks* have not undergone a division between them, so as to define to each proprietor the proportion and particular soil responsible to him for the Revenue as comprised and included in his share of the *perganah* and upon the whole, I beg leave to offer it as my opinion that for the reasons above-mentioned the inconveniences which exist in the present division of the *zemindari* could not be remedied by a new one, while the latter on its operation would make an exchange of the property between the shares to the benefit of some and proportionate disadvantage of others.

"The Board will, therefore, Judge how far it may be advisable to make the division directed by the Governor-General in Council at their recommendation given under the erroneous information submitted to them by my predecessor, indeed whether it be practicable or not, without giving just cause of complaint to some of the sharers, who will be sufferers, by the exchange of their property. I am so fully satisfied, gentlemen, in my own mind that it cannot be effected without giving this just cause of complaint and

that the new division can, but in a very few instances, remedy the inconvenience complained of in the present one, that I have thought it best not to proceed in it, perhaps it was never your intention to recommend a division where it had this tendency, and at the same time could not but very partially remedy the inconvenience proposed by it. Although for the above reasons I have not proceeded in the division, yet I have deemed it proper to avail myself of the measurement made of the *perganah* for it to ascertain by a *jammabundy* its actual assets in order to form a judgment how far these would admit of the resumption of a part of the large abatement, amounting to Rs. 13,000, granted to the 11½ annas division of it since year 1193 B. S., exclusive of the loss which Government has sustained annually on this reduced *jamma* amounting averagely to Rs. 19,000. I conceived an investigation of the nature the more necessary as a perusal of Mr. Douglas's correspondence with your Board on the subject of this *mehal* gave great reason to suspect that the abatement in question had not been altogether rendered necessary by any actual decline of its resources, but partly by the refractory conduct of some of the *talukdars* refusing to pay the proper and just revenue of their lands to the *zemindars* and partly by the intrigues of others with the *zemindari* servants obtained from them improper deductions as stated in his letters under date the 14th January, 12th April, and 8th of October, 1791.

"As far as a judgment can be formed from the *jammabundy*, these suspicions seem to be well grounded inasmuch as the assets thereby appear nearly sufficient to admit of the resumption of the whole amount of the abatement but to obtain it will require rigorous measures both towards the *zemindars* and *talukdars*, and am fully satisfied, gentlemen, that neither have one just objection to make to the *jammabundy* and so far from its being oppressive that it is fair if not very moderate. I can have no hesitation to give my recommendation that such measures be taken in all instances requiring them and that the lands, whether the instance be with the *zemindar* or *talukdar*, be formed where refused by either on the terms of the *jammabundy* and where they cannot substantiate any reasonable and just objection to it. I am compelled to call upon Your Board for this authority in the conviction that without it no exertions of mine will effect the resumption of any part of the abatement in a *perganah* the renters whereof have ever shown themselves disobedient and of the most refractory disposition, and whose conduct has annually baffled the attempts of the executive officers to realize even the Revenue which they are pleased themselves to admit as justly payable by them, but it cannot be necessary for me, gentlemen, to dwell on the misconduct of these renters where so much of it already appears upon your records in the repeated representation made by my predecessors in my office.

"The vesting me with the requested authority to form all lands in the cases stated will, I have every reason to believe, enable me to complete the settlement of the *perganah* in the course of the current year, with the resumption of a great part of the abatement, but without such authority I must here again repeat it to the Board the very, and I may say incredible, refractory disposition of the people, will not allow me to entertain the hope of realizing the present rated *jamma*, and to conclude a settlement without an abatement from it, will be altogether impracticable. Your Board will, therefore, decide under the information herein submitted respecting the capability of the *mehal* whether such conduct shall benefit the object which instigates it and whether the abatement shall be allowed and the resumption proposed, be foregone, or whether it will not be more proper to notice it by punishment, bearing out of the consideration the justice of the claim which Government has to the resumption.

"In conclusion, permit me to pledge myself to Your Board for the measures proposed by me proving efficacious and that it is my opinion, few instances will occur to render the exercise of the requested discretionary power necessary, it being my belief the knowledge that I possess it will in general prove sufficient. The Board at all events may rest assured that I will in no instance avail myself of it to oppress and I do hope that I hold a better place in their opinion than to be suspected of soliciting it with any such intention.

"Allow me to beg your instructions on the subject of the address as early as convenient.

"I have the honour to be,
Gentlemen,
Your most obedient humble servant,
(*Signed*) G. Thompson,
Collector.

"Dacca
The 28th December, 1793."

It is interesting to compare these shares with the shares now registered in the books of the Collector—

NO. OF ESTATE.	SHARE Annas *gandas*.
3834	0 6¼
3836	0 7
3840	5 15
3841	2 17½
3842	0 18½
3843	0 13
3844	0 13
3845	0 13
3846	0 12¼
3847	0 9¼
3848	0 9¼
3849	0 9¼

This requires to be supplemented by a share of 1 anna 16¾ *gandas* to make up 16 annas. This missing share was composed of 17½ *gandas*, 5 *gandas*, 10½ *gandas* and 4 *gandas* mentioned in the above letter.

It may be observed that estates Nos. 3842-3845 make up 2 annas 17½ *gandas*, which together with estate No. 3841, make up 5 annas 15 *gandas*; this taken with estate Nos. 3840 makes a share of 11½ annas. Estates No. 3846-49 make up a 2 annas, and these together with the remaining shares, namely estates Nos. 3834 and 3836 and the four shares aggregating 1 anna 16¾ *gandas*, make up 4½ annas. If these shares are borne in mind, the various documents may be easily understood; this also bears out that there was originally a division of the *perganah* into two shares 11½ annas and 4½ annas respectively:

In the second place, it is plain that absolute reliance cannot be placed upon the *thak* map. It is clear that the *mahal milani* statements were prepared only on reference to the original state of the *mahal* pending the decisions in the *adam nisani* and miscellaneous cases then under consideration. This must be borne in mind in the examination of the long series of documents in the case.

As regards the *first* position taken up by the appellants, we have only to observe that it cannot possibly be sustained. Assume that the first defendant had annexed the disputed lands to the under-tenure claimed by her and had acquired a good title thereto by adverse possession for the statutory period against the true owners. That does not avail the plaintiffs, as they have purchased estate Mo. 3846 and nothing beyond it. Take two contiguous estates A and B, held by *X* and *Y*. Suppose *X* annexes a portion of *B* and professes to hold it as included in A, till the title of *B* is extinguished. If thereafter *X* makes default in the payment of Government revenue, what does the Collector expose for sale? Obviously estate *A* as it stood at the time of the Permanent Settlement: he does not put up the sale the portion of B annexed to A by *X*. Similarly, if *Y* had defaulted to pay revenue, the Collector would expose for sale estate *B* as it stood at the time of the Permanent Settlement and would not exclude from the sale the portion annexed by *X*. The substance of the matter is that the purchaser at the revenue sale is not prejudiced by an encroachment against the defaulting proprietor; nor does he reap the benefit of an encroachment by the defaulter. To put the matter in another way, the effect of the adverse possession by *X* with regard to the lands of B is to make him a joint proprietor of B along with *Y*. The Collector is nowise affected by the adverse possession between the proprietors of A and B and if he has occasion to sell either estate, he sells the estate as it was at the time of the Permanent Settlement. Here the plaintiffs have purchased estate No. 3846; they are entitled to all lands included in the estate at the time of the Permanent Settlement: they cannot have the advantage of, any more than they can be prejudiced by, adverse possession subsequent to that date. The *first* contention, consequently, fails.

As regards the *second* position taken up by the appellants, obviously it cannot be sustained. The plaintiffs in an action in ejectment must succeed on the strength of their own title they cannot succeed, merely because the defendants

may not be able to establish title to all the lands in their possession; in other words, the plaintiffs as purchasers of estate No. 3846 cannot oust the defendants from lands, which, though not included in the estates claimed by them, are equally outside the estate purchased by the plaintiffs.

As regards the *third* point taken up by the appellants, we may observe that this covers the real controversy between the parties. The Subordinate Judge has rejected without discrimination the documents adduced by the plaintiffs to prove that the disputed lands are the joint lands of estates Nos. 3846 – 3849. No doubt, many of these documents are not registered, but they are of some antiquity: many of them were mentioned in the litigation of 1863. It is further clear that they have not been fabricated by the present plaintiffs, and the very fact that they are inconsistent with the extreme case of the plaintiffs that the disputed lands are included in estate No. 3846 alone, removes them from the sphere of indiscriminate suspicion; if the plaintiffs had manufactured these documents for the purposes of this suit, they might well have been drawn up to support their maximum claim. These documents, which disclose the dealings of the various parties with separate parcels of lands as included in one or other of the shares on definite partitions by metes and bounds in *Perganah* Selimabad, are obviously of value, as embodying assertions of title in times now long past. The letter of Mr. Thompson, as we have seen, proves conclusively that there was a partition prior to 1793, and that many of the estates then and now existing had separate parcels of land allotted to them before the Permanent Settlement. The question thus narrows down to this: have the plaintiffs proved that the disputed lands or any portion thereof were at the time of the Permanent Settlement the separate lands of the 2-annas share now represented by estate Nos. 3846—3849. In the investigation of this question, we are materially assisted by the proceedings in a suit for assessment of rent brought by Manikya Chandra Das against Mahes Chandra Biswas and decided by the Deputy Collector of Bakergunj on the 23rd November, 1864 and by this Court on the 17th November, 1865 (Exhibits 618 and 619).

[After adverting briefly to the facts of that suit and discussing evidence in the present case His Lordship concluded as follows :—]

The conclusion follows that the plaintiffs have established that there was a partition prior to 1793) and that plots Nos. 3, 6, 7, 9, 10 and 11 of the map of 1864 fell to the 2-annas share now represented by estates Nos. 3846—3849. Consequently the plaintiffs are entitled to a decree for possession of these plots only, in respect of a 12¼-*gandas* share out of 2-annas, that is, if the 2-annas be treated as 16-annas the plaintiffs are entitled to a decree for possession of 4-annas 18 *gandas* share of plots Nos. 3, 6, 7, 9, 10 and 11 only. The Subordinate Judge, however, has given them a decree for 16¾-*gandas* share of all the plots in suit. As the defendants have not filed an independent appeal or preferred a memorandum of cross-objections, we cannot on an appeal by the plaintiffs, deprive them of the benefit of any portion of the decree already made in their favour by the Subordinate Judge.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The decree in favour of the plaintiffs for 16¾-*gandas* share of all the lands claimed in the suit is maintained. In addition to this, the plaintiffs are awarded in respect of plots Nos. 3, 6, 7, 9, 10 and 11 of the map of 1864 a further decree for 4 annas 1¼-*gandas* share, so as to bring up their share in those plots only to 4-annas 18-*gandas*. The plaintiffs will have joint possession of the lands now decreed in their favour and also mesne profits in the way directed by the Subordinate Judge. We set aside the order for costs made by the Subordinate Judge and direct that all parties pay their own costs both here and in the Court below.

V.B./R.K.

Appeal allowed in part.

A. I. R. 1916 Calcutta 962

MOOKERJEE AND NEWBOULD, JJ.

Salimullah Bahadur and *others*—Plaintiffs—Appellants.

v.

Kali Prosonno Parbat and *others*—Defendants—Respondents.

Appeal No. 2334 of 1913, decided on 8th April, 1915, from the Appellate Decree of Dist. Judge, Backergunge, dated 12th May, 1913.

Landlord and Tenant—Rent — Abatement—Abatement of rent for diluvion not provided though for all other causes—Held tenants are entitled to claim abatement for diluvion—Held no forced construction to include diluvion also be made.

A lease provided *inter alia*: "We (tenants) shall not be able to claim abatement of rent on account of flood, drought, death and flight, waste and abandonment, inundation, possession and dispossession or any other ground of like nature," but there was no mention of diluvion in the clause:

Held, that the tenants did not contract themselves out of their right to claim abatement on the ground of diluvion by virtue of that clause; that a forced construction should not be put upon that clause to justify an inference that the tenants made themselves responsible for the entire rent, notwithstanding diluvion.

[P. 963, C. 2.]

Surendra Nath Guha—for Appellants.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for rent. The defendants claim abatement as a portion of the land demised has been lost by diluvion. The question in controversy is, whether the tenants are entitled to abatement on the ground stated. The Courts below have decided concurrently in favour of the tenants. On behalf of the plaintiffs-appellants, it has been contended that the defendants contracted themselves out of their right to claim abatement on the ground of diluvion, under the instrument whereby the tenancy was created on the 21st September, 1894.

It cannot be disputed, indeed it has not been disputed before us, that if a portion of the land demised be washed away, the tenant is entitled to abatement of rent, on the principle formulated in S. 52 of the Bengal Tenancy Act. In the case of *Sheikh Enayetoollah* v. *Sheikh Elahee Buksh* (1) Sir Barnes Peacock, C.J., stated it as settled doctrine that the tenant was entitled to abatement for the lands washed away, if the terms of the *kabuliyat* were not such as to preclude him from claiming that abatement. He pointed out that the rule was founded on principles of natural justice and equity, and that if a landlord let his land at a certain rent to be paid during the period of occupation and the land was by the act of God put in such a state that the tenant could not enjoy it, the tenant was entitled to abatement. He held accordingly that when land was proved to have been washed away and yet the claim for abatement was resisted by the landlord, it must be proved affirmatively by him that the tenant had contracted himself out of his right to claim abatement by some express stipulation mentioned in the lease. In the case before us, there is no express stipulation in the lease to show that the tenant contracted himself out of his right to claim abatement. But it has been argued that the right has been taken away, by implication, under a clause which is in these terms:

"We shall not be able to claim abatement of rent on account of flood, drought, death and flight, waste and abandonment, inundation, possession and dispossession or on any other ground of like nature."

There is no mention of diluvion here; but it is worthy of note that the clause is followed by another which reserves in the landlords expressly a right to claim additional rent, if, on measurement, it transpires that the tenant is in possession of excess area. On behalf of the landlords, it has been argued that the clause to which we have referred includes, by implication, cases of diluvion. We are unable to accept this contention as well founded. If there had been an express reference to diluvion, as in the leases in the cases of *Watson & Co.* v. *Nistarini Gupta* (2) and *Nunda Laul Mukherjee* v. *Kymuddin Sardar* (3) or, if there had been a general comprehensive clause under which the tenant precluded himself from claiming abatement on any ground whatsoever, as in the case of *Ishan Chunder Chowdhry* v. *Chunder Kant Roy* (4), the contention of the landlords might have prevailed. But it is plain that a forced construction should not be put upon this clause to justify an inference that the tenant made himself responsible for the entire rent even if all the lands comprised in his tenancy were washed away. This would be the inevitable logical result if the contention of the appellants were to prevail. The description of the lands in the schedule to the lease shows that they were situated on the bank of a river. Consequently the possibility of diluvion could not have

(1) W. R., 1864, Act X, 42.

(2) (1884) 10 Cal. 544.
(3) (1905) 9 C. W. N. 886.
(4) (1883) 13 C. L. R. 55.

escaped the parties and yet they did not exclude diluvion as a possible ground for abatement of rent. In the absence of an express stipulation to cover the contingency which has arisen, it would, in our opinion, be unreasonable to hold that the tenants placed themselves in a position of manifest disadvantage without any corresponding benefit. The case of *Satyendra Nath Thakur* v. *Nilkantha Singha* (5), on which the appellants rely, is clearly distinguishable. There the tenant agreed to pay rent for a specified area, and it was ruled that the purchaser of his right, title and interest could not successfully contend that he was liable to pay rent for a smaller area found on measurement to be contained within the boundaries. We hold that the view taken by the Courts below is just and unassailable.

The result is that the decree of the District Judge is confirmed and this appeal dismissed.

V.B./R.K.

Appeal dismissed.

(5) (1893) 21 Cal. 383.

A. I. R. 1916 Calcutta 964

SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Lalljee Mahomed—Defendant—Appellant.

v.

Dadabhai Jivanji Guzdar and *another*—Plaintiffs—Respondents.

Appeal No. 39 of 1915, decided on 14th December, 1915, from the Original Decree of Greaves, J., dated 24th February, 1915.

(a) Contract—Construction—Agency for sale on commission—Power of sale limited for particular term—Held it was necessary for agent in order to earn his commission; to introduce within the term to seller, a person ready to purchase—It was not necessary that sale should be completed within the term.

The defendant, an owner of an oil mill, employed the plaintiff to sell his mill on an agreement embodied in a letter in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on the same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date," and there was added a postscript to the effect that "on the sale-proceeds being received in hand brokerage will be paid:"

Held (*Woodroffe, J. dibitante*), on the construction of the agreement, that it was essential for the plaintiff, if he was to earn his commission, that he introduced within fifteen days to the defendant a person who would be ready and willing to purchase for Rs. 40,000, but it was not necessary that the sale should be completed within 15 days. [P. 965, C. 1.]

Per *Sanderson, C. J.*—That the postcript did not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; if the defendant chose to agree with the purchaser to receive the purchase-money partly in cash and parlty by *hundis*, the plaintiff's right to commission on the stipulated date would not be affected. [P. 966, C. 2.]

(b) Appeal — Appellate Court — Duty of—Decision depending upon verbal evidence of witnesses in Trial Court—Decision of Trial Court, unless wrong, should not be, interfered with.

Where the decision of a question depends to a large extent upon the verbal evidence of witnesses examined before the Trial Court which had the advantage of seeing and hearing the witnesses, the Appellate Court ought not to interfere with the decision of the Trial Court unless it is clear that that Court has come to a wrong decision. [P. 966, C. 2.]

(c) Appeal—Appellate Court—Duty of—Court convinced thet Judgment under appeal is erroneous—It should not be affirmed although it raises question of fact.

Per *Woodroffe, J.*—If, after arguments, an Appellate Court has a conviction that the judgment under appeal is erroneous, it should not be affirmed, and this is not the less so because the judgment raised a question of fact. [P. 968, C. 1.]

(d) Contract—Construction—Agency for sale—Term of agency expiring—Subsequent execution by agent is invalid.

Per *Mookerjee, J.*—When the term of an agency for sale has expired, a subsequent execution thereof by the agent is invalid unless the term has been extended. [P. 969, C. 1.]

(e) Appeal — Appellate Court — Duty of—Appreciation of evidence—Court should make allowance for fact that it has neither seen nor heard witnesses.

It is the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. [P. 971, C. 2.]

S. Mookerjee and *S. K. Roy*—for Appellant.

Langford James and *S. Ghosh*—for Respondents.

Sanderson, C. J.—In this case the plaintiff, as assignee, claims Rs. 2,000, which is alleged to have been due by way of commission to Moses Judah who has died since the suit was instituted.

The defendant being the owner of certain oil mills was anxious to sell them.

They were mortgaged to a Bank for Rs. 35,000, and at the end of May or the beginning of June 1911, the mills were advertised for sale in the Exchange Gazette. On the 13th June, 1911, the defendant gave Moses Judah a letter in the following terms and signed by the defendant,

"I agree to allow you to sell my above oil mill at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition to be in force till a fortnight (15 days) from date."

Then there were certain words which, it was agreed between the parties, were added at the time that letter was written, in Guzrati, and the correct translation was in these terms,

"on the sale-proceeds being received in hand, brokerage will be paid."

The first question is as to the meaning of the letter. To my mind, the meaning is pretty plain. In order to earn his brokerage Moses Judah was to introduce a purchaser who would be willing to give Rs. 40,000. He had the opportunity of introducing such a purchaser and thus qualifying for his brokerage, for 15 days only. I do not think that the letter means that the sale had to be completed within 15 days, but it was essential for Moses Judah, if he was to earn his commission, that he was to introduce within 15 days a person who would be ready and willing to purchase for Rs. 40,000. In other words, if he did so introduce a purchaser, the mere fact that the purchase was not completed until September would not deprive the broker of his commission.

Now, there is no question as to the law which governs such a matter as this. In my judgment, it is correctly stated by Mr. Justice Greaves at the bottom of page 75 of the paper-book. There he says, quoting from Lord Halsbury's Laws of England,

"In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do, or at any rate must have substantially done so, and all conditions imposed by the contract must have been fulfilled."

The main question, therefore, in this case is whether Moses Judah substantially carried out what he had bargained to do. This is a question of fact mainly dependent upon the evidence of the witnesses. The case was evidently tried with great care, and the learned Judge reserved his judgment. After due consideration he has accepted the evidence of Bhatuknath, the purchaser, and rejected that of the defendant: and, in a case such as this, where the matter depends to a large extent upon the verbal evidence of the witnesses, in my judgment, this Court ought not to interfere with the decision of the learned Judge save on very clear grounds; in other words, unless it is clear that a miscarriage of justice has taken place. The Judge who tried the case has had the advantage, which we have not had, of seeing and hearing the witnesses, an advantage which, in my experience, it is almost impossible to overestimate. In this case I am not prepared to say that the learned Judge has decided wrongly; on the contrary, I think there is sufficient evidence to justify the decision at which he arrived. On the material points he has accepted the evidence of Bhatuknath and rejected that of the defendant; and, in passing, I may say that the comments made upon the evidence of the defendant by the learned Counsel for the plaintiff were not without justification. Bhatuknath's evidence was to the effect that it was Moses Judah who introduced him to the defendant, and his evidence on one point is very significant: he says he did not want to pay more than Rs. 35,000, but he was persuaded by Moses Judah to offer Rs. 40,000, which was the price eventually agreed upon. Some of the passages in his evidence are at pages 36 and 37 of the paper-book, as for instance, where he says in cross-examination.

Q. "Do you say it was Judah who introduced you to Lallji Mahomed?"

A. "Yes, that is true."

Q. "You wanted to pay Rs. 35,000 not 40,000."

A. "Yes, that is true, I first offered Rs. 35,000 and Judah used to come and see me often and he got me into this scrape."

Then he is asked what is the scrape.

"*A.* What could I do, I did not. I am telling you the truth, it was Judah who introduced me to the defendant; it was Judah through whom everything was settled in respect of this matter, and it was Judah who got me into this trouble." "The trouble is this:—I was made to agree to pay Rs. 40,000 for the mill, it was not worth Rs. 13,000" * * * "I did not want to buy it, but Judah persuaded me to take it. He introduced me to the defendant, pressed me to take it, and at last got me into this trouble."

That being so, the plaintiff's case is proved on one of the material points, namely, that it was through the instrumentality of Moses Judah that the purchase price, Rs. 40,000, was obtained. But it is said that there is nothing to

show that Moses Judah introduced the purchaser and performed his part of the contract within the specified time, 15 days. In my judgment if Bhatuknath's evidence is accepted, as it was by the learned Judge, that it was through Moses Judah that he was persuaded to offer Rs. 40,000, there is evidence that this must have been done within the time limit, because we find that on the 26th June, 13 days from the date of the broker's letter, Bhatuknath wrote to the defendant in the following terms :

" As per our conversation with your Mr. Lallji Mahomed we intend to purchase the above mills together with the land connected with it at a cost price of Rs. 35,000 on the following condition."

Then he set out the condition. The letter closed as

" The alternative arrangement for payment is as follows: Rs. 10,000 in cash at the time of sale. Rs. 30,000 to be paid after one year,"

containing an offer, though it was an alternative offer, of Rs. 40,000 which, he said, he would never have made but for the instrumentality of Moses Judah. He must have seen the defendant that day, and such letter contains an offer of Rs. 40,000. It is true that the payment of part was to be deferred for one year, but that offer was the one which with a slight variation of the terms was eventually accepted in August. Consequently, Bhatuknath's evidence having been accepted by the learned Judge, the performance of contract by Moses Judah was within the time.

I am aware that the letters in the case provide matter of comment on Bhatuknath's evidence, as, for instance, the letter of the 25th of June refers to his having seen the advertisement in the Exchange Gazette. This is a legitimate comment, but it is not conclusive that Moses Judah did not introduce the purchaser. The matter had been advertised and it was quite possible that it was Moses Judah who brought the advertisement to the attention of the purchaser in the first instance. Again, the receipt for Rs. 200 where the payment is stated to be " brokerage " is a legitimate subject of comment, but I think the learned Judge's remarks on that transaction are not unreasonable, and, in any event, as between vendor and purchaser, the use of the word " brokerage" is quite unsuitable, whatever the nature of the transaction was. The main reason, however, which weighs with me is that the learned Judge has had to deal with conflicting verbal evidence on a question of fact; and after seeing and hearing the witnesses he has come to the conclusion that the truth lies on the side of Bhatuknath and not on the side of the defendant: and, in such a case, in my judgment, this Court should not interfere, unless it is clear that he has come to a wrong conclusion. This I am not prepared to say.

A further point has been raised, namely, that the plaintiff in any event cannot recover more than the commission on the amount actually received by the defendant in cash. In my judgment, this is not correct. The brokerage was to be paid when the " sale-proceeds " were received. The purchase was completed on the 27th of September, 1911, when the purchaser paid Rs. 10,000 in cash and gave *hundis* for Rs. 30,000. I agree with the learned Judge that the words in Guzrati added to the letter of the 13th June, 1911 do not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; and, if the defendant chose to agree with the purchaser that the " sale-proceeds " should be partly cash and partly *hundis*, I do not think that can affect the plaintiff's right to commission.

In my judgment this appeal should be dismissed.

Woodroffe, J.—The plaintiffs as the assignees of one Judah sue to recover commission alleged to be due to him under a written agreement dated 13th June, 1911 for having effected through his agency the sale of certain oil mills. It must be shown that the conditions of the contract have been complied with. The onus of proving this is on the plaintiffs. This is of importance in the present case, for in regard to the particular question on which I mainly rest my judgment, *viz.*, whether it has been shown that Judah obtained the purchaser within 15 days of and in terms of the agreement, it has been argued by Mr. Langford James for the respondent that this was not at issue in the lower Court. There is no finding on this particular point. It was, however, not necessary to put this specifically in issue, since the onus of proving all facts necessary to establish the claim was on the plaintiffs and the defendant put in issue the allegation that the purchase was effected by Judah in terms

of the agreement, according to the conditions of which alone he was entitled to a commission.

Several questions arise upon the construction of the agreement. It has been argued for the respondent that it is sufficient if a purchaser was secured within 15 days even if the actual purchase was completed later. This the appellant denies, contending that commission was payable only in the event of the transaction being completed (which it was not within 15 days: and *nextly* that brokerage was only payable on the sale-proceeds being received in cash (which was not the case) within this period.

The appellant's contention is not without force on both these grounds, but it is not necessary to go into this matter for whatever be the true construction of the document on these points, it is clear and is indeed conceded that whenever or in what way the sale was concluded the purchaser at such sale must have been secured by the broker within 15 days of the agreement. Now the agreement was dated the 13th June, 1911 and admittedly the first proved date at which vendor and purchaser were in communication was the 25th June, when 12 days under the agreement had already run by. It must be shown then that within the remaining 3 days Judah found the purchaser. Has this been shown? In cross-examination the purchaser was asked whether his letter of the 25th June was written before or after his introduction to the defendant and whether Judah asked him to write to the defendant or not. He was again asked about this matter in re-examination and he replied that he did not remember the date nor even the month when Judah spoke to him about this letter and that he could not say whether it was before or after this letter that Judah spoke to him. Had it been the fact that it was due to Judah's intervention that the first letter was written, it does not seem to me possible that the witness could have forgotten it. His answer must have been in that case that he must have seen Judah first, for before seeing him he had known nothing of the defendant or of his property. He will not commit himself to this and, I think, for the reason that he had not then seen Judah but had learnt about the property through an advertisement in the Gazette. This is indicated by the words in the letter of the 25th, "I see in the Exchange Gazette that you are going to sell." The purchaser also in his evidence says, "I saw the Exchange Gazette and then I wrote that letter," not that he had seen Judah meanwhile or at all. Though the omission of Judah's name from the letter may not be conclusive, it is certainly evidence against the plaintiffs for a reference to the broker, through whom it is suggested that the purchaser came to know of the property, might have been expected. There is no specific evidence that Judah secured the purchaser between the 26th and 28th or the conclusion of the period allowed to him. There is some general evidence that he introduced the purchaser, which in any case is scarcely accurate if the first communication of the 25th to which I have referred was without his intervention. The evidence, however, is not such as I can accept. Doubtless, in a case of this kind great weight must be attached to the judgment of the learned Judge who heard the case; but, in the present instance, we have no finding on the specific point and the uncorroborated evidence of the purchaser on which the learned Judge has relied is, upon the most favourable view, consistent with the fact of work done after the limited period and is, in my opinion, in conflict with and unsupported by the documentary evidence in the case and the inference to be derived therefrom. As stated, the first letter of the 25th indicates that it was the advertisemnt which first put the parties in communication. There is no mention of Judah as broker in any of the letters until we get to the letter of 15th November, 1911, which is of doubtful admissibility against the appellant. But on the merits the letter comes too late to be of value and is open to the suspicion that evidence was then being made for the claim by Judah, which followed it in January.

It is remarkable also that there is no letter or other document by the broker which establishes his claim. Had he earned his commission in terms of the agreement, I think he would have been careful to put it on record. The Solicitor Mr. E. O. Moses, who acted in the sale as attorney for the vendor, states that he never heard that Judah was the broker in the transaction. The purchaser also in his evidence says he never mentioned the matter to any one. Finally,

there is evidence that the purchaser Bhatuknath took a commission of ½ per cent. on the entire sale-proceeds of Rs, 40,000 on the ground that there had been no broker in the sale. He further granted a receipt for the same, on which express reference is made to "amount of brokerage." The purchaser knows some English and though asked to give an explanation of this circumstance was unable to do so. Mr. Justice Greaves has held that this was a rebate, an explanation which the witness himself has not ventured to give. But, assuming that it was, the point is that it was allowed because no broker had been employed. If so, then this directly contradicts the purchaser witness when he says that Judah was to his knowledge the broker. Nor is it likely that the defendant would have agreed to make a further payment for "brokerage" if he was already indebted for considerable brokerage to Judah. For these reasons, I would allow this appeal. It is possible that what may have happened is that the defendant advertised his property and then Judah coming in this way to know of it got the agreement of agency from the defendant. After that, and independently of Judah, the purchaser learnt from the Gazette that the property was for sale and entered into communication with the vendor. Judah, who may have heard of this, may, sometime between June and August (for it is to be observed that the sale was not concluded till the latter date), have pressed the purchaser to buy in the hopes of putting forward a claim for commission. But this would not be sufficient. It is, however, not necessary for me to hold anything more than that the plaintiffs have not established that Judah earned his commission within the terms of the agreement and I would, therefore, decree this appeal with costs and dismiss this suit with costs. As regards the question whether we should interfere in appeal with questions of fact, I will only say this, that if after argument the Court has a conviction that the judgment under appeal is erroneous it should not be affirmed, and this is not the less so because the judgment raised a question of fact. The mode in which the conviction is brought about in matters of law and fact is a question into which I do not enter, it being sufficient in the present case to say that, in my opinion, the appellant has shown us circumstances under which the judgment under appeal should be reversed.

Mookerjee, J—This is an appeal by the defendant in an action by an agent against his principal for recovery of commission. The defendant employed the plaintiff to sell his oil mill; the agreement was made on the 13th June, 1911 and was embodied in a letter in the following terms:

"I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on the same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date."

There was a postscript to the effect that

"on the sale-proceeds being received in hand brokerage will be paid."

On the 25th June, 1911 one Bhatuknath Boodhnath wrote to the defendant:

"I see in the Exchange Gazette that you (are) going to sell your oil mill at Narikeldanga. I went thrice to your office, but unfortunately could not find you there. I shall, however, call at your oil mill tomorrow, with an expert engineer's opinion, and will give you offer for the same. I may by for myself or sell to my friends."

On the next day, the intending purchaser again wrote to the defendant. The letter referred to a conversation which the writer had with the defendant and contained two alternative offers. The first alternative was the purchase of the mill for Rs. 35,000 cash Rs. 1,000 to be deposited thereout as earnest money, and the balance to be paid after one month, if on trial working meanwhile, the mill turned out to be satisfactory. The second alternative was the purchase of the mill on payment of Rs. 10,000 in cash at the time of sale, and Rs. 30,000 to be paid after one year. It may be observed parenthetically that neither of these offers accorded with what the seller expected, namely, Rs. 40,000 in cash. What followed does not transpire from the correspondence, but we find that on the 8th August, 1911 the purchaser wrote to the defendant and confirmed an arrangement made on the day previous for the sale of the mill for Rs. 40,000; Rs. 10,000 to be paid in cash on registration of the conveyance, Rs. 20,000 by a *hundi* payable one year after that date, and the balance of Rs. 10,000 by another *hundi* payable 18 months after the date of the registration of the conveyance. On the 15th November, 1911, nearly

two months after the sale had been completed on the 27th September, the purchaser is said to have written a letter to the plaintiff and authorised him to negotiate for appointment of managing agents of the mill, which is described as "purchased through you." On the 26th January, 1912, the Solicitors of the plaintiff wrote to the defendant and demanded immediate payment of Rs. 2,000 as brokerage due on the sale of the mill, which was alleged to have been effected through their client. The Solicitor of the defendant promptly replid on the next day. He pointed out that the letter of authority of the 13th June, 1911 was limited to 15 days from the date thereof. He asserted that the plaintiff had failed to secure a purchaser within the prescribed time and that the mill had been sold without any concern with him; and he added that the seller had already paid brokerage on the transaction. This referred to a payment of Rs. 200 by the defendant to the purchaser, who had granted a receipt therefor as paid on account of brokerage. The plaintiff thereupon instituted this suit on the 13th June, 1912. The defendant asserted that the sale had taken place without the intervention of the plaintiff as broker and repudiated the claim as entirely unfounded. Mr. Justice Greaves has held on the evidence that the sale was effected through the instrumentality of the plaintiff and has decreed the suit. On the present appeal, the defendant has contended that this finding is not supported by the evidence on the record, and that even if the finding is maintained it is not sufficient to justify the decree.

It is an elementary principle that where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended. It is thus plain that the plaintiff could be entitled to the commission, only if he found a purchaser on or before the 28th June, 1911. I do not hold that the plaintiff was bound to complete the transaction within this period; in my view of the contract, the plaintiff would be entitled to the commission, if, within the time prescribed, he produced a person able, ready and willing to enter into the transaction with the defendant on the terms prescribed by the latter, and the plaintiff must within that period notify his principal that he had secured such a person. It is also indisputable, I think, that the burden lies upon the plaintiff to establish that he has earned the commission he claims. If these principles are borne in mind, there is no escape from the conclusion that the plaintiff cannot be awarded a decree, merely on the finding that the sale was effected through his instrumentality. If the case were before a Jury, the Court would have to instruct them that to find a verdict for plaintiff, they must find that plaintiff procured a purchaser able and willing to buy on the terms stated in the writing, that he notified defendant of the fact and that this was done within the 15 days prescribed. The vital question, consequently, is, did the plaintiff bring the purchaser to the defendant on or before the 28th June, 1911. There is no trace in the correspondence already summarised that he had done so. The first letter of the purchaser to the defendant mentions that he had learnt from the Exchange Gazette about the proposed sale of the mill. This, no doubt, is not conclusive proof that he had not met the broker on or before the 25th June; but there is no specific evidence upon which I can act that the two had met before that date. The letter of the 26th June also, taken by itself, does not assist the plaintiff. No doubt, it recites a conversation between the defendant and the purchaser, but it does not show that the plaintiff was present at that interview. I do not overlook that the purchaser asserts that he was introduced to the defendant by the broker, and his version has been accepted as true by Mr. Justice Greaves; but this does not carry matters far enough. The purchaser could not pledge his oath that his first letter was written after the broker had informed him of the proposed sale of the mill. I am not unmindful that the purchaser asserts that he first offered Rs. 35,000 and that the broker Judah used to come and see him often and got him into the scrape, that is, induced him to pay Rs. 40,000. This statement, even if accepted and taken along with the letter of the 26th June, does not conclusively

prove that Judah introduced the purchaser to the defendant on or before the 26th. There can be no dispute that if such introduction did not take place on or before the 26th June, the evidence does not show that it was brought about either on the 27th or 28th June ; indeed, the evidence is entirely silent with regard to these two dates.

Mr. Langford James, in the course of his able argument for the respondent, properly emphasised the fact that Mr. Justice Greaves, who had the opportunity to see the witnesses, which we have not, has believed the purchaser in preference to the defendant ; and he has argued that in a case of this description, where there is a conflict of oral testimony, the Court of Appeal should not reverse the finding of the Primary Court. This contention raises a question of considerable importance as to the duty and functions of a Court of Appeal in this country. As was stated by White, J., in *Pratap Chunder Mukerji* v. *Empress* (1) and by Trevelyan, J., in *Milan Khan* v. *Sagai Bepari* (2), the sound rule to apply in trying an appeal in a civil case is that the Court must be convinced before reversing a finding of fact by a lower Court, that the finding is wrong ; in other words, the burden lies upon the appellant to satisfy the Court that the finding he assails is not supported by the evidence on the record : *Wise* v. *Sunduloonissa Chowdhranee* (3), *Tahboonissa Bibee* v. *Koomar Sham Kishore Roy* (4), *Shetabdee Biswas* v. *Molamdee Mundul* (5), *Gopee Nath Mookerjee* v. *Boddhumunt Mal* (6), *Anund Chunder Chuckerbutty* v. *Rutnessur Doss Sen* (7), *Nobin Chunder Pooshalee* v. *Bungo Chunder Chatterjee* (8), *Musammat Hoymobutty Dosse* v. *Sreekishen Nundee* (9), and *Munsoob Bibee* v. *Ali Miah* (10). When such evidence consists entirely or even principally of the oral testimony of witnesses, the appellant is at a special disadvantage. Reference may in this connection be made to the observation of Lord Collins in *Shunmugaraya Mudaliar* v. *Manika Mudaliar* (11) :

"No doubt it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of truth."

The reasons for this rule of practice are too obvious to require elucidation. But it is worthy of note that Lord Collins refers with approval to the judgment delivered by Lindley, M. R., in the Court of Appeal in the case of *Coghlan* v. *Cumberland* (12), which sets out the limitations of the rule :

"Even where, * * * the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and, when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not : and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

In the case in which these observations were made, the Court of Appeal (Lindley, M. R. Rigby, L. J., and Collins, L. J.), allowed the appeal, although the appeal turned on a question of fact. It is obviously impossible to frame a formula, to define the impression which must be produced on the minds of the Judges of the Court of Appeal, so that they may not shrink, in the words of Lindley, M.R., from overruling the judgment of the Trial Court : and the cases in the books employ various expressions which are really of

(1) (1882)11 C. L. R. 25.
(2) (1896) 23 Cal. 347.
(3) (1866-67) 20 E. R. 68=11 M. I. A. 177 (P. C.).
(4) (1871) 15 W. R. 228.
(5) (1876) 25 W. R. 30.
(6) (1876) 25 W. R. 26.
(7) (1876) 25 W. R. 50.
(8) (1876) 25 W. R. 363.
(9) (1870) 14 W. R. 58.
(10) (1872) 17 W. R. 358.
(11) (1909) 32 Mad. 400=3 I. C. 799=36 I. A. 185 (P. C.).
(12) (1898) 1 Ch. 704=67 L. J. Ch. 402.

little assistance, such as that the judgment is 'clearly wrong' [*Khoorshedjee Manikjee* v. *Mehrwanjee Khoorshedjee* (13)], that the decision is 'irresistibly erroneous' [*Gray* v. *Turnbull* (14) followed in *Pandurang Vasudeo* v. *Anant Lakshman* (15) and *Bai Gulabbai* v. *Shri Datgarji Mahangarji* (16)], that 'a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong, [*Bandon* (*Earl*) v. *Becher* (17) followed in *Yemunabai* v. *Balshet* (18)], that the Court will not reverse the decision 'except in cases of extreme and overwhelming pressure' [*The Julia, Bland* v. *Ross* (19) and *The Alice and the Princess Alice* (20)], that 'a Court of Appeal will hesitate long before it disturbs the findings of a Trial Judge based on verbal testimony' [*Khoo Sit Hoh* v. *Lim Thean Tone* (21)], or that the finding 'is so clearly against the weight of the testimony as to amount to a manifest defeat of justice:' [*Aberdeen Glen Line Steamship Co.* v. *Macken, ss. Gairloch* (22)]. We may also bear in mind the observation of Lord Chemsford in *Tayammaul* v. *Sashachalla Naicker* (23),

"the advantage the Judge of the Primary Court possesses in forming a correct opinion of the credit due to the witnesses, does not relieve the Court of Appeal from the duty of examining the whole evidence and forming for itself an opinion upon the whole case."

To the same effect are the observations of Baggallay, J. A., in *Glannibanta, The* (24). Indeed, if the conclusion of the Trial Court in a case of conflict of oral testimony were held practically unassailable, that Court would in essence be constituted the final Court on questions of fact. But the parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, though, as James L. J., said in *Bigsby* v. *Dickinson* (25),

"if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened."

The matter is obviously simpler where the conclusion is merely an inference of fact [Lord Blackburn in *Smith* v. *Chadwich* (26)] or where the evidence whereon the decision of the Trial Judge is based, has been taken on commission [Lord Collins in *Imdad Ahmad* v. *Pateshri Partab Narain Singh* (27)]. But, even in other cases, it is undoubtedly the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. Cases are by no means rare where an Indian Appellate Court has reversed the decision of the Primary Court based on conflicting oral testimony and the conclusion of the Appellate Court has been ultimately affirmed by the Judicial Committee: *Rash Mohini Dasi* v. *Umesh Chunder Biswas* (28), *Gangamoyi Debi* v. *Troiluckhya Nath Chowdhry* (29), *Musammat Bulli Kunwar* v. *Musammat Bhagirathi* (30), *Chotey Narain Singh* v. *Ratan Koer* (31), *Secretary of State for India* v. *India General Steam Navigation and Railway Company, Limited* (32) and *Jeolal Mahton* v. *Loke Narayan Mahton* (33) (decided by the Judicial Committee on the 23rd January 1912). I am not unmindful that there are other instances where the Judicial Committee has reversed the decision of the local Appellate Court and restore the decree of the Trial Judge, but that has been done because their Lordships were satisfied, upon a scrutiny of the entire evidence, that the view of the latter was more consistent therewith than that of the former, *Romesh Chunder Mukerji* v. *Rajani Kant Mukerji* (34),

(13) (1836-37) 1 M. I. A. 431=5 W. R. 57 (P. C.).
(14) (1876) 2 H. L. Sc. 53.
(15) (1903) 5 Bom. L. R. 956.
(16) (1907) 9 Bom. L. R. 393.
(17) (1853) 3 Cl. & F. 479=9 Bligh, (N. S.), 532.
(18) 5 Bom. L. R. 584.
(19) (1860) 14 Moo. P. C. 210=Lush. 224=15 E. R. 284.
(20) (1868) 2 P. C. 245=19 L. T. 678.
(21) (1912) App. Cas. 323=81 L. J. P. C. 176.
(22) (1899) 2 I. R. 1=32 I. L. T. R. 33.
(23) (1863-66) 10 M. I. A. 429=2 Sar. P. C. J. 139.
(24) (1876) I. P. D. 283=34 L. T. 934.
(25) (1876) 4 Ch. D. 24=35 L. T. 679.
(26) (1884) 9 App. Cas. 187=53 L. J. Ch. 873.
(27) (1910) 32 All. 241=6 I. C. 981.
(28) (1898) 25 Cal. 824=25 I. A. 109 (P. C.).
(29) (1906) 33 Cal. 537.
(30) (1905) 9 C. W. N. 649.
(31) (1895) 22 Cal. 519=22 I. A. 12 (P. C.).
(32) (1909) 36 Cal. 967=4 I. C. 448 (P. C.).
(33) (1912) 15 I. C. 184.
(34) (1894) 21 Cal. 1.

Sajid Ali v. *Ibad Ali* (35), *Shama Charn Kundu* v. *Khettromoni Dasi* (36), *Khoo Sit Hoh* v. *Lim Thean Tone* (21) and *Nawab Shah Ara Begum* v. *Nanhi Begam* (37). We may also bear in mind the fact that, although as an ordinary rule the Judicial Committee does not interfere with concurrent judgments of the Courts below on questions of fact, instances are by no means rare where their Lordships have examined the whole evidence, formed for themselves an opinion on the entire case and reversed the unanimous decision of the two Courts in India on a question of fact: *Rungamma* v. *Atchama* (38), *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (39), *Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdry* (40), *Tayammaul* v. *Sashachalla Naikar* (23), *Charles Seton Guthrie* v. *Abool Mozuffer* (41) *Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (42), *Hay* v. *Gorden* (43), *Venkateswara Iyan* v. *Shekhari Varma* (44), *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (45) and *Bishun Chand Bachhaot* v. *Bijoy Singh Dudhuria* (46). It is not necessary for the present purpose to consider whether any general principle is deducible from the expressions used by their Lordships as to the circumstances under which they will depart from the rule ordinarily observed by them, such as 'that the very clearest proof is shown that the decision is erroneous,' that 'the Board is clearly satisfied that there has been miscarriage in the appreciation of evidence,' that 'it is manifestly clear from the probabilities that the Court below was wrong,' that 'the case is very extraordinary,' that 'a strong case must be made out before the Board would recommend reversal,' that 'it must very clearly appear that the conclusion is very plainly erroneous,' that 'there has been some miscarriage in respect of a presumption to which too much weight was given,' that 'very definite and explicit grounds must be assigned for interference,' that 'there is so strong a preponderance of testimony that the Board can confidently pronounce the decision to be wrong,' and other expressions of like import. But it is obvious that if reversal of concurrent findings of fact is permissible, the Court of first Appeal should not be deemed fettered to a larger extent.

In the preset case, as I have already stated, the finding that the sale was effected through the instrumentality of the plaintiff does not justify a decree in his favour. The purchaser does not make an explicit statement that the plaintiff introduced him to the defendant on or before the 28th June, 1911, but even if this much be deemed to be implied in his statements, I cannot accept his testimony. The correspondence does not show any trace of the presence of Judah in the negotiations; one would have expected some mention of his name in the first or the second letter. It is also remarkable that no written communication appears to have passed between the plaintiff and the defendant, although the plaintiff had taken the precaution to accept the agency by a written instrument. There is further the unexplained fact that the purchaser received Rs. 200 as brokerage; he cannot explain why the sum was described by this obviously inappropriate term; it is extremely improbable that the defendant would have made a present of this sum to the purchaser, if he had really to pay Rs. 2,000 to plaintiff as broker. There is the further significant fact that the claim for brokerage was not put forward till the 26th January, 1912, though, if the plaintiff is to be believed, he had earned it before the 26th June, 1911 and the sale had been actually completed on the 27th September, 1911. Finally, the case for the plaintiff is certainly not improved by the letter alleged to have been written on the 15th November, 1911 which plainly bears the appearance of an attempt to create evidence for future use. After the most careful and anxious consideration of the entire evidence on the record and the circumstances of the case, I have arrived at the conclusion that the plaintiff has failed to establish that he has

(35) (1896) 23 Cal. 1=22 I. A. 171 (P. C.).
(36) (1900) 27 Cal 521=27 I. A. 10 (P. C.).
(37) (1907) 29 All. 29 (P. C.).
(38) (1846-50) 4 M. I. A. 1=7 W. R. 57 (P.C.).
(39) (1846-50) 4 M. I. A. 414=7 W. R. 71 (P. C.).
(40) (1846-50) 4 M. I. A. 431=7 W. R. 73 (P. C.).
(41) (1870-72) 14 M. I. A. 53=15 W. R. 50 (P.C.).
(42) (1870-72) 14 M. I. A. 393=17 W. R. 117 (P. C.).
(43) (1872) I. A. Sup. Vol. 106=10 B. L. R. 301.
(44) (1881) 3 Mad. 384=8 I. A. 143 (P. C.).
(45) (1889) 11 All. 460=16 I. A. 205 (P. C.).
(46) (1911) 11 I. C. 399 (P. C.).

earned the commission claimed in terms of the contract and that the decree in his favour cannot be supported. In my opinion, the appeal should be allowed and the suit dismissed with costs throughout.

Sanderson, C. J.—The result is that, in view of the opinion expressed by the majority of the Court, this appeal will be allowed, the judgment of the Court of first instance set aside, and the plaintiff's suit dismissed with costs both of the Court of first instance and of this appeal.

V.B./R.K.

Appeal allowed.

A. I. R. 1916 Calcutta 973

JENKINS, C.J. AND N.R. CHATTERJEA, J.

Debendra Nath Das—Defendant—Petitioner.

v.

Bibudhendra Mansingh — Plaintiff — Opposite Party.

Privy Council Appln. No. 2 of 1914, decided on 24th May, 1915, for leave to Appeal to His Majesty in Council.

(a) Civil P. C. (5 of 1908), S. 110—Decree of lower Appellate Court set aside by single Judge of High Court—Reversal of his judgment by High Court under Clause 15 of Charter, has effect of affirming decision of Lower Appellate Court.

A reversal by the High Court, in an appeal under Clause 15 of the Charter of the judgment of a single Judge of the High Court, setting aside the decree of a lower Appellate Court, has the effect of affirming the decision of the latter Court, that is, the "Court immediately below" within the meaning of S. 110 of the Code of Civil Procedure. [P. 973, C 2.]

(b) Civil P. C. (5 of 1908), S. 115—No decision of single Judge of High Court can be revised under S. 115.

A Judge of a High Court sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court. No decision of a single Judge can, therefore, be revised under S. 115 of the Civil Procedure Code. [P. 973, C. 2.]

Narendra Chandra Bose—for Petitioner.

Ram Charan Mitter — for Opposite Party.

Jenkins, C. J.—This is an application for a certificate that, as regards amount or value and nature, the case fulfils the requirements of S. 110 of the Code of Civil Procedure, or that it is otherwise a fit one for appeal to His Majesty in Council.

To ascertain the amount or value, the matter was referred to the Court of first instance (O. 45, R. 5). That Court has determined the amount or value and has returned its report, according to which the amount or value exceeds Rs. 10,000. We see no reason to dissent from that determination.

It only remains to be seen whether as regards nature the requirements of S. 110 are fulfilled. The Court of first instance as well as the lower Appellate Court decided adversely to the present applicant. On appeal to the High Court, a single Judge reversed the decree of the lower Appellate Court. From this judgment of a single Judge there was an appeal to the High Court under Clause 15 of the Charter, with the result that the judgment of the single Judge was reversed by a Bench of two Judges. It will thus be seen that the first judgment of the High Court reversed the decree of the Court immediately below, but that this reversal was afterwards in effect cancelled, with the result that the only effective judgment of the High Court affirmed the decision of the Court immediately below (S. 110, Civil Procedure Code).

This appears to me to be the true result of the Letters Patent and the Code, for the Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on Clause 15 of the Charter.

And here I may point out that a Judge sitting alone is not a Court Subordinate to the High Court, but performs a function directed to be performed by the High Court (Clause 36, Letters Patent). And thus no decision of a single Judge can be revised under S. 115 of the Code.

But though in this view of the matter the decree of the Court immediately below has been affirmed, it will be right to grant a certificate for there is a substantial question of law involved, and it makes the case all the more a fit one for appeal to His Majesty in Council that on the question involved, a Judge of the Hig Court took a different view from that which ultimately prevailed.

The certificate sought must, therefore, be granted that as regards amount or value and nature the case fulfils the requirements of S. 110 of the Code.

N. R. Chatterjea, J.—I concur.

V.B./R.K.

Certificate granted.

A. I. R. 1916 Calcutta 974

HOLMWOOD AND MULLICK, JJ.

Golam Muhammad — Defendant — Appellant.

v.

Akhoy Kumar Laha and *others*—Plaintiffs and Defendants – Respondents.

Appeal No. 1024 of 1914, decided on 22nd December, 1915, from the Appellate Decree of Addl. Dist. Judge, 24 Parganas, dated 24th January, 1914.

(a) Muhammadan Law—*Wakf*—Contract of lease with full knowledge of *wakf*—*Mutwalli* must do all that is necessary to give good title.

A person who with full knowledge enters into a bargain for the lease of a *wakf* house property with a *mutwalli*, is equitably entitled to insist upon the *mutwalli* doing all that is necessary to give him a good title. [P. 974, C. 2.]

(b) Muhammadan Law—*Wakf*—Lease of *wakf* property for more than one year—Sanction of *Kazi* is necessary.

A sanction of a *Kazi* is necessary to validate a lease of *wakf* house property for more than a year. [P. 974, C. 2.]

(c) Muhammadan Law—*Wakf*—Lease of *wakf* property not made property—Lease impugned after many years—It may be held valid on doctrine of *factum valet*.

Semble.—When a lease of *wakf* property has been made improperly and many years afterwards it is impugned before a Court, the lease may be held valid on the doctrine of *factum valet* and on the principle that a Court should not disturb the arrangement made in the ordinary course of management of an estate for the benefit of the beneficiaries. 37 Cal. 179, ref. to. [P. 975, C. 1.]

(d) Muhammadan Law— *Wakf* — Earnest money advanced for taking lease—*Mutwalli* cannot retain it unless he can give good title

A *mutwalli*, to whom money is advanced by a person as earnest money for getting a lease of the *wakf* property, cannot seek to retain the money unless he is willing to give a good title by going to a *Kazi* and getting sanction for the transfer. [P. 975, C. 1.]

(e) Contract—Construction—Money advanced by party by way of partial guarantee for performance—He cannot recover it if there is default on his part.

A party to a contract advancing money to the other party by way of a partial guarantee for performance cannot recover the money if there has been default on his part and no default on the part of the other. [P. 975, C. 2.]

B. K. Chakerbutty, *Hemendra Kishore Sarbadhicary* – for Appellant.

Dwarka Nath Chakerbutty, *Hemendra Nath Sen* and *Santosh Kumar Bose*—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff to recover a sum of money paid to the defendant No. 1 for granting a certain lease which the defendant agreed to execute in favour of the plaintiff and the *pro forma* defendant in respect of certain premises known as 46, 46-1 to 46-12, Bentinck Street, in the town of Calcutta. The premises in question were part of an estate which was *wakf* property and the defendant No. 1 is the *mutwalli* of that property. In view of the contentions that have been raised before us, it is necessary to state that the plaintiff had been a tenant of this *mutwalli* for many many years and, therefore, presumably must have known that the property was *wakf* property. The *salami* was fixed at 20 thousand rupees, but the plaintiff states that two thousand rupees was paid as earnest money for the execution of the *bima-patra*, which is called an agreement of sale in the plaint, and the same expression " earnest money " occurs in the agreement which is upon the record. A further two thousand rupees was to be paid within a week, and these two items of guarantee so to speak were also to be taken as part of the *salami* of 20 thousand rupees, so that we must hold that this four thousand rupees was not only a mere part of the consideration for the lease but was specifically the guarantee for the performance of the contract on the part of the plaintiff. Under such circumstances the defendant could not seek to recover this sum unless there was some default on the part of the lessor in refusing to carry out the contract to the extent to which he is capable of carrying it out.

It is clear that the plaintiff, although he entered into the bargain with full knowledge that defendant No. I was a *mutwalli*, is equitably entitled to insist upon defendant No. 1 doing all that is necessary and that he is capable of doing to give him a good title. He has refused to take this lease because the Muhammadan Law, according to his contention, necessitates the leave of the *Kazi* when a building, which Baillie describes as a mansion, which later authorities describe as houses, is leased by the *mutwalli* for a longer term than one year. The learned Subordinate Judge found that the balance of authority seems to be in favour of the view that sanction of the Court was necessary to validate a lease of *wakf* house property for more than

a year. He does not state where he gets the contrary opinion. We can find no contrary authority at all. It does not appear to be a question of balance of authority, but a question of all the authorities which seem to lay down that sanction of the *Kazi* is necessary for such a lease. No doubt when such a lease has been made improperly and many years afterwards it is impugned before the Court, this Court has held in *Nemai Chand Adhya* v. *Mir Golam Hossein* (1) that *factum valet*, and that it would not disturb the arrangement which was made in the ordinary course of management of an estate for the benefit of the beneficiaries. But that does not in any way debar the plaintiff from seeking at the outset of the negotiation to obtain the best title which the transferor is now capable of giving him, and there is no doubt that the transferor is capable of giving him a good title and that his title cannot be considered to have passed without this action of going to the *Kazi* and getting sanction of the transfer. They who seek equity must do equity, and we are of opinion that defendant No. 1 cannot seek to retain this money unless he is willing to do this very simple act, which he is bound to do under S. 8 of the Transfer of Property Act.

It has been contended before us that this is not the point on which the case was decided in the lower Court, and that the Judge raised some new issues. We do not see that there is any force in these contentions. In both the lower Courts the question of Muhammadan Law was distinctly raised. The Court of first instance found in favour of the plaintiff on that point. The Court of appeal below says that it is immaterial and decides the appeal on other grounds. The respondent is undoubtedly entitled to uphold the judgment and decree of the lower Appellate Court on grounds of Muhammadan Law which have been fully discussed and upon which the decree can be supported and it is in no way necessary to bring a counter-case. There is, moreover, no new question raised. It is not necessary to go into the question of fact whether the plaintiff entered into the bargain with his eyes open and, therefore, cannot ask the defendant to do anything more than was specifically set forth in the bargain. The matter is purely one of law and the plaintiff can ask that the defendant should do, as we have pointed out, anything that is necessary under S. 8 of the Transfer of Property Act.

We do not agree with the learned Judge that whether there was any default on the part of the plaintiff or the defendant is immaterial. His view was that if the lease was not carried out the defendant was bound to refund the money, because it was simply a part of the consideration and not a guarantee for performance. We have already said that we think it was a partial guarantee for performance and that if there had been any default on the part of the plaintiff and no default on the part of the defendant, the plaintiff could not recover the money. But there has been this obvious and serious default on the part of the defendant and the plaintiff is, therefore, entitled to recover the money.

The result is that the judgment and decree of the learned Additional District Judge is affirmed and the appeal dismissed with costs, though for different reasons than those given by the learned Judge.

V.B./R.K.

Appeal dismissed.

(1) (1910) 37 Cal. 179=3 I. C. 353.

A. I. R. 1916 Calcutta 975

HOLMWOOD AND NEWBOULD, JJ.

Nripendra Nath Sahu and *others* — Creditors—Appellants.

v.

Ashutose Ghosh — Receiver — Respondent.

Appeals Nos. 3 and 6 of 1915, decided on 23rd August, 1915, from the Orders of Addl. Dist. Judge, 24 Parganas, dated 8th December, 1914.

(a) Provincial Insolvency Act (3 of 1907), S. 37 —Mortgage in favour of creditor impugned by Receiver—Assets of debtor covered more than his liabilities—Intention of debtor to put himself in position to pay debts—Held mortgage did not fall within purview of S. 37.

Where at the time of execution of a mortgage in favour of a creditor impugned by the Receiver in insolvency under S. 37 of Act III of 1907, the assets of the debtor more than covered his liabilities and it was found that his intention was to secure debts payable on demand by the security of a mortgage which would relieve the pressure on his ready cash and so put him in a

better position to pay his debts, as they became due, with his own money, and that there was no idea of applying for insolvency at that time :

Held, that the mortgage did not come within the purview of S. 37 of Act III of 1907.

[P. 978, C. 1.]

(b) Provincial Insolvency Act (3 of 1907), S. 37 —Transfer - Question whether transfer falls under S. 37 depends upon real intention of the transferor.

The question whether a transfer comes within S. 37 of the Act depends upon the state of mind of the person who made it. Such a person should not be taken to have intended the natural consequences of his act. One must find out what he really did intend. Suspicion is not enough in these cases. [P. 978, C. 1.]

(c) Provincial Insolvency Act (3 of 1907), S. 37 —Transfer in favour of creditor as result of real pressure exercised by creditor does not come under S. 37.

A transfer in favour of a creditor made by an insolvent debtor as the result of real pressure brought to bear upon him by the creditor, or in performance of a previous enforceable agreement does not come within S. 37 of the Act.

[P. 978, C. 1.]

(d) Provincial Insolvency Act (3 of 1907), S. 37 —Transfer—Pressure by creditor—Threats of civil suit may constitute pressure.

Threats of civil suits may constitute real pressure ; it is not essential that the threats must be of criminal proceedings. [P. 978, C. 1.]

(e) Provincial Insolvency Act (3 of 1907), S. 37 —Transfer in performance previous enforceable agreement—Enforceable agreement—Conditions necessary.

An oral agreement to mortgage in favour of a creditor sufficient property to cover the debt is sufficiently specific to constitute an enforceable agreement. [P. 978, C. 1.]

Caspersz, Jnanendra Nath Sarkar, Bhupendra Nath Bose, Rash Behari Ghosh and *Panchanan Ghosh*—for Appellants.

Umakali Mukerji, Bepin Behary Ghosh and *Khettra Gopal Banerjee*—for Respondents.

Judgment.—These two appeals arise from an order made on remand by the learned Additional District Judge of the 24 Parganas in an insolvency matter. It appears that Babu Ashutose Ghosh, the Receiver in bankruptcy to the estate of Nilratan Mondal and others, sought to set aside three mortgage-deeds on the ground that they were void against him under S. 37 of the Provincial Insolvency Act. The insolvency proceedings were started by one Kissen Chand Kesori Chand, a creditor of Nilratan Mondal, for Rs. 2,500 at the instigation, it is said, of Mr. Palit, a secured creditor, for Rs. 45,000 odd who had advanced Rs. 5,000 to Gopinath Mondal, the appellant in Appeal No. 6, to give to Nilratan his brother-in-law on a note of hand dated the 1st March, 1911. It further appears that Gopinath had advanced Rs. 1,200 on a note of hand dated the 17th June, 1911 and Rs. 2,000 on a note of hand dated the 1st December, 1911, both of which sums he had borrowed from Dr. Satya Charan Mukerjee, the next heaviest secured creditor of Nilratan.

In Appeal No. 3 the appellant Nripendra Nath Sahu, a distant connection of the insolvent, had advanced four sums on hand-notes in July, 1911, namely, Rs. 2,500 on the 11th July, Rs, 2,500 on the 20th July, Rs. 2,000 on the 21st July and Rs. 2,000 on the 26th July, making a total of Rs. 9,000. A stamp paper was purchased on July 26th, the date of the last transaction, for Rs. 45 for the purpose, it is alleged, of engrossing a mortgage security for this Rs. 9,000. Interest was to run on the hand-notes at the rate of 12 per cent. per annum. On the 4th December, 1911 a mortgage-deed for this Rs. 9,000 was executed by Nilratan and his four brothers, one of them a minor under his guardianship, in favour of Nripendra Nath Sahu. This was a second mortgage of the property already mortgaged to Nripendra's father Upendra Nath Sahu, who had had continuous transactions with Nilratan's firm for years.

On the 27th December Nilratan executed a mortgage-deed for Rs. 6,000 in favour of Gopinath. It is stated in the evidence to have been on account of the hand-note for Rs. 5,000 above referred to after making up accounts. It is further stated that Rs. 3,000 was paid in cash to Gopinath in the beginning of February and that the balance Rs. 10,000 formed the subject of another mortgage on the 14th February, 1912. The mortgage for Rs. 6,000 was the third mortgage of the land already mortgaged to Nripendra and Upendra. The mortgage for Rs. 10,000 was the second mortgage of the lands already mortgaged to Mr. Palit for Rs. 45,000 odd.

Now, the only question that arises in this litigation was, whether these three mortgage-bonds fell within the mischief of S. 37 of the Provincial Insolvency Act. At the first hearing the learned Additional Judge held that they did. On appeal Mr. Justice Mookerjee and Mr. Justice Beachcroft remanded the case,

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Hints for the use of the following Tables

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Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER with corresponding references of all JOURNALS.

TABLES Nos. I & II.

Showing seriatim the pages of REPORTS, JOURNALS and PERIODICALS for the year 1915 with corresponding references of the ALL INDIA REPORTER.

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442	"	"	24
449	"	"	27
455	"	"	1
460	"	"	2
468	"	"	124
475	"	"	4
484	"	"	69
487	"	"	29
527	"	"	7
549	"	"	15
556	"	"	18
609	"	"	111
617	"	"	21
730	"	"	59
754	"	"	99
998	"	"	81
1006	"	"	96
1012	"	"	30
1022	"	"	70

3 Bom. Cr. Cas.

BCrC	A. I. R.
56	1915 *PC* 29.

I. L. R 42 Cal.

ILR	A. I. R.		
46	1914	*PC*	45
56	"	"	92
72	"	"	129
116	"	"	140
244	"	"	72
384	"	"	1
489	"	"	48
582	"	"	76
710	"	"	22
739	1915	"	29
765	1914	"	30
776	"	"	150
801	"	"	27
876	"	"	90
897	1915	"	24
914	"	"	116
1029	"	"	27
1179	"	"	30

21 C. L. J.

CLJ	A. I. R.		
1	1914	*PC*	33
4	"	"	63
9	"	"	76
23	"	"	31
26	"	"	34
31	"	"	22
118	"	"	150
122	"	"	132
134	"	"	20
137	"	"	10
210	"	"	18

21 C. L. J.

CLJ	A. I. R.		
218	1914	*PC*	16
225	"	"	90
231	"	"	27
237	"	"	11
412	1915	"	24
419	"	"	116
446	"	"	27
499	"	"	4
507	"	"	2
515	"	"	124
522	"	"	29
524	"	"	69
528	"	"	1

22 C. L. J.

CLJ	A. I. R.		
1	1915	*PC*	7
165	"	"	21
172	"	"	111
180	"	"	18
190	"	"	15
481	"	"	70
498	"	"	30
508	"	"	81
516	"	"	96

19 C. W. N.

CWN	A. I. R.		
65	1914	*PC*	22
97	"	"	87
162	"	"	95
193	"	"	10
197	"	"	34
225	"	"	63
250	"	"	27
282	"	"	16
305	"	"	20
337	"	"	132
370	"	"	90
393	"	"	11
426	"	"	18
449	1915	"	116
481	"	"	24
507	1914	"	30
531	"	"	31
561	"	"	150
585	1915	"	27
617	"	"	1
621	"	"	69
641	"	"	124
674	"	"	29
713	"	"	2
718	"	"	4
729	"	"	7
762	"	"	78
787	"	"	45
841	"	"	15
873	"	"	18
905	"	"	53
929	"	"	111
991	"	"	21
1023	"	"	106
1056	"	"	118
1087	"	"	59

19 C. W. N.

CWN	A. I. R.		
1119	1915	*PC*	30
1175	"	"	81
1207	"	"	96

1915 P. R.

PR	A. I. R.		
93	1915	*PC*	111

1915 P. W. R.

PWR	A. I. R.		
110	1915	*PC*	111

1915 P. W. R. Cr.

PWR	A. I. R.		
59	1915	*PC*	29

16 Cr. L. J.

Cr.LJ	A. I. R.		
494	1915	*PC*	29

26 I. C.

IC	A. I. R.		
676	1914	*PC*	22
915	"	"	132
924	"	"	10
949	"	"	74

27 I. C.

I.C.	A. I. R.		
26	1914	*PC*	20
53	"	"	18
674	"	"	90
683	"	"	150
892	"	"	34

28 I. C.

IC	A. I. R.		
34	1914	*PC*	11
422	"	"	16
699	1915	*PC*	24
710	"	"	116
930	1914	"	27

29 I. C.

IC	A. I, R.		
223	1915	*PC*	2
229	"	"	1
290	1914	"	30
298	1915	"	124
334	"	"	29
617	"	"	15
639	"	"	7
717	"	"	78
724	"	"	4
781	"	"	18
807	"	"	111
100	..	"	106

30 I. C.

IC	A. I. R.		
55	1915	*PC*	27
59	"	"	69
265	"	"	81
299	"	"	96

30 I. C.

IC	A. I. R.		
303	1915	*PC*	59
366	"	"	21
529	"	"	70
539	"	"	118
833	"	"	30
849	"	"	99

31 I. C.

IC	A. I. R.		
637	1915	*PC*	45
684	"	"	53
949	"	"	48

I L R 38 Mad

ILR	A. I. R.		
406	1915	*PC*	124
807	1914	"	41

28 M. L. J.

MLJ	A. I. R.		
167	1914	*PC*	18
179	"	"	20
448	"	"	10
453	"	"	34
457	"	"	22
470	"	"	150
480	"	"	30
515	"	"	132
535	1915	"	124
548	1914	"	27
556	"	"	11
565	"	"	90
577	"	"	16
583	1915	"	24
589	"	"	2
593	"	"	1
596	"	"	69

29 M. L. J.

MLJ	A. I. R		
34	1915	*PC*	7
63	"	"	15
70	"	"	116
75	"	"	4
80	"	"	27
130	"	"	18
137	"	"	106
159	"	"	21
165	"	"	99
242	"	"	59
299	"	"	118
307	"	"	111
329	"	"	81
335	"	"	96
371	"	"	30
434	"	"	70
851	"	"	37
856	"	"	33

17 M. L. T.

MLT	A. I. R.		
45	1914	*PC*	10
76	"	"	20
115	"	"	90
120	"	"	150
143	"	"	27
148	"	"	16
193	"	"	11
203	"	"	18
312	1915	"	116
321	"	"	24
377	"	"	27
402	"	"	2
408	"	"	1
435	"	"	124
441	"	"	29
443	"	"	69

18 M L. T.

MLT	A. I. R.		
1	1915	*PC*	7
31	"	"	18
39	"	"	4
54	"	"	111
61	"	"	15
85	"	"	21
173	"	"	99
179	"	"	59
203	"	"	81
228	"	"	30
248	"	"	96
409	"	"	70

1 M. L. W.

MLW	A. I. R.		
461	1914	*PC*	116
483	"	"	66
520	"	"	41
533	"	"	128
549	"	"	72
555	"	"	92
561	"	"	45
567	"	"	129
607	"	"	31
610	"	"	48
619	"	"	140
645	"	"	136
648	"	"	44
695	"	"	86
697	"	"	33
729	"	"	65
731	"	"	149
733	"	"	48
762	"	"	60
779	"	"	87
794	"	"	38
807	"	"	82
813	"	"	36
831	"	"	1
863	"	"	76
914	"	"	97
959	"	"	95
963	"	"	137
965	"	"	63
989	"	"	150

Other Journals=All India Reporter—(*Concld.*)

1 M. L. W.				2 M. L. W.				2 M. L. W.				1915 M. W. N.				31 M. W. N.			
MLW	A. I. R.			MLW	A. I. R.			MLW	A. I. R.			MWN	A. I. R.			MWN	A. I. R.		
1015	1914	*PC*	105	282	1914	*PC*	150	671	1915	*PC*	99	394	1914	*PC*	34	606	1914	*PC*	132
1050	„	„	67	303	„	„	11	676	„	„	18	449	1915	„	18	621	„	„	27
1059	„	„	111	355	1915	„	24	701	„	„	118	454	„	„	7	633	„	„	18
				377	„	„	116	706	„	„	106	485	„	„	116	642	1915	„	106
2 M. L. W.				422	1914	„	30	731	„	„	59	500	„	„	111	709	„	„	21
MLW	A. I. R.			521	1915	„	1	830	„	„	96	511	1914	„	90	713	„	„	81
11	1914	*PC*	22	524	„	„	2	837	„	„	81	514	1915	„	15	717	„	„	30
113	„	„	34	555	„	„	27	843	„	„	30	522	„	„	2	736	„	„	99
133	„	„	132	560	„	„	69	891	„	„	15	526	„	„	4	757	„	„	96
163	„	„	10	589	„	„	4	897	„	„	70	536	„	„	118	772	„	„	70
191	„	„	20	596	„	„	124	1915 M. W. N.				555	„	„	124	787	„	„	78
208	„	„	18	602	„	„	29	MWN	A. I. R			559	„	„	24	788	„	„	1
219	„	„	90	611	„	„	7					563	„	„	59	790	„	„	69
258	„	„	27	639	„	„	21	387	1914	*PC*	95	581	1914	„	11	11 N. L. R.			
277	„	„	16	645	„	„	111	389	„	„	63	592	„	„	16	NLR	A. I. R.		
								392	„	„	10	603	„	„	20	53	1914	*PC*	10

TABLE No. III.

Showing seriatim the pages of the ALL INDIA REPORTER, 1915 PRIVY COUNCIL SECTION with corresponding references of REPORTS, JOURNALS and PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1915 PRIVY COUNCIL.

Column No. 2 denotes corresponding references of REPORTS, JOURNALS and PERIODICALS.

All India Reporter, 1915 Privy Council=Other Journals.

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	39 *Bom* 386	7	39 *Bom* 441	21	37 *All* 474		30 *I C* 55
	42 *I A* 110		42 *I A* 135		42 *I A* 163	29	42 *Cal* 739
	17 *Bom L R* 455		13 *A L J* 570		13 *A L J* 809		42 *I A* 133
	21 *C L J* 528		17 *Bom L R* 527		17 *Bom L R* 617		17 *Bom L R* 487
	19 *C W N* 617		22 *C L J* 1		22 *C L J* 165		3 *Bom Cr C* 56
	28 *M L J* 593		19 *C W N* 729		19 *C W N* 991		21 *C L J* 522
	17 *M L T* 408		29 *M L J* 34		29 *M L J* 159		19 *C W N* 674
	2 *M L W* 521		18 *M L T* 1		18 *M L T* 85		59 *PWR* Cr 1915
	1915 *M W N* 788		2 *M L W* 611		2 *M L W* 639		17 *M L T* 441
	29 *I C* 229		1915 *M W N* 454		1915 *M W N* 709		2 *M L W* 602
2	39 *Bom* 399		29 *I C* 639		30 *I C* 366		16 *Cr L J* 494
	42 *I A* 103	15	37 *All* 359	24	42 *Cal* 897		29 *I C* 334
	13 *A L J* 529		42 *I A* 155		42 *I A* 79	30	42 *Cal* 1179
	17 *Bom L R* 460		13 *A L J* 721		13 *A L J* 501		42 *I A* 192
	21 *C L J* 507		17 *Bom L R* 549		17 *Bom L R* 442		13 *A L J* 1034
	19 *C W N* 713		22 *C L J* 190		21 *C L J* 412		17 *Bom L R* 1012
	28 *M L J* 589		19 *C W N* 841		19 *C W N* 481		22 *C L J* 498
	17 *M L T* 402		29 *M L J* 63		28 *M L J* 583		19 *C W N* 1119
	2 *M L W* 524		18 *M L T* 61		17 *M L T* 321		29 *M L J* 371
	1915 *M W N* 522		2 *M L W* 881		2 *M L W* 355		18 *M L T* 228
	29 *I C* 223		1915 *M W N* 514		1915 *M W N* 559		2 *M L W* 843
4	37 *All* 298		29 *I C* 617		28 *I C* 699		1915 *M W N* 717
	42 *I A* 115	18	37 *All* 369	27	42 *Cal* 1029		30 *I C* 833
	17 *Bom L R* 475		17 *Bom L R* 556		42 *I A* 97	33	39 *Mad* 115
	21 *C L J* 499		22 *C L J* 180		13 *A L J* 534		14 *A L J* 153
	19 *C W N* 718		19 *C W N* 873		17 *Bom L R* 449		18 *Bom L R* 360
	29 *M L J* 75		29 *M L J* 130		21 *C L J* 446		23 *C L J* 337
	18 *M L T* 39		18 *M L T* 31		19 *C W N* 585		20 *C W N* 201
	2 *M L W* 589		2 *M L W* 676		29 *M L J* 80		29 *M L J* 856
	1915 *M W N* 526		1915 *M W N* 449		17 *M L T* 377		19 *M L T* 150
	29 *I C* 724		29 *I C* 781		2 *M L W* 555		3 *M L W* 149

All India Reporter, 1915 Privy Council = Other Journals—(*Concld.*)

AIR	Other Journals
	(1916)1 *MWN* 100
	32 *I C* 258
37	39 *Mad* 107
	43 *I A* 20
	14 *A L J* 178
	18 *Bom L R* 372
	23 *C L J* 366
	20 *C W N* 234
	29 *M L J* 851
	19 *M L T* 147
	3 *M L W* 177
	(1916) 1 *MWN* 97
	32 *I C* 373
39	18 *Bom L R* 355
	23 *C L J* 177
	19 *M L T* 103
	3 *M L W* 297
	(1916)1*MWN* 201
	33 *I C* 924
41	40 *Bom* 270
	43 *I A* 56
	14 *A L J* 185
	18 *Bom L R* 172
	23 *C L J* 395
	20 *C W N* 702
	30 *M L J* 193
	19 *M L T* 193
	3 *M L W* 259
	(1916)1*MWN* 258
	32 *I C* 403
45	19 *C W N* 787
	31 *I C* 637
48	43 *Cal* 493
	43 *I A* 6
	8 *L B R* 343
	14 *A L J* 89
	18 *Bom L R* 315
	23 *C L J* 137
	20 *C W N* 105
	30 *M L J* 73
	19 *M L T* 80
	3 *M L W* 181
	(1916) 1*MWN* 70
	9 *Bur L T* 8
	31 *I C* 949
50	34 *I C* 273
53	19 *C W N* 905
	31 *I C* 684
57	43 *Cal* 417
	36 *I C* 499
59	39 *Bom* 625
	42 *I A* 229
	13 *A L J* 953
	17 *Bom L R* 730
	23 *C L J* 1
	19 *C W N* 1087
	29 *M L J* 242
	18 *M L T* 179
	2 *M L W* 731
	1915 *M W N* 563
	30 *I C* 303
69	17 *Bom L R* 484
	21 *C L J* 524

AIR	Other Journals
	19 *C W N* 621
	28 *M L J* 596
	17 *M L T* 443
	2 *M L W* 560
	1915 *M W N* 790
	30 *I C* 59
70	37 *All* 604
	42 *I A* 208
	13 *A L J* 1007
	17 *Bom L R* 1022
	22 *C L J* 481
	20 *C W N* 1
	29 *M L J* 434
	18 *M L T* 409
	2 *M L W* 897
	1915 *M W N* 772
	30 *I C* 529
78	19 *C W N* 762
	1915 *M W N* 787
	29 *I C* 717
79	43 *Cal* 290
	43 *I A* 1
	14 *A L J* 97
	18 *Bom L R* 308
	23 *C L J* 130
	20 *C W N* 137
	30 *M L J* 67
	19 *M L T* 108
	3 *M L W* 145
	(1916) 1*MW N* 67
	32 *I C* 161
81	37 *All* 545
	42 *I A* 177
	13 *A L J* 999
	17 *Bom L R* 998
	22 *C L J* 508
	19 *C W N* 1175
	29 *M L J* 329
	18 *M L T* 203
	2 *M L W* 837
	1915 *M W N* 713
	30 *I C* 265
83	40 *Bom* 289
	43 *I A* 26
	14 *A L J* 225
	18 *Bom L R* 163
	23 *C L J* 358
	20 *C W N* 744
	30 *M L J* 186
	19 *M L T* 184
	3 *M L W* 239
	(1916)1*M W N* 229
	32 *I C* 246
86	43 *I A* 35
	18 *Bom L R* 635
	20 *C W N* 362
	30 *M L J* 227
	(1916)1*MWN* 176
	32 *I C* 413
88	30 *M L J* 238
	3 *M L W* 257
	32 *I C* 354
89	20 *C W N* 297

AIR	Other Journals
	30 *M L J* 444
	3 *M L W* 308
	(1916)1*MWN* 137
	34 *I C* 268
92	38 *All* 163
	43 *I A* 43
	18 *Bom L R* 382
	23 *C L J* 411
	20 *C W N* 425
	19 *M L T* 206
	3 *M L W* 293
	(1916) 1*MWN* 234
	33 *I C* 505
94	33 *I C* 323
96	37 *All* 557
	42 *I A* 202
	13 *A L J* 991
	17 *Bom L R* 1006
	22 *C L J* 516
	19 C *W N* 1207
	29 *M L J* 335
	18 *M L T* 248
	2 *M L W* 830
	1915 *M W N* 757
	30 *I C* 299
99	37 *All* 485
	42 *I A* 171
	13 *A L J* 937
	17 *Bom L R* 754
	23 *C L J* 55
	20 *C W N* 35
	29 *M L J* 165
	18 *M L T* 173
	2 *M L W* 671
	1915 *M W N* 736
	30 *I C* 849
101	43 *Cal* 432
	43 *I A* 12
	14 *A L J* 167
	18 *Bom L R* 347
	23 *C L J* 169
	20 *C W N* 169
	30 *M L J* 110
	19 *M L T* 97
	3 *M L W* 252
	(1916) 1 *MWN* 73
	34 *I C* 892
103	20 *C W N* 265
	3 *M L W* 454
	(1916) 1 *MWN* 142
	34 *I C* 673
106 (1)	6 *P R* 1916
	19 *C W N* 1023
	29 *M L J* 137
	2 *M L W* 706
	1915 *M W N* 642
	1 *P W R* 1916
	29 *I C* 1005
106 (2)	20 *C W N* 457
	35 *I C* 378
111	93 *P R* 1915
	13 *A L J* 801
	17 *Bom L R* 609

AIR	Other Journals
	22 *C L J* 172
	19 *C W N* 929
	11 *P L R* 1916
	110 *P W R* 1915
	29 *M L J* 307
	18 *M L T* 54
	2 *M L W* 645
	1915 *M W N* 500
	29 *I C* 807
113	32 *I C* 47
115	43 *Cal* 521
	43 *I A* 104
	14 *A L J* 198
	18 *Bom L R* 378
	23 *C L J* 406
	20 *C W N* 393
	30 *M L J* 116
	19 *M L T* 203
	3 *M L W* 207
	(1916) 1*MWN* 198
	32 *I C* 343
116	42 *Cal* 914
	42 *I A* 91
	13 *A L J* 540
	17 *Bom L R* 432
	21 *C L J* 419
	19 *C W N* 449
	29 *M L J* 70
	17 *M L T* 312
	2 *M L W* 377
	1915 *M W N* 485
	28 *I C* 710
118	39 *Bom* 664
	42 *I A* 185
	13 *A L J* 1026
	19 *C W N* 1056
	29 *M L J* 299
	2 *M L W* 701
	1915 *M W N* 536
	30 *I C* 539
121	43 *Cal* 527
	43 *I A* 48
	8 *L B R* 536
	14 *A L J* 217
	18 *Bom L R* 387
	23 *C L J* 348
	20 *C W N* 329
	30 *M L J* 232
	19 *M L T* 176
	3 *M L W* 210
	(1916)1 *MWN* 150
	9 *Bur L T* 1
	32 *I C* 419
124	38 *Mad* 406
	42 *I A* 125
	17 *Bom L R* 468
	21 *C L J* 515
	19 *C W N* 641
	28 *M L J* 535
	17 *M L T* 435
	2 *M L W* 596
	1915 *M W N* 555
	29 *I C* 298

THE
ALL INDIA REPORTER
1915
PRIVY COUNCIL

***A.I.R. 1915 Privy Council.**

(FROM BOMBAY)

25th February 1915.

LORDS DUNEDIN AND SHAW,
SIR GEORGE FARWELL, SIR JOHN EDGE
AND MR. AMEER ALI.

***** *Bombay Cotton Manufacturing Co.*—Defendants-Appellants

v.

R. B. Motilal Shivlal—Plaintiff—Respondent.

Privy Council Appeal No. 17 of 1914.

**(a) Practice—Appeal—Case depending on credit given to particular witnesses—Trial Court's verdict should not be lightly disregarded.*

It is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appeal Court. But generally speaking, it is undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of appeal. Where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded. [P. 2, C. 1.]

** (b) Evidence Act, S. 155—Cross-examination to credit is relevant to credit or discredit a witness and not an issue.*

Cross-examination to credit is necessarily irrelevant to any issue in the action; its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy. [P. 2, C. 2.]

Upjohn and *Dunne*—for Appellants.

Robert Finlay, *Brown* and *Raikes*—for Respondent.

Sir George Farwell.—This is an appeal from a judgment and decree of the High Court of Bombay in its appellate jurisdiction reversing a judgment of the High Court in its original jurisdiction. The question at issue is one of fact. The respondent is a banker and money-lender against whom personally no imputation is made; his manager was one Dani. Dani was on intimate terms with one Dwarkadas, and Dwarkadas was for some years, until his death in August 1909, Agent and Managing Director of the appellant Company, and of two other Companies, the Tricumdas and the Lakhmidas; in 1908 the appellant Company was a flourishing and solvent Company, and the two other Companies were largely insolvent; and both were heavily indebted to the respondent for advances, to the amount of about 5½ lacs. The respondent was pressing Dwarkadas for further and better security in respect of these sums, and also of other monies advanced by the respondent to Dwarkadas personally; and Dani and Dwarkadas accordingly arranged to shift part of the indebtedness of the Tricumdas and Lakhmidas Companies on to the appellant Company. This arrangement was carried out by entries which can only be characterised as a barefaced swindle. Dani procured two cheques, one from the Tricumdas Company for eighty-five thousand rupees and one from the Lakhmidas Company for one lac and fifteen thousand rupees and sent them over by his son to the office of the appellant Company, to be placed to their credit, but simultaneously Dwarkadas through his son Devji Damodhar telephoned to the cashier of that Company not to present the cheques, but to await further instructions; the two amounts were entered in the appellants' books to their credit and appear as:—" Rs. 85,000 cheque 1 in number drawn on the Bank of Bombay (bearing) No. 95500 S.S., and 115,000 cheque drawn on the Bank of Bombay bearing No. 7, 94950 S.S. No. 2." The two cheques were then destroyed by Dani's orders. It is difficult to suggest any object for this transaction of drawing and paying in cheques for the purpose of being entered with every circumstance of identification and reality, and then of immediate destruction without presentation, except fraud. The transaction was merely a paper one for the purpose

of shifting the respondent's security from the two insolvent to the one solvent company. The Judge of first instance has heard the evidence, which depends on the credit to be attached to the two sons of Dwarkadas on the appellants' side, and to Dani on the respondent's: he has stated that he has seldom seen in the box "such serviceable, clear headed and absolutely truthful witnesses" as the two sons or a more "thoroughly unscrupulous, untrustworthy, and untruthful man" than Dani and he finds that the transaction was a deliberate fraud on the appellants. The Appellate Court refused to accept as conclusive the judgment of the lower Court as to veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appeal Court. But generally speaking it is undesirable to interfere with the findings of all of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is, which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded.

With all respect to the Appellate tribunal, their Lordships cannot accept their reading of the facts and inferences. They find no such contradictions or impossibilities in the evidence of two witnesses whom the Trial Judge in this case has believed as to justify their preferring the opinion of the Appellate Court formed on the written record to his deliberate conclusions after hearing it in Court. Again, several of the conclusions of fact adopted by the Appeal Court appear to their Lordships to be quite mistaken, *e.g.*, that Dani had no reason to fear and did not fear that the respondent would lose the money owing to him by the Tricumdas Company. It would serve no useful purpose to comment in detail on the judgment of the Appeal Court, but their Lordships feel bound to take exception to the Chief Justice's statement that the cross-examination of Dani, which convicted him of being party to a false and fraudulent balance sheet of the Tricumdas Company, was "not a very relevant point," and that Dani was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers." The observation might be of disastrous effect if accepted. Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case like the present where everything depends on the Judge's belief or disbelief in the witness's story, and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow.

Their Lordships will humbly advise His Majesty that the judgment of the Appeal Court be set aside and that of the High Court in its original jurisdiction be restored and that the respondent do pay the costs of this appeal.

D.D. *Appeal allowed.*

Solicitors for Appellants—T. L. Wilson & Co.

Solicitors for Respondent—Latteys & Hart.

***A.I.R. 1915 Privy Council.**

(FROM BOMBAY)

25th February 1915.

LORDS DUNEDIN AND SHAW,
SIR GEORGE FARWELL, SIR JOHN EDGE
AND MR. AMEER ALI.

Motabhoy Mulla Essabhoy—Defendant—Appellant

v.

Mulji Haridas—Plaintiff—Respondent.

Privy Council Appeal No. 40 of 1914.

* (*a*) *Evidence Act. S. 92, Prov. 2—Oral agreement on which document is silent can be proved.*

The existence of separate oral agreement between parties to a promissory note whereby the note executed by two persons was to be held as substituted by another executed by one only at a subsequent date can be proved.

*(b) *Pleadings—Construction—Admissions in pleadings should be taken as a whole.*

It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. [P. 4. C 1]

Upjohn and *E. B. Raikes*—for Appellant.

Robert Finlay and *Lowndes*—for Respondent.

Lord Dunedin.—The plaintiff-respondent, Mulji Haridas, sues the defendant—appellant, Motabhoy Mulla Essabhoy, upon a promissory note jointly executed by the defendant and the firm of Hyderally Cassumji Sons & Co., hereinafter called Hyderally, for Rs. 50,000. The note was made in the following circumstances. Mulji, before July 1907, had made advances to Hyderally amounting in all to Rs. 4,00,000 the consideration for making such advances being certain shares in an agency commission in a certain company. The advances were partially but not wholly covered by security. In July 1907, Hyderally applied for a further advance of Rs. 1,50,000 in order to pay off Motabhoy a debt of that amount due to him. Mulji agreed to make the loan, a condition being an increased share in the commission agency, and to make it in three equal instalments. Two of these instalments were paid and the money handed on by Hyderally to Motabhoy, and the third instalment fell to be paid on 30th January 1908.

At the end of December 1907 Motabhoy was in want of money to meet a bill. He accordingly applied to Hyderally to ask if the balance of the debt, namely, Rs. 50,000, could be paid immediately. Hyderally then approached Mulji to see if he would prepay his instalment due on the ensuing 30th January. He consented to do so on being given the joint promissory note in question of date 23rd December 1907, and the money was handed to Motabhoy. So far there is no discrepancy between the view of the parties, but now arises the difficulty. The defendant Motabhoy alleges that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the instalment promised to be paid by Mulji to Hyderally on that date, and that the note should be replaced by a single acknowledgment on the part of Hyderally. The plaintiff Mulji says that all he agreed to was that he would surrender the note if at 30th January 1908 Hyderally had given sufficient security for the whole debt as then due by him, that on the 30th January no such sufficient security was given, that accordingly he is entitled to maintain Motabhoy's liability under the note.

The learned Judge of first instance allowed the parties to go to trial and examine witnesses; and coming to the conclusion that it had not been proved that any arrangement had been made for the giving of security by Hyderally gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at because in their view the promissory note constituted a written contract binding the defendant to pay on demand, and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement.

Now, if the defendant's pleading is to be dealt with in absolute strictness that view is right, for what the defendant says is this: he admits the execution of the note, and then he says that it was verbally agreed that his liability on it should cease on the 30th January 1908. That is a bald averment of a verbal contract contradicting the written contract, and would be inadmissible under section 92. But this bald averment does not represent the defendant's true case. His true contention has been already stated, and in the form of averment it might be put thus:—

"It was agreed that on 30th January 1908 the advance then to become due by Mulji to Hyderally should be held as made by the monies paid on 23rd December 1907, and that the liability under the note should be held as satisfied by a fresh note to be granted by Hyderally for the advance of 30th January 1908."

That would be an agreement in terms of proviso 2 to section 92, which allows to be proved

"the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms."

Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the

parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led.

Although, however, there are cases, of which this is one, where it is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, it is obvious that such oral agreement must be clearly proved and that the *onus* lies on him who sets it up. Their Lordships are of opinion that this has not been sufficiently realised by the learned Judge of first instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated for security being given for the whole debt by Hyderally by the 30th January, the learned Judge takes it as a necessary sequitur that the defendant's case is established. But the agreement alleged by the defendant must be substantively proved, and it is here, in their Lordship's judgment, that the defendant fails. The agreement must be an agreement to which the plaintiff Mulji is shown to have assented either himself or by an agent with power to bind him. Now there was no one who had power to bind Mulji. Further, Motabhoy and Mulji never met at the time at which the alleged agreement was concluded, and there is absolutely no evidence which shows that Mulji ever consented to anything except to advance the money, if he got the promissory note. In the argument the defendant's counsel sought to put his case thus: He said that Mulji himself admitted in his pleadings that the promissory note was not to represent the true state of matters after 30th January, that no doubt he adhibited the condition that security was by that date to be given, but that as the Judge of the first instance disbelieved the story that any such condition was made the matter rested on his own confession that the promissory note lost its efficacy after 30th January. The fallacy here consists in so treating an admission. It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. Therefore the admission that the promissory note was to be held as satisfied on 30th January by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

Their Lordships are therefore of opinion that the decree of the Court of Appeal was right, although to be supported on other grounds than those stated in the judgment of that Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant—Ranken Ford, Ford and Chester.

Solicitors for Respondent—T. L. Wilson & Co.

***A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

15th March 1915.

LORD DUNEDIN, SIR GEORGE FARWELL, SIR JOHN EDGE, AND MR. AMEER ALI.

(*Mahant*) *Lahar Puri*—Plaintiff—Appellant

v.

(*Mahant*) *Puran Nath*—Defendant—Respondent.

Privy Council Appeal No. 25 of 1914.

* *Hindu Law—Religious endowment—Math—Founder not laying down rules for succession—Appointment of successor should be had from practice prevailing in the Math.*

Where the founder of a Math has not prescribed any rules or practice to be followed in the selection and appointment of the future mahants, the selection and appointment of a person to be the mahant of the math on a vacancy occurring in the mahantship must depend on the custom or usage and the practices which prevail in the appointment of mahants of the particular math. [P. 5, Col. 1.]

E. Richards and *Parikh*—for Appellant.

DeGruyther and *B. Dube*—for Respondent.

Sir John Edge—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 11th of March, 1912, which reversed a decree of the Subordinate Judge of Saharanpur, dated the 29th of November, 1909, and dismissed the suit with costs. The suit was brought on the 12th of January, 1909, by Lahar Puri, who is the appellant, against Puran Nath who is the respondent. The dispute between the parties to this appeal relates to the title to the mahantship of the Hindu math, or

temple, at Hardwar, known as the Akhara Baba Sarwan Nath, and to the property appertaining to the math.

The math was founded by one Baba Sarwan Nath, who was a Sunniyasi Rukhar Fakir and died in 1849. Since his death there have been several mahants of the math in succession. It does not appear that Baba Sarwan Nath, in founding the math, prescribed any rules or practice to be followed in the selection and appointment of the future mahants. Consequently, the selection and appointment of a person to be the mahant of the math on a vacancy occurring in the mahantship must depend on the custom or usage and the practices which have prevailed in the appointment of mahants of this math, and on that principle this suit has been fought in the First Court, in the High Court, and before this Board.

The dispute as to the title to the mahantship arose in February, 1905, on the death in that month of Jhandu Nath, who was the mahant of the math, and had succeeded Tej Nath in the mahantship in 1897. In this suit the plaintiff alleges that he was the only *sadhak* (disciple) of the deceased Mahant Jhandu Nath, and being the only *sadhak* of Mahant Jhandu Nath, he was the only one of the mendicant fraternity of the temple who was qualified for election to the mahantship; that he was duly elected mahant by the ten classes of mendicants (*dasnam bhik*) on the 24th of February 1905; and that he was appointed with the usual ceremonies. On the other side the defendant denies that the plaintiff had ever been the *sadhak* of Mahant Jhandu Nath, or was qualified for election to the mahantship, or was elected mahant. The defendant's case is that it is not necessary that the *sadhak* of the last mahant should be elected as the mahant. He alleges in his written statement that:—

"The *sadhak* or a co-disciple, or the *sadhak* of a co-disciple of the deceased mahant is appointed a mahant, and failing these or in the event of none of these being a fit person, the mendicants of all the ten classes (*dasnam bhik*) have the power to make any fit person the *sadhak* of the *gaddi* and appoint him a mahant."

The defendant further alleges that he was a *sadhak* of mahant Tej Nath, who preceded Mahant Jhandu Nath on the *gaddi* of the temple, and as such *sadhak* was qualified for election to the mahantship, and that he was duly elected and with the usual ceremonies was appointed mahant by all the ten classes of mendicants (*dasnam bhik*) on the 24th of February, 1905. It is not disputed that the defendant was a *sadhak* of Mahant Tej Nath. It is common ground that the time for the election of a successor in the mahantship of this temple is the *terhwin*, the thirteenth day ceremony, after the death of the deceased mahant, which in this case fell on the 24th of February 1905. It is also common ground that on the death of a mahant of this temple the election of his successor takes place at Hardwar, and that the election and appointment of the new mahant is by the ten classes of mendicants (*dasnam bhik*) assembled at Hardwar for that purpose. From the evidence their Lordships infer that the usual place at which the *dasnam bhik* assemble for the purpose of electing a mahant of this temple, and at which they elect a mahant, is at the temple. Another common ground is that on the election and appointment of a mahant of this temple a *mahantinama* is drawn up and is witnessed by those who were present at the election, and is registered.

The defendant, who was the general attorney and storekeeper of the deceased mahant, is in possession of the temple and of the property appertaining to it. Consequently it is for the plaintiff to prove his right to the mahantship, which if proved, would in the case of this temple, carry with it the right to the possession of the temple and of the property appertaining thereto. If the plaintiff has failed to prove that he is the duly elected mahant of the math his suit must fail, and in the event it would be immaterial to consider whether the defendant is or is not the mahant of the math, or whether he has or has not any better title to the temple and the property which appertains to it than a title of mere possession.

Much evidence has been led by each side. The documentary evidence is not, in their Lordships' opinion, conclusive in favour of either side. The oral evidence is, as the High Court observed, extraordinarily conflicting, even for a case of this kind. Some of the material witnesses, who, if their evidence was true, must have been in a position to contradict or explain much of the evidence of the other side as to the events of the 24th of February 1905, were examined and were cross-examined at great length, but were

allowed to leave the witness box without their attention having been directed to the case of the other side. As the case was treated in the court of the trial judge, it was an important question whether there were, on the 24th of February 1905, two elections of a mahant by the *dasnam bhik*, or one election only, or no real election at all. As the learned Judges of the High Court observed in their judgment in the defendant's appeal before them :—

"The witnesses for the respondent (the plaintiff) say nothing about the election of the appellant (the defendant), and the witnesses for the appellant, with one or two exceptions, say nothing about the election of the respondent."

and yet it is alleged that there were two elections on the morning of the 24th of February, 1905, by the *dasnam bhik* then assembled at the temple.

The Subordinate Judge found as a fact that the plaintiff was the *sadhak* of Mahant Jhandu Nath. The learned Judges of the High Court, after reviewing the evidence bearing on that question, and not overlooking the fact that it was a strong point in favour of the view which the Subordinate Judge had taken that a number of fakirs who were unlikely to choose a complete outsider had joined in the so-called election of the plaintiff as mahant, were on the whole unable to say that the evidence that the plaintiff had been duly appointed a *sadhak* was satisfactory. As the plaintiff had failed to satisfy the Judges of the High Court that he had been a *sadhak* of Mahant Jhandu Nath, and as he had neither alleged nor proved that he was in any other way qualified for election as mahant of the math, they might have allowed the appeal and have dismissed the suit without going into the question as to whether he was or was not elected. However, they did not dispose of the appeal before them on that point; they decided the appeal on the question as to whether the plaintiff had or had not been duly elected the mahant. In the view which their Lordships take of this case it is not necessary for them to decide whether or not the plaintiff had been a *sadhak* of Mahant Jhandu Nath.

The evidence as to the so-called elections on the 24th of February 1905, is most conflicting. Each party claims to have been elected mahant by the *dasnam bhik* on that day. That there were, in fact, two factions amongst the *dasnam bhik*—one faction desirous of electing the plaintiff as mahant, the other faction desirous of electing the defendant as mahant—is on the evidence obvious. The Subordinate Judge found that it was satisfactorily proved that the plaintiff was duly elected mahant by the *dasnam bhik* on that day, and that the alleged election of the defendant as mahant was a fictitious transaction. The High Court found it proved that the defendant was elected on the 24th of February, 1905, by a large gathering of qualified persons and that the election of the plaintiff was :—

"A hole-and-corner affair in comparison with that of the appellant (the defendant), and seems to have been carried out hurriedly by a discontented minority."

of the *dasnam bhik* which had assembled at the temple on the morning of the 24th of February, 1905.

There is evidence to support each of these contradictory findings. (The judgment then discussed the evidence and proceeded): The High Court has found that the majority of the persons present on the morning of the 24th of February who were qualified to elect a mahant of this temple were in favour of the defendant; that in point of numbers and of influence the defendant received more support than the plaintiff did; that the election of the defendant must have taken place before that of the plaintiff; and that there was no attempt on the part of the defendant to conceal the arrangements which he had made for the 24th of February, 1905. It has not been shown to their Lordships that the High Court came to a wrong conclusion on any one of these points. An election by *dasnam bhik* of a mahant to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. Their Lordships have come to the conclusion that the plaintiff has failed to prove that he was elected a mahant.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

D.D.

Appeal dismissed.

Solicitor for Appellant—E. Delgado.

Solicitors for Respondent—Barrow Rogers and Nevill.

****A.I.R. 1915 Privy Council.**

(FROM BOMBAY)

26th March 1915.

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Bal Gangadhar Tilak and others—Plaintiffs—Appellants.

v.

Shrinivas Pandit and others—Defendants—Respondents.

Privy Council Appeal No. 33 of 1914.

* (a) *Evidence Act, S. 33—Depositions in a previous criminal trial are inadmissible except as in S. 33 or to contradict the witness on particular point—Evidence Act, S. 155.*

A Civil Cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under S. 33 evidence given by a witness in a previous criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this is permissible when the witness is dead, or cannot be found or is incapable of giving evidence, or is kept out of the way, etc. But there is no warrant whatsoever for using such evidence for the purpose of either contradicting or discounting the evidence of the witnesses, given in the Civil Suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. [P. 11. C. 1.]

* (b) *Evidence Act, S. 145—Witness must be given opportunity to give his explanation.*

On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary and intelligible rule, and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear. [P. 11. C. 2.]

** (c) *Hindu Law—Adoption—Datta Homam—Within the same gotra this ceremony is unnecessary.*

Where the child to be adopted belongs to the same gotra as that of the adoptive father, the celebration of the ceremony of Datta Homam is not an essential to the legal validity of an adoption. 24 Bom. 218 Appr., 11 Mad. 5, (F.B.) and 4 M.H.C.R. 165 Ref. [P. 13. C. 1.]

* (d) *Civil P.C.O. 6, R, 4—Allegations as to fraud, etc., must be specific.*

Under the Contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation are all separate and separable categories in law. They may overlap or may be combined. But in pleadings general allegations, however, strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice. (1880) 5 A.C. 685 and 15 Cal. 533 Ref. [P. 13. C. 2.]

* (e) *Hindu Law—Adoption.*

Where a will provided for adoption by testator's widow with the consultation of trustees under the will and accordingly the widow adopted a son, with the consent of four out of five trustees.

Held that the adoption was valid. [P. 15. C. 1.]

E. Richards, W. Garth and *Parikh*—for Appellants.

Robert Finlay, DeGruyther, Lowndes, Dunne and *A. Majid*—for Respondents.

Lord Shaw.—This is an appeal from a decree of the High Court of Judicature at Bombay, dated 23rd September 1910, which reversed the decree of the First Class Subordinate Judge at Poona, dated 31st July 1906.

The main question to be determined on the appeal has reference to the validity of the adoption by the widow of the late Shri Vasudev Harihar Pandit, *alias* Shri Baba Maharaj, of a son to her late husband. The appellant Jagannath claims to be the duly adopted son. This claim is resisted by the defendants and forms the issue in the case.

The adoption is challenged substantially upon three grounds—first, that it was never completed in fact. This in argument was reduced to the proposition that the whole transaction had been left at the stage of a proposal to be afterwards carried into effect. As to the adoption itself, it is maintained that there was never a complete giving and taking of the child, and in particular he was not taken upon the lap of the adoptive mother. Secondly, that the religious ceremony of Datta Homam, namely, the sacrificial burning of the clarified butter in accordance with the practice of the Hindu religion, was an essential requisite, and was not performed, and that on this ground also the adoption remained inchoate.

These grounds of challenge affect the completion and formalities of the ceremony itself. The third ground, however, is one of general law. There are difficulties on the pleadings and arguments in placing it within any definite category, and to this allusion will afterwards be made. But it may at least be said that almost every known ground of challenge is imported into the case by suggestion. Allegations amounting to or compounded of fraud, circumvention, coercion and undue influence are all

mixed together. The disentangling of these separate and separable grounds of action must undoubtedly have caused certain difficulties in the Court below. But the challenge appeared to their Lordships to preserve even at the bar of the Board this mixed or jumbled character.

The facts of the case, briefly stated, are these: The late Baba Maharaj was a first class sardar of the Deccan. He died at Poona on 7th August 1897, leaving a young widow, Tai Maharaj.

At the date of his death he made a will appointing five gentlemen as his trustees. One of these, Rao Sahib Kirtikar declined to act; the other four obtained probate of the will on 2nd December 1897. These were Messrs. Tilak, Khaparde and Kumbhojkar, the appellants. The fourth, Mr. Nagpurkar, while remaining a trustee, after a time dissociated himself in action from his three colleagues, and was properly convened as a defendant in the suit. The suit itself was brought in defence of the validity of the adoption (the adopted child being, of course, one of the plaintiffs), and for the administration of the estate in terms of the will.

In the will the clause material to the questions of adoption and succession is as follows:—

"My wife, Saubhagyavati Shri Sakvarbai, is now pregnant. If she does not give birth to a son, or if the son after birth is short-lived, then, for the purpose of continuing the name of my family with the Vichare of the above-mentioned gentlemen, a boy should be given as often as may be necessary in adoption on the lap of my wife, in accordance with the Shastras, and the above-mentioned Panch should, on behalf of that son, carry on the management of the immovable and movable estate until he attains majority."

On 18th January 1898 the widow gave birth to a son, but he died within two months thereafter, namely, on the 9th March. The circumstances for giving effect to the testator's intentions by his widow performing an act of adoption thus arose. And it is an admitted fact in the case that for a period of over three years she and the four acting trustees made frequent enquiries and numerous efforts towards the securing of a suitable boy. The circle of relations was considerable, but for various reasons, none of which bear upon the present case, a suitable adoptee could not be found in the Kolhapur or Poona branches of her husband's family.

On the 18th June 1901 a meeting of the trustees was held, at which Tai Maharaj was present, and the facts which were otherwise spoken to by the witnesses are recorded in the minute, the substance of which was that there were no boys available in the Kolhapur family, that of all those available in the Poona family none was approved. The minute in this particular is of importance, because it shows that an anxious search had been made, that deference was paid to the wishes of the widow, and that objection is made to certain suggested adoptees on the ground of their being too old; One boy, the youngest named, of eleven years, being, however, stated to be in point of age suitable, although delicate. The minute then proceeds:—

"The only family which remains, therefore, is that descended from the brother of Shri Siddheshwar Maharaj at Babre. It is not yet known whether there is a boy or not in that family. But if there is a boy of that family fit in point of age, etc., for adoption; it is our unanimous opinion that one should not be taken from any other family. 'And Shri Tai Maharaj is of the same opinion'.

"Shri Tai Maharaj suggests that Messrs. Bal Gangadhar Tilak and Ganesh Shrikrishna Khaparde should both go to Babre, select boys, and return after settling as regards that family.

"Shri Tai Maharaj should go, see boys and approve."

It should be mentioned that the trustees were, and had been since the testator's death, duly administering the testator's estate.

What followed upon the proceedings of the 18th June was that Messrs. Tilak and Khaparde accompanied the widow to Aurangabad, where the widow remained; the two trustees proceeded to Nidhone, a place near the Babre village, and selected five boys within the circle of relationship, and they came back, accompanied by their parents, to Aurangabad. The boys stayed with the widow for several days, being entertained and kept under observation. Certain astrologers, including Durga Shastri, who was one of her suite who had accompanied her to Aurangabad, cast the horoscopes of the children. These proved favourable to the appellant, Jagannath; and her personal likings appeared to point in the same direction.

All this course of conduct pointed to the entire acquiescence on the part of the widow in the testator's wishes and directions, and so far there is no substantial suggestion to the contrary. As to what happened at

Aurangabad it is sufficient to say that, in their Lordships' opinion, the sworn testimony is abundant, is clear, and is overwhelming. It amounts to this. The widow's desire, the arrangement of all parties, and the horoscopes of the astrologers all pointing in one direction, on the 27th June a meeting of the Shastris and of other persons in Aurangabad was summoned. The father of the boy being present, it was announced by the trustees that the boy had been selected. The father was taken to the widow; in pursuance of the familiar procedure she asked him to give her his boy in adoption, and he agreed. The fact of the arrangement was announced to the assembled guests, and there and then duplicate deeds of adoption were drawn up, the one being impressed with a Monglai, and the other with a British stamp, and both intended to be signed and attested by the widow. This deed was in due form and bore that the father gave the son in adoption. The second document was a letter from the widow addressed to the father and agreeing to take the boy in adoption. So far as giving and receiving of the child those documents were prepared for and pointed to actual adoption in fact.

The preparation of the documents, however, occupied time, and the hour being late the proceedings were stopped, but were resumed early next morning. A gathering was accordingly again held early on the 28th. The deeds of adoption and the letter were duly executed, the boy was given in fact by his natural father to his adopted mother, he was received in fact by her on her lap in performance of the requisite essential in this caste of Hindus on occasion of adoption and—all being completed—the formal ceremonies and festivities were postponed, to take place afterwards at Poona, and the widow left Aurangabad.

The Subordinate Judge of Poona has gone into the circumstances with the utmost minuteness and detail, and he has weighed and considered every argument, presented, and he comes to the conclusion that the adoption was in fact completed. Notwithstanding the judgment of the learned Judges of the High Court of Bombay their Lordships have no hesitation whatever in entirely agreeing with the Judge of first instance. Reference in a little time will be made to the reasons assigned by the High Court for differing from him. But in the meantime it may be said that it appears to their Lordships that, viewed as a matter of evidence, no other conclusion was possible than that come to by the Subordinate Judge.

Their Lordships do not stop to examine the oral testimony in detail. It is really all one way. Upon the crucial question of whether the boy was received by being taken on the lap of the adoptive mother there can be no doubt. Witness after witness speaks of it. It would be very strange if it had not taken place, because it is conceded that it is among the very elements of the ceremonial of adoption and entirely familiar. It is not only that Hindus of various classes were present and saw it, but it has to be borne in mind what the nature of the challenge of the transaction now is. It has come to be one in which the trustees, men of high position, and some of them of learning and legal training, are accused of conspiring by fraud, duress, undue influence, and nearly everything that is improper to have procured from the widow this act of adoption. It is not to be believed that if such a scheme were afoot, if deeds had been signed, horoscopes taken, and meetings gathered, the scheme would have failed because of the omission of that which was elementary to the knowledge of everybody, namely, the taking of the child upon the mother's lap.

It must, however, be borne in mind that against a body of evidence of ten or twelve witnessos, five witnesses are produced for the defendants. It is sufficient to say of this evidence that most of it was entirely irrelevant to any issue in the case, and such of it as was not, was disbelieved by the Judge of first instance, a verdict with which the High Court saw no ground for interfering.

It may be added that when the party returned to Poona, Mr. Tilak wrote out a full account of the transaction, which was recorded in the minutes, and the trustees who had not taken part in the mission to Aurangabad were communicated with, to the effect that the adoption was complete. The sworn evidence is entirely in accordance with what has now been stated. Here and there, there are expressions in the letters out of which it may with ingenuity be possible to suggest a doubtful meaning; for instance, that the word "selected" and "decided"

refer to something in the future. And it is also undoubtedly true that both the minutes of the trustees, and the letters, date the adoption as the 27th, whereas in point of fact, as has been seen, it began upon the 27th and was concluded on the 28th. But so far as oral evidence goes, their Lordships see no reason to doubt that it represented the truth, and that the fact of adoption was by it proved.

The Subordinate Judge says:

"Here there was a clear direction of the husband to his wife to adopt, the wife after his death was anxious to carry out the direction. There is no evidence to prove that any effort or cajolery was practised upon her, or that there was any suppression or concealment of facts from her; the plaintiffs had no personal interest whatever."

In another passage of his judgment he remarks:

"The evidence clearly shows, and it is undisputed that on the 27th there was selection and verbal gift and acceptance, and preparation of necessary documents. On the 28th there was execution of documents under corporeal acts of giving and taking."

In their Lordships' view these conclusions are well justified.

It is an admitted fact in the case that neither the trustees nor any of the witnesses for the plaintiffs had any interest whatsoever in the subject-matter of the suit, and that no motive can be reasonably suggested for their maintaining or testifying that the adoption of the boy mentioned was made, except that this represented the actual truth which occurred.

It is in these circumstances that their Lordships have viewed with surprise the charge which is made not only against the trustees, but against the whole body of the plaintiffs' witnesses, ten or twelve persons in all.

"The account unquestionably, to my mind," says Mr. Justice Chandavarkar,

"given by the witnesses appears to be a true account of many of the series of events, and a false account of at least one, and that the most important."

This event is the taking of the child on the lap. Later on in his judgment he states:

"We are driven to believe that a considerable number of men of good position have conspired together to give false evidence."

The conclusion thus made is of the most serious character, amounting to a plain judicial finding of conspiracy and of perjury.

Their Lordships will presently refer to one or two circumstances accompanying such a verdict, but meantime they will only observe that they do not think that one word of it is justified by the evidence in the case. Referring to Messrs. Tilak and Khaparde, Mr. Justice Chandavarkar observes that:—

"They were men of mature years of exceptional education and mental qualities, lawyers and men of affairs of great repute and good standing, and both men of dominating personality."

Some of the witnesses who gave evidence for the plaintiffs are also persons of considerable standing. It is *a priori* difficult to understand how these men, with no object to gain and no interest to serve, could be supposed to have entered into the conspiracy and committed the perjury which the High Court judgment found. Their Lordships think the conclusion come to by the learned Judges to be entirely unwarranted on the facts.

Their Lordships find themselves constrained to observe upon certain procedure in the case, the result of which was to introduce into it large masses of irrelevant matter.

It should be mentioned that, subsequent to the adoption at Aurangabad, the widow, upon returning to Poona and after having been a party to certain communications naturally following the adoption which had been made, fell under other influences, and in the month of July expressed a change of mind. And on the 19th August she went through the form of another adoption, *viz.*, of Bala Maharaj—a married man older than herself—as her son. It is unnecessary to make any observations upon his claim. The widow, who, while she was a litigant, maintained that adoption, died on 30th September 1903. Her daughter who was, on her death, admitted to the suit as defendant, challenges not only the first adoption but the second adoption also—her interest being to maintain that the provisions of the testator's will with regard to adoption had failed, that the widow became the owner of the estate as heiress to her infant son who died, and that the property passes in this way to her heir.

It appears that the widow and Bala Maharaj left no stone unturned in the way of litigation. In July proceedings were begun to revoke the probate granted to the trustees, and subsequently criminal proceedings were instituted in respect of perjury.

Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned Judges of the High Court.

In the opinion of the Board this was an irregularity of a somewhat serious character. They refer particularly to the depositions in the criminal case, which seems to have been imported in bulk into the present. There is a risk by such procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under section 33 of the Indian Evidence Act,1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only, as the section proceeds :—

"When the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way, etc."

Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses, given in this suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. It was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in the civil action of these criminal proceedings, as above described, were illegitimate.

A further mischance in point of procedure must now be mentioned. As already stated,the testimony of the plaintiff's witnesses is not contradicted orally, and is internally a consistent body of evidence. But various minutes and documents are the subject of minute analysis, observation, and comment by the learned Judges of the High Court with a view to rebutting it. Their Lordships think it right to observe that in view of the serious nature of the verdict of the High Court, they have considered it within their province themselves to peruse the documents. Having done so, they are of the opinion that, taken together, they completely confirm the case made in the witness-box, and that there is no ground, in fact, for the conclusion that they either contradict the testimony or cast any reasonable doubt upon it.

But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule, and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear.

Fortunately the law of India pronounces no uncertain sound upon the same matter. By section 145 of the Indian Evidence Act, 1872, it is provided that :—

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict—none—the—less sweeping on that account—but an inferential verdict actually of perjury. What are the premises upon which this inference proceeds? In no inconsiderable degree they consist of documents, statements, even turns of expression, which are used to confound the spoken word. Had the safeguards set up by the law with respect to the use of documents been observed? Not at all. Not only have the documents been used for the purpose of contradicting witnesses without obeying the injunctions prescribed by law, but the inference thus derived, and improperly derived, from these documents has resulted, as stated, in an inferential verdict of perjury.

Heaton, J., deals elaborately with this portion of the case, and one example taken from his judgment will suffice. One letter out of many is taken, passages are cited from it, and a minute argument proceeds as to the expressions used, and why this was mentioned and that other omitted. Mr. Tilak was for five days under cross-examination before the Subordinate Judge; but not one of these things was put to him; and he was not asked in the witness-box to give one single explanation with regard to any of these expressions or omissions which are now alleged to compromise him. On this point of the case no more need be said.

One other matter of procedure may be mentioned. One of the trustees, Mr. Nagpurkar, dissociated himself from his colleagues, and in July appears to have written a minute of doubt or dissent with regard to certain proceedings. A letter from him resiling from this position is also produced.

The learned Judges have come to a conclusion which would be in some respect in accord with the so-called dissent. It is a striking circumstance that Mr. Nagpurkar, a relevant witness, intimately acquainted with what had gone on, and with the position both of the trustees and widow as regards adoption, and a party in the case aware of the charges launched against his colleagues, does not appear as a witness to explain the one or to support the other.

In the result, their Lordships are unable to agree with the view taken by the High Court on this part of the case.

The next argument is that the adoption was void because it lacked the ceremonial of datta homam, which ceremonial is declared to be essential to its legal validity.

Datta homam is the service of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation. It is admitted that in this case the ceremony was not performed, and it seems to be fairly clear that it was one of those things which it was intended afterwards to carry out at Poona as part of the general ceremonial and festivities which were to be carried through there.

In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities, ancient and modern, are not in accord on the point as to whether this is a legal as well as a religious requisite. There is a danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of Indian belief, while, on the other hand, the danger must also be avoided of carrying these—except when the law is clear—into the legal sphere, so as to affect or impair personal or patrimonial rights. The subject of the requisites for adoption has, in recent years, been the matter of not infrequent consideration by this Board, and their Lordships refer, in especial, to the elaborate examinations of the authorities made by Lord Hobhouse in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1) and by Mr. Ameer Ali in *Ramchandra Martand Waikar* v. *Vinayek Venkatesh Kothekar* (2).

The former case had reference to the validity of the adoption of an only son. From the religious point of view this is, in many writings of great authority, forbidden. There was, however, in India, considerable difference in the view as to whether the religious and legal injunctions on the subject were co-extensive. It must be admitted that if one has recourse to the ancient writings when Brahminical influence was most predominant, one finds the ceremonial part of adoption the subject of highly elaborate detail; and it is beyond all question that in the course of ages many of these details have disappeared as essentials within the legal sphere. As Lord Hobhouse observes:

> "The further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality, and law, lest foreign lawyers accustomed to treat as law what they found in authoritative books, and to administer a fixed legal system, should too hastily take for strict law, precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law-givers."

The case resulted in the decision that the adoption of an only son is not null and void under the Hindu law.

The question whether the datta homam is a legal requisite in Bombay for adoption among the three twice-born classes does

(1) (1899) 22 Mad., 398; 26 I.A. 113; 21 All. 460; 9 M.L.J. 67; 3 C.W.N. 427 (P.C.)

(2) (1914) 42 Cal. 384; 25 I.C. 290 41 I.A. 300 (P.C.)

not, however, in the view of their Lordships broadly, arise in the present case. It is in no way necessary to canvas or call in question any dicta upon that general point, nor does the question arise whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar* v. *Dorasami* (3) or of the Madras High Court in *V. Singamma* v. *V. Venkatacharlu* (4),both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of datta homam is not essential to a valid adoption among Brahmins in Southern India, for, in the opinion of the Board, the necessity does not arise where the child to be adopted belongs to the same gotra as that of the adoptive father. It is an admitted fact that this was so in the present case. And their Lordships have come clearly to the conclusion that where this is so in fact then the Law of India is that the celebration of the ceremony of datta homam is not an essential to the legal validity of an adoption. It is conceded in argument that certain exceptions to the alleged general rule do exist, but it is maintained that these exceptions are limited to the case of the adoption of a nephew or of a daughter's son. In decided cases this may have been the relationship in fact, but the principle of all the decisions, and in their Lordships' opinion of all the authorities, is that within the same gotra the ceremony is unnecessary. They agree with what, in their opinion, is the full and careful judgment of Chief Justice Jenkins, in the case of *Valubai* v. *Govind Kashinath* (5), the decision being to the effect that among Brahmins in the Presidency of Bombay the performance of the datta homam ceremony is not essential to the validity of the adoption of a brother's son. An examination of the judgment shows that it was not based upon the narrow particular degree of relationship but upon the broad ground of the identity of gotra.

Mr. Colebrooke's annotation upon Mitakshara, Ch. II 5, is as follows :--

"Gotraja or persons belonging to the same general family (gotra) distinguished by a common name, those answer nearly to the gentiles of the Roman law."

A good illustration of the point has reference to the law applicable to the Sudra caste. The use of datta homam is not necessary for adoption within that caste and why? The explanation is given in a sentence by Strange in his Hindu Law, volume II, page 89, in which it is laid down that;

"Ceremonial adoption cannot be necessary in the case of a Sudra, since, by the datta homam, the adopted son is offered from the stock (gotram) of the natural to that of his adopted father; and Sudras have no gotra."

It may be added that in the treatment in the same volume, page 104, of the celebration of the Upanayana rite, or the investiture with the sacred thread; this is laid down:

"With respect to the non-eligibility of a person for adoption, on whom the Upanayana rites have been performed, it is much disputed. The more reasonable opinion would appear to be that he is eligible, if of the same gotra (family); non-eligible if of a different gotra from the adopter; that if of the same gotra, the datta homam, though proper, is not necessary."

Their Lordships do not pursue the investigation of the authorities further, adopting, as they do, the survey made in last-mentioned judgment of the learned Chief Justice Jenkins.

In their opinion accordingly, this part of the respondents' case also fails.

What remains is the attack which was made upon the transaction of the adoption itself, an attack in which the various grounds of rescission applicable to contracts in general were alluded to. Their Lordships hold that it is impossible to discover what it is that is really put forward by the defendants. Under the Contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentations are all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleading expressed in the frequently quoted language of Lord Selborne [*Wallingford* v. *Mutual Society* (6)] that:--

"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however, strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

The law of India is in no way different from this, and it has been decided over and

(3) [1887] 11 Mad. 5 (F.B.)
(4) [1868] 4 M. H. C. R. 165.
(5) [1899] 24 Bom. 218; 1 Bom. L.R. 770.

(6) [1880] 5 A. C. 685; 43 L. T. 258; 50 L.J. Q. B. 49; 29 W. R. 81.

over again, *e.g.*, in *Gunya Narain Gupta* v. *Tiluckram Chowdhry* (7).

It is, in their Lordships' opinion, much to be regretted that the rule is not more strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expense to the parties, in consequence of its neglect. No definite issue upon any one of the well known categories of attack was settled for trial, the only issue on the subject being—whether the plaintiff No. 4 is a validly adopted son of Bala Maharaj. From time to time, in the course of t is case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties, have been lost sight of. Their Lordships, however, are unwilling, confused though the charges be, to dismiss this part of the case on such a ground.

The position upon the facts was this: The will of the testator prescribing an adoption was clear: the wish of the widow and the trustees alike to follow it was clear; the trustees, so long as the testator's wishes were carried into effect, had no interest of any kind as to who the adoptee should be. It was also clear that the testator's will indicated that a minor should be adopted, because express provision was made for the management of the estate till that minor should come of age. It was manifest that every consideration pointed to the advantage of keeping, if possible, within the gotra, and it was further clear that the trustees, in advising the widow, should pay due regard to her wishes, and that, so far as this could be accomplished, they and she should act together.

It is in these circumstances a strange situation that the adoption should be challenged upon the ground, nebulously stated as it is, of fraud. There is no evidence, says the Subordinate Judge, to prove that any fraud or cajolery was practised upon her, or that there was any suppression or concealment of facts from her. With this judgment it does not appear that the High Court differs, and their Lordships entirely agree with it. It was for some reason, however, held that the general issue above quoted did include allegations of coercion and undue influence. Coercion is by admission out of the case. There was nothing of the sort; and this is not now maintained. What remains accordingly is the judgment of the High Court to this effect that:—

> "The question here is difficult, she was indeed willing to adopt, but was she a free agent when she adopted the fourth plaintiff, assuming that she adopted him, or was she forced into it against her will by unconsientious means used by the first two plaintiffs, that is, Messrs. Tilak and Khaparde and unfair advantage taken by them of her ignorance and youth, and of other fiduciary relations between them?"

The citation just made is from the notes of Mr. Justice Chandavarkar. With much respect to the learned Judge, it is, notwithstanding the protracted argument before their Lordships, even now somewhat difficult to gather what are the legal categories under which the attack upon this transaction is made. Unconscientious means are mentioned and unfair advantage is mentioned. It is needless to ask whether this implies fraud because their Lordships are of opinion that no sort of unconscientious means was employed by these trustees from beginning to end of the transaction, and that no unfair advantage was either taken or meant throughout their whole course. It is true that the adoptive mother was a young widow, probably easily guided, and that the trustees are admitted to have been men of great influence and strong personality, but their Lordships are of opinion that these were used in no respect unduly, but with propriety and entirely in the interests of the proper administration of the estate. Their Lordships cannot approve of the idea that in India the law would make the possession of reputation or high standing an element of suspicion. If it were so, then the result in India would be to import *pro tanto* a disqualification and disability into the position of reputable men.

A reference is made in the Court of Appeal to the fiduciary relations in which the trustees stood to the widow, and in one part of the judgment impropriety of conduct upon the part of the trustees is alleged to lie in this, that they failed in their duty of informing her as to her rights. Upon inquiry as to what was meant by this, their

(7) [1888] 15 Cal. 533; 15 I. A. 119; 5 Sar. 168 (P.C.)

Lordships were informed that the reference was to this effect, that if the widow had failed to adopt, then by doing so she would herself have come into the position of being heiress to her infant deceased child. The meaning of this is accordingly as follows :—Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the line of the childless father, but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit of the soul of the deceased passing from Hades into Paradise.

The widow in the present case is said to have been injured because she had not been informed that she could win for herself his temporal estate, by violation of her husband's dying wishes, and at the price of sacrificing his soul's happiness. Their Lordships are not of opinion that it was any part of the duty of the trustees to suggest this infamous alternative to her mind. Their duty was to give effect to his wishes, and his wishes were in accord with the religious belief of Hindus in regard to adoption. It is to be recorded further that the widow herself did not put forward, during her life, any plea or suggestion of this sort; she was as anxious as the trustees that an adoption should be made.

Only a word need be said as to the argument put forward on behalf of the daughter, that neither the first nor second adoption was valid. The only separate point put forward was to the effect that the trustees' consent had not been unanimous, one trustee out of five having declined to act. In their Lordships' opinion his consent in these circumstances was not required. Of the acting trustees it was said that one, Nagpurkar, dissented. Whether he did so or not, the question would remain as to the action of the majority of the trustees; but in their Lordships' opinion that question does not arise; because he did in fact not dissent, but consent. His dissent, or alleged dissent, was subsequently made under circumstances in which it is not necessary to inquire.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored, The appellants will have their costs here and in the Courts below.

Appeal allowed.

Solicitors for Appellants—Downer and Johnson.

Solicitors for Respondent—T. L. Wilson & Co. and E. Dalgado.

****A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

6th May 1915.

LORDS DUNEDIN AND ATKINSON, SIR GEORGE FARWELL AND SIR JOHN EDGE.

Puttu Lal and others—Plaintiffs—Appellants.

v.

Mt. Parbati Kunwar and another—Defendants—Respondents.

Privy Council Appeal No. 72 of 1912.

* (a) *Practice—Precedents—Subordinate Court is bound to follow decisions of its High Courts.*

A court which is subordinate to a High Court is bound to follow the decision in law of a Bench of that High Court to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to the Privy Council, or unless the law has been altered by a subsequent Act of the legislature.

* (b) *Hindu Law—Adoption by widow to her husband of her brother's son is valid.*

An adoption by a Hindu widow, in virtue of an authority to adopt given to her by her deceased husband, of her brother's son is not invalid as the adoption by the widow is not an adoption to herself but is an adoption to her deceased husband.

* (c) *Hindu Law—Adoption—Eligibility—Test laid down.*

The test of oligibility of the adopted son for adoption by a widow to her husband under authority from him must be the test which would have applied had the adoption been made by the husband himself in his life-time. 27 All. 417 Affirmed 22 Bom. 973 Ref.

* (d) *Hindu Law—Adoption—Texts Dattaka Mimansa should be accepted with caution where it deviates from Smritis.*

The "Dattaka Mimansa" is a work which has had a high place in the estimation of Hindu lawyers in all parts of India and has become embedded in Hindu Law, but the caution is required in accepting the glosses of Nanda Pandit in the "dattaka Mimansa" where they deviate from or add to the Smritis. 21 All. 412 and 21 All. 460 P.C. Ref.

* (e) *Hindu Law — Adoption — Texts — Nanda Pandit's extension of the rules criticised.*

The extension by Nanda Pandit in the "Dattaka Mimansa" to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married is not based upon the authority of any of the Smritis or institutes of sages. Remarks in 7 N.W.P.H.C.R. 117 held as *obiter*.

* (f) *Hindu Law—Adoption—Rule as to possibility of marriage refers to relationship prior to marriage.*

The rule of Hindu law that a legal marriage must have been possible between the adopter and the mother of the adopted boy refers to their relationship prior to marriage. 3 Mad. 15 Appr.

Lowndes—for Appellants.

De Gruyther and *Dube*—for Respondents.

Sir John Edge.—This is an appeal by the plaintiffs from a decree of the High Court of Judicature at Allahabad, dated the 15th of December, 1909, which reversed a decree of the Subordinate Judge of Mainpuri, and dismissed the suit with costs.

The plaintiffs brought their suit in the Court of the Subordinate Judge of Mainpuri on the 15th June, 1907, to have it declared that Jwala Prasad, who is a defendant and one of the respondents, was not the adopted son of one Tiwari Gandharp Singh, deceased, who had been the husband of Musammat Parbati Kunwar, who is the other defendant and respondent. The adoption which is impugned was made by Musammat Parbati Kunwar in March, 1899, to her deceased husband, Tiwari Gandharp Singh, who had died on the 9th November, 1898, without issue surviving him, and had been a Brahman. Jwala Prasad was the son of a brother of Musammat Parbati Kunwar. The plaintiffs, who claimed as reversioners, denied that Jwala Prasad had been in fact adopted and alleged that Tiwari Gandharp Singh had not given to Musammat Parbati Kunwar authority to adopt Jwala Prasad to him, and further alleged that Jwala Prasad; being a son of a brother of Musammat Parbati Kunwar, was in law ineligible for adoption by her as a son to her deceased husband.

The Subordinate Judge framed six issues; two only of the issues are now of importance. It was concurrently found by the courts below that the adoption was in fact made. The two issues which have to be decided in this appeal are as framed by the Subordinate Judge:—

"(4) Did Gandharp Singh give permission to his wife to adopt Jwala Parshad?"

"(6) Is the adoption invalid, inasmuch as the boy is the son of the adoptive mother's brother?"

The authority to adopt Jwala Parshad was alleged to have been given to Musammat Parbati Kunwar by an oral will of her husband, Tiwari Gandharp Singh, a few days before his death. The Subordinate Judge held that the evidence that the authority to adopt Jwala Parshad had been given was untrustworthy, and found that no authority to adopt Jwala Parshad was proved to have been given.

The High Court on appeal saw no reason whatever for doubting the trustworthiness of the evidence of the witnesses who had deposed to the fact that Tiwari Gandharp Singh had given permission to his wife to adopt Jwala Parshad as a son to him, and after a careful consideration of the evidence and the surrounding circumstances found as a fact that the permission to adopt Jwala Parshad had been given. In their Lordships' opinion the learned Judges of the High Court could have come to no other conclusion unless they had perversely disregarded the evidence and all the probabilities of the case. The direct evidence that the authority to adopt Jwala Parshad had been given by Tiwari Gandharp Singh to his wife was clear, and in their Lordships' opinion was unassailable, and other facts showed that it was probable that such an authority would be given. Tiwari Gandharp Singh was a man well advanced in years; he had been thrice married; he had no surviving issue; there was no *sagotra sapinda* in his family; he was the last male of the male line; he was a man of some considerable estate and position; and he had taken Jwala Parshad, when a child of 4 or 5 years of age, to live in his house with the object of adopting him as his son, should Jwala Parshad prove himself to be a boy worthy of adoption as his son. Their Lordships agree with the finding of the High Court that the authority to adopt Jwala Parshad had been given. That authority was not a general authority to Musammat Parbati Kunwar to adopt a son to Tiwari Gandharp Singh, it was a specific authority to her to adopt Jwala Parshad as the son to her husband.

There remains to be considered the question of law raised by the sixth issue which had been framed by the Subordinate Judge. The court of the Subordinate Judge of Mainpuri is a court which is subordinate to the

High Court at Allahabad, and the Subordinate Judge of Mainpuri is bound to follow the decision in law of a Bench of the High Court to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has been altered by a subsequent Act of the legislature. As the Subordinate Judge was well aware it had been decided five years before this suit was instituted, by a Bench of the High Court at Allahabad, composed of Sir John Stanley, the then Chief Justice, and Mr. Justice Banerji, in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1), that an adoption by a Hindu widow, in virtue of an authority to adopt given to her by her deceased husband, of her brother's grandson or son is not, according to Hindu Law an invalid adoption, as the adoption by the widow is not an adoption to herself but is an adoption to her deceased husband, and that the test of eligibility of the adopted son for adoption in such case must be the test which would have applied had the adoption been made by the husband himself in his life-time.

The Subordinate Judge of Mainpuri, Chhajju Mal, professing disapproval of that decision of the High Court, which he was bound to follow, entered upon a consideration of Sanskrit texts bearing more or less upon the subject, and decided that as Musammat Parbati Kunwar could not have married her brother, the father of Jwala Parshad, the adoption of Jwala Parshad was invalid. It is difficult to follow the arguments of the Subordinate Judge, but he does not appear to have kept clearly before his mind, that the question in this case was whether a Hindu widow acting on her husband's authority, could validly adopt as a son to him the son of her brother, and was not the question as to whether a Hindu female could validly adopt to herself a son of her brother. On appeal, Sir John Stanley, C.J., and Banerji, J., applied the decision in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1) which had not been overruled, and accordingly decided that the adoption of Jwala Parshad was a valid adoption, and by their decree dismissed the suit with costs. From that decree of the High Court this appeal has been brought.

(1) (1904) 27 All. 417=1905 A.W.N. 20=2 A.L.J. 36.

1915—K 3 & 4

The foundation of the decision of the Subordinate Judge on this question of Hindu Law is the Commentary of Nanda Pandita which is known as the "Dattaka Mimansa." The "Dattaka Mimansa" is undoubtedly a high authority on the law of Hindu adoption and is treated with respect. The authority of the "Dattaka Mimansa" was considered by this Board in *Radha Mohun* v. *Hardai Bibi* (2) and in *Bhagwan Singh* v. *Bhagwan Singh* (3) and the view of this Board was that the "Dattaka Mimansa" is a work which has had a high place in the estimation of Hindu lawyers in all parts of India and has become embedded in Hindu Law, but the caution is required in accepting the glosses of Nanda Pandita in the "Dattaka Mimansa" where they deviate from, or add to the Smritis. It was pointed out by Banerji, J., in *Jaisingh Pal Singh* v. *Bijai Pal Singh* (1), on this question, as to whether a widow can lawfully adopt to her deceased husband a son of her own brother, that Nanda Pandit in the "Dattaka Mimansa" extended to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not based upon the authority of any of the Smritis or institutes of sages.

As Banerji, J., further pointed out in the same case the extension of the rule by Nanda Pandita is not supported by any text of the "Dattaka Chandrika" or by any of the texts of the sages Saunaka and Sakala from which most of the rules of the "Dattaka Mimansa" were deduced. It has not been shown to their Lordships that the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least so far as adoption by widows to their deceased husbands are concerned. It is true that in the case of *Musammat Battas Kuar* v. *Lachman Singh* (4), Pearson and Spankie, JJ. said:—

"No sufficient reason is shown why the doctrine of Nanda Pandita that a woman may not affiliate a brother's son should not be accepted as correct, and why it should not apply to the case of a woman adopting a son with the sanction and on behalf of

(2) (1899) 21 All. 460=26 I.A. 113=9 M.L.J. 67=22 Mad 398=1 Bom. L.R. 226=7 Sar. 333=3 C.W.N 427 (P.C.)

(3) (1899) 21 All. 412=26 I.A. 153=1 Bom. L.R. 310=3 C.W.N. 454 (P.C.)

(4) (1875) 7 N.W.P. H.C.R. 117.

her husband. Indeed, it does not appear that the Hindu Law contemplates or provides for the adoption by a widow of a son in her own right."

It was not necessary for these learned Judges to express any opinion on the subject. nor is it clear how the case came on appeal to the High Court, as the two Courts below had concurrently found that it was not proved that the husband had given his wife authority to adopt a son. It is quite clear that Tiwari Gandharp Singh could, in his life-time, have legally adopted Jwala Parshad, the son of his wife's brother, and had he done so the adoption would have been a valid adoption, and their Lordships fail to see any reason why Jwala Parshad, who was legally eligible for adoption by Gandharp Singh, should have become ineligible by reason of the death of Gandharp Singh. It must be remembered that the adoption was not by the widow in her own right and to herself; the adoption was to her deceased husband and under the authority which he had given to her. In *Sriramulu* v. *Rammayya* (5), the adoption of a son of a wife's brother was held to be a valid adoption, and it was rightly pointed out that the rule of Hindu Law that a legal marriage must have been possible between the adopter and the mother of the adopted boy refers to their relationship prior to marriage. In *Bai Nani* v. *Chunilal* (6), it was held that the adoption by a Hindu widow of her brother's son was valid. Their Lordships have not thought it necessary to discuss the texts and authorities which have been referred to, and are relevant to this question, as they have been fully and exhaustively considered by Sir John Stanley, C.J., and Banerji, J., in their judgments in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1).

This appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed. The appellants must pay the costs of the appeal.

D. D. *Appeal dismissed.*

Solicitors for Appellants—T. L. Wilson &. Co.

Solicitors for Respondents—Barrow, Rogers and Neville.

(5) (1831) 3 Mad. 15.
(6) (1898) 22 Bom. 973.

***A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

7th May 1915.

LORDS DUNEDIN AND ATKINSON, SIR GEORGE FARWELL AND SIR JOHN EDGE.

Vasonji Morarji—Defendant—Appellant.

v.

Mt. Chanda Bibi—Plaintiff—Respondent.

Privy Council Appeal No. 24 of 1913.

* (*a*) *Deed—Construction—Liberal construction should be placed—Meaning and not the form should be looked to.*

Deeds and contracts of the people of India ought to be liberally construed. The form of expression and literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. 6 M.I.A. 393 Ref. [P 19 C 1.]

* (*b*) *Hindu Law—Widows—Interest is not 'life-interest'—Nor is it a trust for reversioners—She can under certain circumstances convey absolute title to vendee.*

It is not quite accurate to describe the interest which a widow normally takes in immoveable property, which her husband inherits and leaves at his death, as a "life-estate." The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder but different in degree. The distinctive feature of the estate is that at her death it reverts to the heirs of the last male owner. It is not a life-estate, because, under certain circumstances, she can give an absolute and complete title. Nor is it in any sense an estate held in trust for the reversioners. Within the limits imposed upon her, the female holder has the most absolute powers of enjoyment. [P. 21, Cols. 1 and 2]

De Gruyther and *Lowndes*—for Appellant.

Lord Atkinson.—This is an appeal from a decree of the High Court of the North-Western Provinces, Allahabad, dated the 6th February, 1912, whereby a decree of the Subordinate Judge of Benares, dated the 28th July, 1910, was set aside. The respondent did not appear on the hearing before this Board to support the judgment appealed from.

The suit out of which the appeal has arisen was brought by the respondent against Thakur Vasonji Morarji, a well-to-do merchant of Bombay to recover possession of a certain house in the city of Benares, and also mesne *rates*.

The land upon which this house is built was part of the immoveable property inherited by the respondent's father, one Kunj Behari Lal, the last surviving male member of a joint Hindu family, who died on the

6th November, 1890. He left his widow, Musammat Rama Bibi, and the respondent, his daughter by that lady surviving him. He had no other issue. One Musammat Phundo Bibi, the widow of Goshain Radha Govind, the paternal uncle of Kunj Behari Lal, was, in and subsequent to the year 1892, entitled to maintenance out of the property so inherited by the latter. By deed, dated the 24th November, 1892, these two widows jointly conveyed to Thakur Vasonji Morarji some interest in the site of the aforesaid house with the two houses then standing upon it in consideration of the sum of Rs. 10,500.

The main question in dispute upon which the two Indian tribunals have differed is the nature of the interest so conveyed. The Subordinate Judge held in effect as a fact, first, that the sale of these houses was made by Musammat Rama Bibi as a matter of necessity, in order to discharge out of the purchase money certain debts due respectively by her husband's father, Krishen Chaitan Deo, deceased, and his aforesaid paternal uncle amounting to Rs. 9,500 with interest, for the payment of which the creditors were pressing, and also certain debts incurred by herself, in order to obtain the necessaries of life for the family; and secondly, that Musammat Rama Bibi, having under these circumstances the power to sell the absolute interest in this immoveable property, she intended so to do; that this deed, on the true construction of its terms, effected her intention, and carried to and vested in the purchaser the absolute interest in the then existing two houses and their sites.

The High Court, while not differing from or disturbing in any way the conclusions of fact at which the Subordinate Judge had arrived, or questioning the intention of Musammat Rama Bibi, to sell and convey the absolute interest in this piece of immoveable property, held that the terms of the deed were inadequate to convey to the purchaser anything beyond her own interest in the same, which they described as a life-interest.

The purchaser, the defendant in the suit, died on the 22nd of March, 1913. He purchased these houses for the purpose of founding a Dharamshalla on their site, and with that object caused the two dilapidated houses standing upon it at the date of the deed to be demolished, and one house to be erected upon the site at a cost to him of Rs. 13,000. Rama Bibi died on the 19th August, 1909, Phundo Bibi having predeceased her. On the 12th January, 1910, this suit was instituted by the respondent, as heir of her father, claiming the relief asked for on the ground that the sale by her deceased mother was made without necessity and without her, the respondent's consent. The Subordinate Judge found as a question of fact that the respondent was not a minor at the date of the deed, and that she had full knowledge of the intended sale, and consented to it. Owing to the fact that the respondent did not appear on the hearing of this appeal, their Lordships thought it right not to content themselves with accepting and acting on the findings of fact of the Subordinate Judge, without examining for themselves the evidence upon which those findings purport to be based. Counsel for the appellant has accordingly fully opened this evidence. Their Lordships have fully considered it, and are clearly of opinion that the existence of the debts incurred by the predecessors of Kunj Behari Lal to the amount mentioned, the necessity for the sale of the absolute interest in these two houses in order to discharge them, and the payment of them out of the purchase money when obtained, are clearly established. Their Lordships see no reason whatever to dissent from any of the Subordinate Judge's findings of fact.

The question of the proper construction of the deed of conveyance remains. The principle laid down by Lord Justice Knight Bruce in delivering the judgment of the Board in the case of *Hunooman Persaud Pandey* v. *Babooee Manraj Koonweree* (1) is particularly applicable to this case. At pp. 411-412 of the report he says:—

> "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Well, it appears to their Lordships that an examination in detail of the provisions of the deed of conveyance in this case cannot leave any doubt upon one's mind that all the parties meant that the absolute interest

(1) (1854—57) 6 M.I.A. 393=2 Suther 29=18 W.R. 81 *note*=1 Sar. 552 (P.C.)

in these two houses should be conveyed to the purchaser, and thought that it had by the deed been effectually conveyed to him. That instrument commences with a full and detailed recital of the title to the property. It contains a declaration that Rama Bibi is the owner of all the property left by her deceased husband, but that Phundo Bibi being an elderly woman in the family, this property was by courtesy enjoyed by the latter jointly with herself.

It is then recited that the deceased husbands of these two ladies (both of whom executed the deed) did not leave behind them property, the produce of which was sufficient to meet their necessary expenses; that they had been obliged to borrow money to provide the ordinary necessaries of life; that the father and paternal uncle of Kunj Behari Lal were at the time of their respective deaths each indebted to several creditors, still unpaid, who were pressing for their money; and that the only way by which money could be procured to discharge all these debts was by selling a portion of the property inherited by Kunj Behari Lal. Not, be it observed, a particular estate, or interest in the whole or a portion of that property but a portion of the property itself, part of the corpus as it were, if one may use that expression.

Now, it is plain that all these recitals touching the existing indebtedness of the executants and their predecessors could only have been introduced for the purpose of showing that the circumstances were such as to give to the executants the power to dispose of the absolute interest. The recitals were entirely *otiose*, serving no purpose whatever, if the intention and object of the parties were merely to dispose of the interest to which Rama Bibi would normally be entitled as the widow of her deceased husband. She could dispose of that interest whether debts existed or not. So the special pains are taken to set out in detail the facts and circumstances which remove every fetter from her power of disposition over the absolute interest.

It is next recited that the two executants have jointly and severally agreed to sell and convey all their full and existing rights in the two houses to the purchaser for the sum of Rupees 10,500, to be paid in cash; and that Phundo Bibi has joined as an executant by virtue of her position in the family for the additional guarantee of the vendee. Her right to maintenance was a liability affecting the absolute interest in every portion of the property left by Kunj Behari Lal. It might last beyond the life of Rama Bibi if Phundo Bibi outlived her; but the vendee, it was agreed, was to enjoy the property absolutely discharged from this latter liability for all time. By the operative granting part of the deed Rama Bibi in the first place sells, conveys, and transfers all her rights and interest in these two houses to the purchaser without any reservation. Then Phundo Bibi transfers to him her only right in the property, namely, her right to maintenance. And then the two ladies jointly proceed to sell and convey to him all their own existing right, title, and interest in, or belonging or appertaining to these two houses, including easements, and declare that from the execution of the deed thenceforth the purchaser shall be—

> "the full owner and proprietor of the said houses in our stead, and shall own, possess, and enjoy them in the same way as we have been hitherto doing."

Then there follow two very significant provisions, first, that—

> "as proof of the existing debts and the necessity of conveying the property for purposes aforesaid Sham Lal, the husband of Chanda Bibi" (*the respondent*) "has signed as one of the witnesses of the deed,"

and secondly, that—

> "should at any time the said vendee or his heirs and representatives be deprived of whole or part of the property conveyed by this deed he or they would be entitled to recover the money in full or in part, as the case may be, from us and rest of our property."

That guarantee might not be of much value, but it contemplated a loss which might occur after the death of Rama Bibi. Well, the purchase money was paid, the debts were discharged, and Sham Lal and the creditors of the male debtors, whose claims were paid, signed the deed as witnesses.

Thus every precaution which apparently occurred to the mind of the parties to the instrument or to those of their advisers was taken to show on the face of the document that circumstances existed which would empower Rama Bibi to dispose of the absolute interest in this property.

There can be no doubt, therefore, as to object and intention of the parties to the transaction, and as to their view as to the

meaning and effect of the language of the instrument. They all obviously intended that all the interest which the recited circumstances, true in themselves, empowered Rama Bibi to alienate should pass to the vendee, and it is equally plain that they thought that the effect of the instrument was to pass it to him.

The High Court seem to have attached little importance to some, if indeed not all, of the pregnant recitals which have been referred to. They took the two following passages from the granting part of the deed, first :—

"I, the said Rama Bibi do hereby convey, sell and transfer all my rights and interest in the said houses which I inherited from my said deceased husband, Goshain Kunj Behari Lal."

And secondly—

'We . . . . . sell all our existing rights, title, and interest . . . ".

As together with the declaration that the vendee—

"Will be the full owner and proprietor of the said houses in our stead, and shall own, possess, and enjoy them in the same way as we have been hitherto doing."

They then proceed to say—

"These recitals" (as they erroneously style them) show that the widow was selling such rights as she had as widow, that is to say, her life-estate."

With all respect to the learned Judges of the High Court their Lordships are quite unable to take that view. They think that the High Court fell into the very error which Lord Justice Knight Bruce, in the passage already quoted, stated should be guarded against, in the construction of deeds between the people of India. They took the strict literal sense of the words in the passages referred to, and ignored the meaning which the parties to the transaction obviously attached to them. It is not quite accurate to describe the interest which a widow normally takes in immoveable property, which her husband inherits and leaves at his death, as a "life-estate."

In Ch. 20 of Mr. Mayne's "Hindu Law," 8th Ed., p. 846, he lays it down that it is wholly incorrect so to describe her estate, and that it would be just as untrue to speak of the estate of a father under the Mitakshara Law as one for life.

"Hindu Law," he says, "knows nothing of estates for life or in tail or in fee. It measures estates not by duration but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder but different in degree. The distinctive feature of the estate is that at her death it reverts to the heirs of the last male owner."

And again at page 870 :—

"It is not a life estate, because, under certain circumstances, she can give an absolute and complete title.

Nor is it in any sense an estate held in trust for the reversioners. Within the limits imposed upon her, the female holder has the most absolute powers of enjoyment."

If the circumstances existed which enabled her to dispose of that absolute interest, and she intended to dispose of it, the language of the instrument does not seem inadequate for the purpose.

Taking the deed as a whole and endeavouring to reconcile its various provisions the one with the other, giving effect as far as possible to each, their Lordships find nothing in its language constraining them to adopt a construction which would plainly defeat the object and intention of the contracting parties. They think the passages relied upon by the High Court may well be construed as meaning to refer to the right to, and interest in, the property which Rama Bibi, as the widow of her deceased husband, had in the particular circumstances of the case, power for the purpose indicated, to sell and dispose of, that is, the absolute interest, and not as merely meaning to refer to the right and interest which a widow normally takes in the immoveable property which her husband owned at his death and leaves after him.

Their Lordships are, therefore, of opinion that the decree appealed from was erroneous and should be reversed, that the decree of the Subordinate Judge should be restored with costs throughout, and they will humbly advise His Majesty accordingly.

The respondent will pay the costs of this appeal.

D.D. *Appeal allowed.*

Solicitors for Appelant—T. L. Wilson & Co.

****A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

3rd June 1915.

LORD ATKINSON, SIR JOHN EDGE AND MR. AMEER ALI.

Padarath Halwai and *others*—Defendants ...Appellants.

v.

Ram Narain Upadhia and *others*—Plaintiffs—Respondents.

Privy Council Appeals Nos. 30 and 31 of 1912.

** (*a*) *Transfer of Property Act, S. 59—Mortgage by Purdha lady—Witnesses not seeing the lady's face but recognising by voice and seeing her signing—Attestation was held proved—Pardanashin lady.*

The mortgagors who were two pardanashin ladies did not appear before the attesting witnesses, and consequently their faces were not seen by the witnesses who however recognised them from the voices with which the witnesses were well acquainted. The witnesses also saw each lady execute the deed with her own hand ;

Held that the mortgage deed was duly attested by at least two witnesses within the meaning of S. 59. [P. 22, C. 2.]

** (*b*) *Transfer of Property Act, S. 81—Two properties mortgaged to prior mortgagee—One only mortgaged to subsequent mortgagee—Prior mortgagee joined in suit by subsequent mortgagee for sale—Sale ordered—Prior mortgagee not insisting on satisfaction of his amount due—His separate suit on his mortgage is not barred—Civil P.C., S.11.*

The prior mortgagee was joined in a suit by subsequent mortgagee for sale of the mortgaged property but did not press his claim for full amount in that suit. The property was sold but proceeds being insufficient another property which was included in the mortgage of prior mortgagee but not in that of subsequent mortgagee was sold. The prior mortgagee then sued on his mortgage ;

Held that that purchaser of the other property could not challenge the right of the prior mortgagee to recover his full amount. [P. 24, C.I.]

E. Richards and *Brown*—for Appellants.

DeGruyther—for Respondents.

Sir John Edge.—These are consolidated appeals from decrees, dated respectively the 29th of March, 1909, of the High Court of Judicature at Allahabad. The two decrees appealed from were made in appeals in the same suit. The suit was brought in the Court of the Subordinate Judge of Jaunpur on the 29th of November, 1904, to enforce, by sale of the village Baragaon and other villages, the payment of Rs. 66,809 odd, due under a mortgage, dated the 25th of June, 1892. The Subordinate Judge decreed the claim in part, and in part dismissed it. Each side appealed to the High Court at Allahabad. The High Court dismissed the defendants' appeal, and in the plaintiffs' appeal gave them a decree for their claim.

When these consolidated appeals first came on for hearing before this Board it was contended on behalf of the appellants that the mortgage upon which this suit was brought had not been attested by at least two witnesses, and as the amount secured by it exceeded one hundred rupees the alleged mortgage was ineffective and could not be given in evidence. That point had not been raised in either of the Courts below. Under the circumstances this Board remanded the case to the High Court in order to enable the parties to produce evidence on the question of attestation. Evidence on that subject has been taken and has been returned to this Board. On behalf of the appellants it has now been contended that the evidence which was given on the remand in proof of the attestation was unreliable, and even if accepted as true, did not prove that the two attesting witnesses who gave evidence on remand had seen the mortgagors sign their names to the mortgage.

The mortgagors were two *pardahnashin* ladies who did not appear before the attesting witnesses, and consequently their faces were not seen by the witnesses. These two attesting witnesses were, however, well acquainted with the voices of the ladies, and their Lordships are satisfied that these two attesting witnesses did identify the mortgagors at the time when the deed was executed. The mortgagors were, on the occasion of the execution of the mortgage deed, brought from the *zenana* apartments of the house in which they were to an ante-room to execute the deed. In the ante-room the ladies seated themselves on the floor, and between them and these two attesting witnesses there was a *chick*, which was not lined with cloth, hanging in the doorway. These two attesting witnesses recognised the ladies by their voices, and they say that they saw each lady execute the deed with her own hand, although owing to the *chick* they were unable to see the face of either of the ladies. On the other side an attempt was made to prove that a *tat*, through which nothing could be seen, was hanging in the doorway. Their Lordships accept the evidence of these two attesting witnesses as true, and hold it proved that the mortgage deed on the 25th of June, 1892, was duly attested by at least two witnesses within the meaning of section 59 of the Transfer of Property Act, 1882. It is not disputed that the mortgage deed was in fact the deed of the two *pardahnashin* ladies, Musammat Niamat Bibi and Musammat Kamar-un-nisa Bibi, the mortgagors.

The only other question to be considered in these appeals is the contention on behalf

of the appellants that the plaintiffs in the suit have by reason of certain events, which will now be referred to, lost their right to enforce against Baragaon payment of a considerable part of the amount which they have claimed.

On the 8th of August, 1887, Musammat Niamat Bibi and Musammat Kamar-un-nisa, who will be hereafter referred to as the mortgagors, mortgaged the villages Arghupur and Baragaon, to Sarju Parshad and Ramanand to secure Rs. 12,000 and interest thereon. On the 19th of February, 1892, the mortgagors mortgaged Arghupur to Lukshmi Prasad and others to secure Rs. 30,000 and interest thereon. The mortgagees of the 19th of February, 1892, and their representatives-in-title will hereafter be referred to as the second mortgagees. On the 25th of June, 1892, the mortgagors by their deed of that date mortgaged Arghupur and Baragaon, together with three other villages, to Sarju Parshad and Ramanand to secure Rs. 32,000 and interest thereon. This sum of Rs. 32,000 included a sum of Rs. 18,000 principal and interest then due under the mortgage of the 8th of August, 1887. On the 20th of May, 1893, the mortgagors further mortgaged Arghupur to the second mortgagees to secure Rs. 21,324 and interest thereon. Sarju Parshad is dead; he is represented in this suit by his son, Ram Narain, who is one of the three plaintiffs. The other plaintiffs are Ramanand and his son S. Narain.

On the 14th of December, 1896, the second mortgagees brought a suit in the Court of the Subordinate Judge of Jaunpur upon their mortgages of the 19th of February, 1892, and the 20th of May 1893, to obtain a decree for the principal moneys and interest due under the said mortgages, and they prayed that in default of payment on a date to be fixed by the Court, Arghupur should be sold by auction and the proceeds of the sale should be applied towards the satisfaction of their decree. To that suit the second mortgagees made Musammat Kamar-un-nisa Bibi as one of the mortgagors and as the heiress of Musammat Niamat Bibi, then dead, the other mortgagor, Surja Parshad, Ramanand and one Indar Sen Singh, defendants. Indar Sen Singh was a subsequent mortgagee; he is a defendant to this suit, but is not an appellant. In their plaint the second mortgagees stated that Sarju Parshad, Ramanand and Indar Sen Singh were mortgagees of Arghupur and that they, the then plaintiffs, "were ready to pay the mortgage money due to any of them who may be prior mortgagees and which they (plaintiffs) may be legally bound to pay."

In their written statement in the suit of 1896, Sarju Parshad and Ramanand distinctly claimed their right as prior mortgagees and said, "If the plaintiffs be willing to get the hypothecated property sold, after paying in full the prior amount due to these defendants, they have no objection whatever to the plaintiffs' claim."

The then Subordinate Judge of Jaunpur, being obviously in confusion of mind as to the rights of the parties to the suit of 1896, by his judgment of the 19th of January, 1897, decided amongst other things that Arghupur should be sold by auction in the event of the defendants to the suit failing to pay, on or before the 19th of May, 1897, to the plaintiffs in that suit (the second mortgagees) Rs. 49,275-9-0, the principal and interest due under the mortgage of the 19th of February, 1892, and future interest, and that the proceeds of the sale should be applied first in payment of the amount due to the second mortgagees under their mortgage of the 19th of February, 1892, and that the balance, if any, should be "applied to payment of the sum which may be due to Sarju Parshad and Ramanand on that date with interest. Any surplus left to be applied in payment of the sum due to the plaintiffs under the second document, dated the 20th of May, 1893." The Subordinate Judge apparently overlooked the rights of Sarju Parshad and Ramanand under their prior mortgage of the 8th of August, 1887. In accordance with the judgment a decree was made by the Subordinate Judge. Default having been made in payment on the date fixed a decree absolute for sale of Arghupur was made by the Subordinate Judge of Jaunpur on the 4th of September, 1897. Under the decree of the 4th of September, 1897, Arghupur was sold. The proceeds of the sale were applied first in payment to the second mortgagees of the sum then due to them in respect of their mortgage of the 19th of February, 1892, and the balance of the proceeds of the sale was paid to the first mortgagees; that balance did not satisfy the amount then due to the first mortgagees.

under their mortgage of the 8th of August, 1887. If the proceeds of the sale of Arghupur had been first applied to the payment of the amount then due under the mortgage of the 8th of August, 1887, that mortgage would have been satisfied, and the amount due under the mortgage of the 25th of June, 1892, would have been to that extent reduced. As the proceeds of the sale of Arghupur did not satisfy the amount due to the second mortgagees under their mortgage of the 20th of May, 1893, they obtained a decree under section 90 of the Transfer of Property Act, 1882, and in execution of this decree the village of Baragaon was sold on the 20th of April, 1904, and was purchased by the appellants.

On behalf of the appellants it has been contended before this Board and in the Court below that Baragaon was relieved of all liability in respect of the debt due under the mortgage of the 8th of August, 1887, by reason of the failure of Sarju Parshad and Ramanand to insist on their priority under that mortgage, it being alleged in support of the contention that Sarju Parshad and Ramanand had agreed to waive their priority as mortgagees of Arghupur, or had waived it, of which, if it were material, there is no proof, and that they were guilty of laches in not insisting on that priority. Their Lordships have found it difficult to follow the argument in support of the contention, as the appellants had no interest in Baragaon until they purchased Baragaon on the 20th of April, 1904, and what they then purchased was the interest of the mortgagors in that village.

It is true that had Sarju Parshad and Ramanand appealed against the decree of the Subordinate Judge, they could have had their interests as first mortgagees under the mortgage of 8th of August, 1887, protected, and would, on the sale of Arghupur, have obtained payment of the amount then due under that mortgage. Sarju Parshad and Ramanand did not, by an appeal, insist on their right as prior mortgagees, but the fact that they did not insist on having the amount due under the mortgage of the 8th of August, 1887, satisfied in priority to the claim of the second mortgagees does not disentitle the plaintiffs to recover the full amount of their claim in this suit, and does not entitle the appellants to relief. No other fact which would entitle the appellants to relief has been shown. The appeals fail.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed.

The appellants must pay the costs.

D.D. *Appeals dismissed.*

Solicitor for Appellants—Douglas Grant.

Solicitors for Respondents—Barrow, Roger and Nevil.

A.I.R. 1915 Privy Council.

(FROM CALCUTTA.)

19th January 1915.

LORDS DUNEDIN AND SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

Ravaneshwar Prasad Singh and *others*—Appellants.

v.

Baijnath Ram Goenka and *others*—Respondents.

Privy Council Appeal No. 21 of 1912.

(a) Bengal Land Revenue Sale Act (11 of 1859), Ss. 5 and 6—Specifications of property to be sold should be given—Object is to ensure competition among likely purchasers.

Act 11 of 1859 is a stringent enactment for the realization of arrears of revenue; at the same time it provides certain safeguards for the protection of the interests of the defaulter so that he may not be necessarily prejudiced. Among these safeguards are the provisions of Ss. 5 and 6 for the issue of notifications of sales specifying the properties to be sold, and their due publication in accordance with the law. And an exact compliance with its requirements is considered so important by the Government that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale. The object of the law as well as of the Board's rules requiring specification of the properties to be sold, is to ensure thereby reasonable competition among the likely purchasers. When an estate is advertised for sale it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard-and-fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case.

What has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's office.

The particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for.

(b) Bengal Land Revenue Sale Act (1859), S. 33—Property worth lakh sold for one-third price—Substantial injury exists within S. 33.

Where the property was worth a lakh of rupees, and in consequence of the irregularity in the sale notification it was sold for one-third of its value.

Held, that there was substantial injury within S. 33. [P. 27, C. 1.]

Earle Richards and *A. M. Dunne*—for Appellants.

De Gruyther and Dube—for Respondents.

Mr. Ameer Ali—This isan appeal from a judgment and decrec of the High Court of Bengal, dated the 1st of May 1907, and the question for determination relates to the validity of a sale for arrears of revenue, held under Act XI of 1859 of a share of an estate called Mahal Bisthazari situated in the district of Monghyr.

The case offers an illustration of the extreme complexity of the land-system existing in Bengal. A 15 annas 6 dams share of Mahal Bisthazari seems to have been in existence as an independent fiscal unit for a considerable time. It includes 360 villages, and in the Collector's register is entered as being Touzih No. 336, which marks its position as a separate revenue-paying estate.

As is usually the case in Bengal and elsewhere in India, a large number of persons possess proprietary rights in this mahal; they own specific shares, some in one village only, others in several villages. Ordinarily the whole estate held in this wise is liable to be put up for sale for default in the payment of Government revenue. But Act XI of 1859, which lays down the rules for the realization of the revenue payable to the State, provides (by section 10) that "a recorded sharer of a joint estate held in common tenancy," or (by section 11), "a recorded sharer of a joint share whose share consists of a specific portion of the land of the estate," may apply to the Collector to open a separate account for the payment of his share of the revenue separately from the others. These separate accounts in respect of separate shares ensure that no share of an estate other than the one in respect of which the default had occurred should be exposed to sale (section 13) until and unless the highest offer for that share does not equal the amount of the arrear (section 14), when the whole estate becomes liable to be put up to sale.

In accordance with the provisions of sections 10 and 11 of Act 11 of 1859, 148 owners of specific but undivided shares in Mahal Bisthazari applied for and obtained from the Collector separation of accounts.

This left, however, a large residue, commonly called the ijmali or joint share, the owners of which remained jointly liable for the revenue due in respect thereof.

In August 1901, this ijmali share was found to be in arrears for the March and June kist or instalment of Government revenue, amounting to Rs. 604, and it was advertised for sale on the 9th September 1901. An application appears to have been made to the Collector for postponement of the sale, which, however, was refused, and the sale was held on the advertised date, when the property was purchased by the defendant—respondent, Baijnath Goenka, for a sum of Rs. 33,500.

An appeal to the Commissioner of the Division, preferred by the owners of the ijmali share, under section 25 of the Act, having been dismissed, the plaintiffs brought their suit in the Court of the Subordinate Judge of Monghyr for the annulment of the sale. The grounds on which they base their action are exactly the same as those they urged before the Commissioner. These grounds are set forth with sufficient distinctness in the 18th paragraph of the plaint, sub-clause (*c*), which is in these terms:—

"That the description of the ijmali share given in column 5 of the said notification was incorrect, insufficient, and misleading, and having regard to the nature of the interest included in the said ijmali account and to the fact that it was constantly fluctuating, a fuller and more specific description thereof, with particular reference to the villages and the diverse interests making it up, should have been given, all materials for the same being available to the Collector in his office. The omission to give such detailed description of the ijmali account has largely affected the sale and value of the property sold."

Shortly stated, the points at issue resolve themselves into two questions—one of law and the other of fact: (i) Whether, having regard to the purpose in view, the specification of the property in the sale-notification was in accordance with the provisions of the law; and (ii) whether, in case the requirements of the law had not been complied with, the plaintiffs, by reason of the irregularity, had sustained injury.

The trial Judge found both questions in favour of the plaintiffs. He held in effect that the specification was insufficient and defective, and that in consequence thereof the property was sold at a gross

under value. He accordingly made a decree annulling the sale. The High Court, on appeal, came to a directly opposite conclusion on both points, and reversing his judgment, have dismissed the plaintiffs' action.

In these circumstances it becomes necessary, in their Lordships' opinion, to consider carefully the description or specification which the Trial Judge holds to be insufficient and irregular and which the High Court, on the other hand, regards as sufficiently complying with the requirements of the law.

Act 11 of 1859 is a stringent enactment for the realization of arrears of revenue; at the same time it provides certain safeguards for the protection of the interests of the defaulter so that he may not be unnecessarily prejudiced. Among these safeguards are the provisions of sections 5 and 6 for the issue of notifications of sales specifying the properties to be sold, and their due publication in accordance with the law. And an exact compliance with its requirements is considered so important by the Government that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale. The object of the law as well as of the Board's rules requiring specification of the properties to be sold is clearly to enable likely purchasers among the public to know exactly what was going to be sold, and to ensure thereby reasonable competition. When an estate is advertised for sale it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard-and-fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case.

In the present case the notification under sections 6 and 13 of the Act was affixed in the Collector's office and in the court of the Judge of the district; and as the revenue payable in respect of the ijmali share exceeded Rs. 500, it was also published in the Calcutta Gazette, which is the official gazette prescribed in the Act. In this notification, which bears date the 7th of August 1901, what purports to be a specification of the share to be sold is in these terms; "ijmali share which cannot be specified excluding the separate accounts number—." Then follows a long list of the 148 separate accounts already referred to. And at the end the following words occur: "All other shares besides that specified are excluded from the sale."

In the sale notification issued on the 6th of August 1901, which was apparently the one affixed in the Collector's office, the entry in column 5 (the specification column) is as follows:—

"The ijmali share cannot be particularised owing to separate accounts having been opened. The shares to be sold are those (sic) given in a separate sheet after excluding the shares in respect of which the separate accounts have been opened."

The learned Judges of the High Court have given in their judgment a translation of the vernacular words in the notice. It is not necessary to consider whether their rendering is quite correct. For, the fact remains that admittedly there was no specification of the share to be sold beyond what has already been stated. The intending purchaser was left to gather for himself by going through an elaborate process of elimination of the property that was advertised for sale, and for which he was expected to bid. It is to be observed that the publication of the notice in the Calcutta Gazette is prescribed with the object of inviting purchasers from other quarters and thus not confining the bidding to speculative money-lenders and Mukhtears of the neighbourhood, which is hardly likely where the notification gives little or no particulars, as in this instance, in respect of the property advertised for sale.

The cases to which their Lordships' attention has been invited give, in their opinion, no assistance in determination of the point at issue here. As already observed, each case must depend on its own particular facts; (*a*), what has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's office. In their Lordships' opinion (*a*2) the particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for.

Their Lordships, therefore, have no hesitation in agreeing with the Trial Judge that the notification in this case was insufficient and irregular, and not in compliance with the requirements of the law.

Section 33 provides that no sale should be set aside on the ground that it was made contrary to the provisions of the Act, unless the plaintiff proves that he has sustained "substantial injury" by reason of the irregularity complained of. The Trial Judge found that (*b*) the property was worth a lakh of rupees, and that in consequence of the irregularity in the sale notification the defendant was enabled to buy it for one-third of its value.

The learned Judges of the High Court, after an elaborate calculation, thought that, considering the mortgages on the property, it had fetched at the sale a fair value. In view of this divergence of opinion their Lordships have examined the evidence for themselves, and they have come to the conclusion that the view of the Trial Judge, both as regards the value and the fact that the lowness of the price was due to the defectiveness of the notice, was well-founded. With respect to the value, the weight of evidence is clearly on the side of the plaintiffs; whilst a reference to the bid-sheet and the testimony of Balmukund and Korban Ali leave little room for doubt that the low figure at which the property as knocked down was directly due to the paucity of genuine or substantial bidders in consequence of the absence of proper specification in the sale-notification.

Their Lordships cannot help regretting that the Commissioner did not annul the sale on the appeal preferred to him, which would have saved a long and harassing litigation extending over 12 years.

Their Lordships are of opinion that the judgment and decree of the High Court ought to be set aside and the decree of the Subordinate Judge restored, save and except as to villages Matasi and Mirzaganj, in regard to which the claim is permitted to be withdrawn, with liberty to the appellants to institute a fresh suit in respect thereof, if so advised. The respondents must pay the costs of this appeal and of the appeal in the High Court. And their Lordships will humbly advise His Majesty accordingly.

D.D. *Appeal allowed.*

Solicitors for Appellants.—T. L. Wilson & Co.

Solicitors for first Respondent.—Watkins and Hunter.

****A.I.R. 1915 Privy Council.**

(FROM CALCUTTA)

9th February 1915

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Ram Kanai Singh Deb Darpashaha and *another*—Appellants.

v.

Mathewson and *others*—Respondents.

Privy Council Appeal No. 62 of 1913.

(*a*) *Chota Nagpur Encumbered Estates Act (1876) and Act 5 of 1884—S. 17—Transaction sanctioned—Deed drawn up later on—Challenge on the ground that the deed was not sanctioned is untenable.*

When it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. [P. 29, C. 1.]

(*b*) *Deed—Construction—Name of lessee misdescribed—Proper lessee intended—Misdescription does not invalidate.*

Where there was a misdescription in the name of the lessee in the deed but the proper lessees were intended,

Held, that such misdescription did not affect the validity of the lease. [P. 29, C. 2.]

Upjohn and *Dunne*—for Appellants.

De Gruyther and *W. Garth*—for Respondents.

Lord Shaw.—This is an appeal from a judgment and decree of the High Court of Bengal, dated the 28th April 1910, affirming a judgment and decree of the Subordinate Judge of Manbhum, dated the 25th November 1907, dismissing the suit with costs. The main object of the suit was to obtain a declaration of the nullity of a putni lease, dated the 29th June 1890. The other demands in the plaint were consequential upon such a declaration of nullity being obtained. The only question argued in the appeal was whether the putni lease was *ultra vires* and invalid.

The facts are briefly these. The first appellant, the plaintiff, is the son and successor of the late Raja Broja Kishore Singh Deb Darpashaha, the owner of the Barabhum estate. In 1883 the Raja borrowed Rs. 60,000 from Messrs Robert.

Watson and Company on a mortgage of his estate, and on 27th February of that year he executed an ijara lease in their favour. This lease contained a condition that if the Company should desire to take a putni lease of such portions of 84¼ villages as were treated in the ijara as ghatwali lands, the Raja would grant such a putni on certain terms. On 8th March 1885 this putni was granted. Four years thereafter, *viz.*, on 8th March 1889, the affairs of the Raja being deeply embarrassed his estate was placed under the protection of Government by virtue of the Chota Nagpur Encumbered Estates Act, 1876.

There were apparently considerable difficulties in arranging for the liquidation of the debts. After negotiations it was agreed that the remaining portions excluded from Messrs. Watson and Company's former putni lease should be demised to these creditors for a sum of Rs. 30,000. Their Lordships have considered the documents and have no hesitation whatsoever in accepting the view that the true, and, in fact, only meaning of the transaction was that expressed in the Commissioner of Chota Nagpur's letter of the 20th February 1890, in which he sanctioned "the proposal to grant them a putni lease of the 84¼ villages excluded from the present putni."

The elements of the transaction being thus settled and the amount of the premium arranged, what remained to be done was to have the actual deed drawn up and executed. This was done. It has been argued before the Board that the putni lease which was sanctioned was to be a lease containing the terms of the ijara lease. The Board cannot assent. These two contracts are essentially different in character, the latter being of a temporary character, containing provisions and reservations suitable to a lease for a short duration. Their Lordships have no hesitation in accepting the judgment of the High Court which is thus expressed on this point :—

"The fact that the Raja had granted a previous putni lease was known to the Commissioner, and was, in fact, referred to in his sanction. It is reasonable to assume that theCommissioner understood its character when he was asked to sanction a similar putni. It would have been inconvenient that the subsequent putni should be on any different terms from the first, because, as pointed out in the course of the correspondence, the proposed new putni was in respect of villages which were scattered about in the area covered by the earlier putni, and the object of the second putni was to round up the Estate. I do not think, therefore, that this ground has been made out."

Apart from the point just dealt with, the putni lease actually granted is now challenged. The grounds of challenge may be compendiously and conveniently stated as follows :—

(*i*) It is said that the sanction was, upon a sound construction of the letter of 20th February 1890 merely a sanction of a proposal to grant a putni. Their Lordships think the objection to be trivial. This proposal had been made, it had been accepted, a contract was accordingly, completed on the subject, and it was that contract so completed that was sanctioned.

(*ii*) It was said that the sanction contained the clause "provided that the amount be paid before the end of March 1890". In the course of carrying out the bargain some delay, not very great, occurred. There was an exchange of views as to the actual wording of the draft putni, but the document was finally settled by both parties, and on the 25th June 1890 Messrs. Watson and Company paid the salami of Rs. 30,000 to the official manager of the estate, *viz.*, the Deputy Commissioner. This being done, it does not appear to their Lordships that it would have been open thereafter for a challenge to be made, even by the Deputy Commissioner himself, or for the Commissioner's sanction to have been withdrawn. *A fortiori* there appears no ground for sustaining such challenge when put forward after a considerable lapse of years on behalf of the successor of the debtor.

(*iii*) The last objection is of a two-fold character. It is urged that the sanction of the Commissioner, being a statutory requisite in virtue of the Chota Nagpur Encumbered Estates Act of 1876, of the rules thereunder, and of the Act of the Governor-General No. V of 1884, such sanction was not given to the final and actual putni lease itself. This depends upon a construction, especially, of Rule 16, which is in the following terms :—

"The powers to lease under section 17 of the Act shall be subject to the following provision :— No lease shall be given for any term exceeding three years without the sanction of the Deputy Commissioner, or exceeding four years without the sanction of the Commissioner."

Upon this point their Lordships are of opinion that when it is affirmatively established that a transaction itself in all its

essential particulars has obtained the sanction of the Commissioner, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect, and put into legal shape, the arrangement to which sanction was adhibited. The first head of this objection accordingly fails. And it was further urged that in any view the transaction which was sanctioned was a transaction of a grant of a putni lease to Robert Watson and Company, in other words to a firm of individual men and not to Robert Watson and Company, Limited, *i.e.*, a different and incorporated persona. This demands careful consideration. Here is this to be said for the objection, that the persona in the latter case is different from the persona in the former, and that a change in the lessee or putnidar ought to be treated as a change in essentials. It may be added that a putni lease of land, an agreement of an important and widereaching character might demand separate consideration, and point to a different conclusion when this essential was altered. Questions might arise, and difficulties suggest themselves with regard to a limited company against whom legal remedies at law might not be the same as in the case of individuals, and public and administrative considerations might come into play operative either in the way of restriction or refusal on account of a change in persona in the lessee. In the opinion of their Lordships, it is not necessary to pronounce any judgment upon this point in the present case. For their Lordships are of opinion that when the negotiators in the course of correspondence mentioned in their letters Robert Watson and Company, they did in fact mean and were perfectly understood to mean Robert Watson and Company, Limited, the fact of the incorporation of the limited concern being well-known; and, indeed, one of the principal documents of the case is the petition dated 14th May 1889, being the petition of Messrs. Robert Watson and Company, Limited, filing, the account of the money due to them. It may be true that the limited concern is a different one from the previous and uncorporated firm, but in the language of the judgment of the High Court:—

"The misdescription does not, under the ordinary principle applicable to such matters, affect the validity of the sanction or the lease. Though there was such a misdescription, it is perfectly clear what was intended by the sanction, and that it was intended that the lease should be given and taken by the persons who are properly described as Messrs. Robert Watson & Co., Limited."

A point was taken to the effect that the putni transaction could not be held to have been ratified, seeing that it had not specifically taken into account the existence of khorposh or maintenance rights, over the property sold. These could in no view have been effected for the simple reason that the interests of third parties properly secured over the properties, were in no respect prejudiced. And as to the further point that in the event of the discontinuance of these rights a certain reversion would follow to the zemindar, their Lordships are of opinion that this reversionary right not being in fact embraced within the grant, no prejudice to any such right has occurred. The point accordingly fails.

Their Lordships are of opinion that the judgments of the Courts below are correct, and they will humbly advise His Majesty that the appeal be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellants.—Theodore Bell & Co.

Solicitors for Respondents.—Burton, Yates & Hart.

** **A.I.R. 1915 Privy Council.**

(FROM PUNJAB)

3rd March 1915

VISCOUNT HALDANE.

LORDS DUNEDIN, AND ATKINSON, SIR GEORGE FARWELL AND MR. AMEER ALI.

Balmukund and *others*—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

* *Royal Prerogative—It is a matter for executive Government and not for Privy Council.*

Privy Council is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of His Prerogative of pardon is a matter for the Executive Government, and is outside the province of Privy Council.

Robert Finlay and *Dube*—for Petitioners.

Dunne—for the Crown.

Viscount Haldane.—Their Lordships are unable to advise His Majesty to make any order on the petition for special leave to appeal at this stage.

With regard to staying execution of the sentence of death, their Lordships are unable to interfere. As they have often said, this Board is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of His Prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province. It is, of course, open to the petitioner's advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will no doubt give due weight to the fact, and consider the circumstances. But their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended.

No order made.

D.D. *Order accordingly.*

Solicitors for Petitioners—Barrow, Rogers & Nevill.

Solicitors for the Crown—Solicitors, India Office.

**A.I.R. 1915 Privy Council.

(FROM CALCUTTA)

13th July 1915.

VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

Tara Kumari—Appellant.

v.

Chaturbhuj Narayan Singh and *others*—Respondents.

Privy Council Appeal No. 31 of 1913.

** (*a*) *Hindu Law—Impartible estate descending by primogeniture—Widow of last issueless male holder is not excluded from succession.*

It is well decided law that the widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from the succession is proved, there is no inconsistency between a custom of impartibility and the right of females to inherit. *12 M.I.A. 523; 29 Cal. 828 and 9 M.I.A. 539 Foll.* [P. 32, C. 1.]

* (*b*) *Custom—Custom supersedes general law.*

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all outside the custom. *12 M.IA. 523 Ref.* [P. 32, C. 1.]

* (*c*) *Hindu Law—Impartible estate—Evidence to show separation discussed.*

The facts that, the younger member of an impartible estate was given lease of certain property for maintenance that after the grant of the Mokurari lease for maintenance he lived in a separate house alongside his family homestead, that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, are sufficient to prove that there was a complete separation between him and the holder of the impartible estate. [P. 33, C.1.]

* (*d*) *Hindu Law — Impartible estate — Other members cannot claim partition nor can prevent alienation by the holder or his widow.*

In the case of an impartible estate, the members other than the holder, have no co-parcenary right nor have they any rights which entitle them to claim a partition. They cannot prevent the holder from alienating the estate so as to determine their contingent interest if any. The widow of the last male issueless holder can exercise the same rights as the male holder. [P. 33, Cols. 1 and 2.]

Robert Finlay and *Lowndes*—for Appellant.

DeGruyther and *Dunne*—for Respondents.

Sir John Edge.—These are consolidated appeals. That in which Thakurani Tara Kumari is the appellant has arisen in a suit which was brought by her on the 10th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In that suit Maharajah Sir Ravaneshwar Pershad Singh was a *pro forma* defendant. The other appeal in which Maharajah Sir Ravaneshwar Pershad Singh is the appellant, has arisen in a suit which was brought by him on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In the latter suit Thakurani Tara Kumari and others were *pro forma* defendants. In each suit the Subordinate Judge made a decree in favour of the plaintiff in the suit. From each decree Chaturbhuj Narayan Singh and his minor sons appealed to the High Court of Judicature at Fort William in Bengal, which, by its decree in each appeal, reversed the decree to which the appeal related and dismissed the suit. From those decrees of the High Court these consolidated appeals have been brought.

The Thakurani is the widow of Thakur Ram Narayan Singh, who was a son of Thakur Ranjit Narayan Singh, who was the elder of the two sons of Thakur Bhairo Narayan Singh. Chaturbhuj Narayan Singh was the son of Bhupat Narayan Singh, who was the younger son of Thakur Bhairo

Narayan Singh. Thakur Ram Narayan Singh died without issue male. The immoveable property to which the suits relate is known as Taluka Telwa, otherwise the Telwa Gadi, in the district of Monghyr. Taluka Telwa is an ancestral impartible estate which, in his life-time, was held as his estate by Thakur Ram Narayan Singh, and had previously been held by his father Thakur Bhairo Narayan Singh. By the *kulachar* or family custom Taluka Telwa descends by the rule of primogeniture. The appellants allege that that Thakur Ranjit Narayan Singh, on the 14th September 1879, granted to his brother Bhupat Narayan Singh a mokurari pottah (perpetual lease) of a part of Taluka Telwa for the maintenance of Bhupat Narayan Singh and his descendants, and that Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh separated and ceased to constitute a joint Hindu family; except in so far as the family custom applies, the law of the Mitakshara governed Thakur Bhairo Narayan Singh and his descendants. The Thakurani claims that she, as the widow of Thakur Ram Narayan Singh, who left no issue, succeeded to the estate on his death for a Hindu widow's interest. It is proved that after her husband's death she, in order to discharge debts which had been contracted by Thakur Ranjit Narayan Singh, sold a moiety of Taluka Telwa to the Maharajah. In her suit the Thakurani claimed possession of one moiety of Taluka Telwa, as the widow of Thakur Ram Narayan Singh. The Maharajah in his suit claimed possession of the other moiety of Taluka Telwa as the vendee from the Thakurani. Chaturbhuj Narayan Singh is in possession, and he and his minor sons deny that Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The written statement of Chaturbhuj Narayan Singh in the suit of the Thakurani is not before this Board, but his written statement in the suit of the Maharajah is, having regard to the evidence and to the findings of the Courts below, instructive. In his written statement in the Maharajah's suit Chaturbhuj Narayan Singh alleged:—

"4. That the said family is governed by the Benares School of Hindu Law save and except that according to family custom the said ancestral zamindari descends according to the rule of primogeniture on the eldest male member of the eldest line and the junior members are entitled to maintenance and that females are in no way entitled to succeed to the said zamindari. The junior members even after khorposh or maintenance grants are made to them out of the joint property, are entitled to obtain the expenses of marriage, sradh and other ceremonies and all other necessary expenses from the income of the said property in the hands of the holder of the said estate for the time being.

"5. That with reference to paragraph 3 this defendant states that Thakur Ranjit Narayan Singh succeeded to the said estate on the death of his father in accordance with the family custom aforesaid and that the mokurari settlement referred to in the said paragraph was also made in accordance with the said custom and not otherwise. This defendant craves leave to refer to the original of the said mokurari deed for the terms thereof. This defendant wholly denies that either before or after the said mokurari settlement Bhupat Narayan Singh became separate from the said Ranjit Narayan Singh or that he was at any time separate in food, worship or estate from the said Ranjit Narayan Singh or that he lived in a house separately built. This defendant asserts that he and his father the said Bhupat Narayan Singh, during his life-time were joint in food, worship and estate with the said Ranjit Narayan Singh and after his death with Thakur Ram Narayan Singh and that they never ceased to reside in the family dwelling house. This defendant continued joint in food, worship and estate with the said Thakur Ram Narayan Singh until the latter's death and thereafter with the defendant No. 6, until shortly before the commencement of the registration proceedings when disputes and disagreements arose. The allegations to the contrary in paragraph 3 of the plaint are wholly fals."

"6. That assuming, though by no means admitting that Bhupat Narayan Singh and this defendant became separate from Thakur Ranjit Narayan Singh in the year 1287 F.S. and since then, he and the defendant were separate in mess and business and lived in a separate house, as has been falsely alleged in the plaint, this defendant submits that nevertheless the impartible estate Taluka Telwa continued to remain joint family property, as before, as it never was nor could be the subject of partition and the defendant No. 1 therefore became solely entitled to it under the family custom on the death of Thakur Ram Narayan Singh in preference to his widow."

The "defendant No. 1" mentioned in the written statement is Chaturbhuj Narayan Singh, and the "defendant No. 6" is the Thakurani, who, as has been already stated, was a *pro forma* defendant in the suit of the Maharajah. So far as is now material, the defence of Chaturbhuj Narayan Singh, as disclosed by his written statement, was that females were by the family custom excluded from a succession to the impartible estate and that the joint family had not separated.

No custom excluding the widow of a sonless and separated holder of the impartible

estate of Taluka Telwa from the succession to the estate for a Hindu widow's interest has been proved, and it is well decided law that the widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from the succession is proved. It was held by this Board in Neelkisto Deb Burmono v. Beerchunder Thakoore (1) that where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the Custom. In *Ram Nundun Singh* v. *Janki Kar* (2) this Board held that :—

> "There is no inconsistency between a custom of impartibility and the right of females to inherit, as may be illustrated by the well-known *Shivagunga Case* (3), and therefore the general law must prevail unless it be proved that the custom extends to the exclusion of females."

Consequently the only issue in these suits which is now material is one of fact, namely the issue as to whether Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The Subordinate Judge came to the conclusion that Thakur Ranjit Singh, being displeased with his brother Bhupat Narayan Singh because the latter kept women, separated from him. It was found as a fact by the Subordinate Judge that Bhupat Narayan Singh built a pucca house, established a Tulsi Pinda there, and removed his family to his pucca house and lived there separately from Thakur Ranjit Narayan Singh. As a fact Thakur Bhupat Narayan Singh built a wall between his pucca house and the family house of Thakur Ranjit Narayan Singh and established a separate Thakurbari in his house. The houses were quite separate houses, as was found by the Subordinate Judge on the evidence.

A daughter of Chaturbhuj Narayan Singh was married after Thakur Ranjit Narayan Singh had in 1879 granted the mokurari pottah to Bhupat Narayan Singh. Chaturbhuj Narayan Singh attempted to prove that Thakur Ranjit Narayan Singh defrayed the expenses of that marriage. The Subordinate Judge however, found on incontestable evidence that the expenses of the marriage were defrayed by Bhupat Narayan Singh and not by Thakur Ranjit Narayan Singh. As a matter of fact, Bhupat Narayan Singh borrowed Rs. 689-2-6 for the expenses of that marriage, and on the 27th June 1897 gave to Shir Lal Modi and Amir Modi a mortagage of lands which he held under the mokurari pottah to secure the repayment to them of, amongst other moneys, that sum of Rs. 689-2-6, which was stated in the mortgage deed to have been borrowed by him from them "for performing the marriage of my own grand-daughter, *i.e.*, the daughter of my son, Baba Chaturbhuj Narayan Singh."

On the 27th April 1905 Chaturbhuj Narayan Singh, on his examination in a criminal case which apparently related to the removal of some timber, stated, "I am separate from the Thakur of Telwa."

On a careful review of all the evidence the Subordinate Judge came to the conclusion that Bhupat Narayan Singh and his son Chaturbhuj Narayan Singh were separate from Thakur Ranjit Narayan Singh and his son Thakur Ram Narayan Singh.

The learned Judges of the High Court, whilst accepting as correct the findings of facts of the Subordinate Judge on which he had come to the conclusion that there had been a complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh, came to the conclusion that it was not proved that there was a separation in intention and in fact. As it is difficult to understand the reasoning of the learned Judges of the High Court, it is better to give the following extracts from their joint judgment. They say :—

> "It is the case common to both sides that Bhupat Narayan was a man of licentious habits and that he made himself a nuisance to his brother Ranjit Narayan and created a scandal by introducing his mistresses into the family dwelling house. It was in consequence of this that Ranjit Narayan executed the maintenance grant in his favour in 1287 to enable him to start a separate establishment. There can be no doubt that, after receipt of the grant, Bhupat Narayan built himself a new house outside the old family dwelling and that in course of time a Thakurbari and a Tulsi Pinda were established in that house and the family house was constructed. It seems to be also beyond doubt that after receipt of the grant BhupatNarayan raised money by mortgages on the property leased to him and spent it on the marriage of members of his

(1) [1869] 12 M. I. A. 523=12 W. R. 21=3 B. L. R. 13=2 Sar. 542=2 Suther 243 (P.C.)
(2) [1902] 29 Cal. 828=7 C. W. N. 57=29 I. A. 178 (P.C).
(3) [1863] 9 M.I.A. 539=2 W.R. 31=1 Suther 520=2 Sar. 25 (P.C.)

family and on their maintenance. Still are not all these acts such as might have been expected on the part of a member of the family who had received a grant for the maintenance? Or must they be accepted as incontestable proof of an intention to separate from Ranjit Narayan from the time of the grant and of a separation in fact from that time?

"It has not been contended before us, nor, indeed could the contention be accepted as a sound one, that a separation in estate and from the joint family must follow as a necessary consequence from the receipt of a maintenance grant.

"The learned Subordinate Judge has accepted these facts coupled with the admitted separation in food as sufficient proof that from the date of the maintenance grant, Ranjit Narayan and Bhupat separated and ceased to be members of a joint Hindu family. We have given our careful consideration to the judgment of the Subordinate Judge and also to the evidence and the arguments of the learned pleader and counsel which have been advanced before us and even though we accept the findings of the Subordinate Judge we are unable to agree in his conclusion that the plaintiffs have proved that there was a separation in intention or in fact.

"The fact that after the grant of the Mokurari lease for maintenance, Bhupat Narayan lived in a separate house alongside his family homestead, that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan."

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and in estate, and they find that there had been complete separation.

Their Lordships infer from the extracts which they have quoted from the judgment of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa had not been partitioned between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh. Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no co-parcenary rights in the impartible estate, and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint, and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widow's interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharajah, and as there was valid necessity for that sale she conveyed a good title to the Maharajah.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed, that the decrees of the High Court should be set aside with costs, and the decrees of the Subordinate Judge should be restored.

The respondents, Chaturbhuj Narayan Singh and his four minor sons, must pay the costs of the appeals.

D.D. *Appeals allowed.*

Solicitors for Appellants—Downer & Johnson.

Solicitors for Respondents—T. L. Wilson & Co.

***A.I.R. 1915 Privy Council.**

(FROM MADRAS.)

16th November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Subramanian Chettiar—Plaintiff—Appellant.

v.

Raja Rajeswar Dorai and *others*—Defendants—Respondents.

Privy Council Appeal No. 108 of 1913.

** Civil P.C., O. 32, R. 7—Provision as to leave is of great importance—Existence of minor's interest must be brought to Court's notice—Fact of granting leave must be clear.*

The provision making it necessary to obtain the leave of the Court to enter into compromise on minor's behalf, is of great importance to protect the interests of a minor. In such a case it is not sufficient that the terms of a compromise are

before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. 28 All. 585 (P.C.) and 36 Mad. 295 (P.C.) Ref. [P. 37 C. 2.]

P. O. Lawrence, *De Gruyther* and *Kyffin* —for Appellant.

Robert Finlay and *K. Brown*— for Respondents.

Lord Parmoor.—These are consolidated appeals from three judgments of the High Court of Judicature at Madras. The appeal which has been argued before their Lordships is one in which M. R. M. A. Subramanian Chettiar is appellant, and Raja Rajeswara Dorai is respondent. It is unnecessary to refer further to the other two appeals since it is admitted that the decision in those cases depends on the decision given in the case which has been argued.

The question involved in the appeal is the validity of an agreement of compromise executed on the 16th day of January 1899, and of two mortgages, dated respectively the 6th July 1899 and 13th July 1899. The validity of these documents is largely dependent on the consideration whether the trustee under a voluntary settlement of 12th July 1895, had power to give a mortgage bond for four lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Raja of Ramnad.

The father of the appellant lent considerable sums to the respondent's father, who at all material times was the Raja of Ramnad. On the 12th July 1895, the Raja owed his creditors sums of money amounting to 20 lakhs of rupees, including a sum of Rs. 1,30,000, which he owed to the appellant's father. At that date the Raja executed a deed of voluntary settlement settling all his Ramnad Zamindari and certain other property, subject to the payment of the debts which he then owed and to certain allowances to members of the family including the Raja himself therein directed to be made and to the several trusts, provisos, and declarations therein contained, on the present respondent, who was a minor. The Raja appointed as trustee Venkata Rangier, and as co-adjutor P. Chensal Rao, and it was provided that the trustee should not without the permission in writing of the co-adjutor enter into any agreement with the creditors or mortgage or sell any part of the trust premises. Subsequent to the execution of the voluntary deed, the Raja borrowed further sums from the appellant's father giving as security certain jewels and furniture and his allowance under the deed of settlement.

The sums due to the creditors had been borrowed at a high rate of interest, and the income in the hands of the trustee was not sufficient to meet the charges on the trust estate. To save the estate, it became necessary to borrow a large sum of money at a moderate rate of interest, and negotiations were entered into between the trustee, the co-adjutor, and certain financiers in England. On the 18th June 1897 a preliminary agreement was made between the trustee, Charles Augustus Verner, and Ogilvie, Gillanders & Co., to raise for payment of the debts existing at the date of the settlement of the 12th July 1895 the sum of £ 1,60,000, and the equivalent in sterling of the Government revenue for a quarter of one year, to be secured by a trust deed vesting the Ramnad Zamindari freed from all incumbrances in trustees for debenture holders. This arrangement was not completed until the 13th of June 1899, on which date the trustee, with the privity and consent of the co-adjutor and the Raja, executed a mortgage of the whole trust estate for the sum of £ 175,000, repayable by instalments with interest at the rate of 5 per cent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognize the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of the negotiations for the English loan the intending lenders required that the Raja should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the appellant that in order to obtain the assent of the Raja, and the consent of the persons entitled to the payment of allowances, it became necessary, and was reasonable and prudent on the part of the trustee, to agree to give a mortgage for

4 lakhs of rupees to the Raja on the security of a suitable portion of the Ramnad estate, such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Raja on 25th April 1898, and on the same day the Raja wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have a first charge upon the Ramnad Zamindari, and that no part of the marginally-noted allowance payable to him under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming—without deciding—it to be within the power of the trustee to create such a charge on the trust estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Raja would not have executed the English mortgage deed and consented to postpone his allowance without some payment or consideration. The counsel for the appellant was pressed in his argument before their Lordships to refer them to the evidence in support of his proposition that the Raja would not have assented to sign the deed and postpone his allowance without receiving payment or consideration. Their Lordships were not referred to any such evidence and the counsel for the appellant relied on a general statement that the Raja was a difficult person for the trustee to influence. Apart from any payment or consideration it was in the interest of the Raja that the intending loan should be satisfactorily arranged and, in the absence of evidence, there is no room for a presumption that he would not sign the deed, or would refuse to postpone his allowance, without some payment or consideration. On the other hand, the documents to which their Lordships have been referred do not support the contention put forward on behalf of the appellant.

The preliminary agreement for the loan was signed on 18th June 1897. On the 22nd September 1897, the coadjutor, P. Chensal Rao, without whose assent the trustee had not the power to arrange the English loan, sent a telegram to Messrs. Lovelock and Lewes, Chartered Accountants, acting on behalf of the lenders, that :— "the Raja consented to sign mortgage deed and Rs. 66,000 or possibly Rs. 76,000 of the allowances can be postponed, letter follows." A further telegram was sent on the 28th September 1897 explaining that the Raja was willing to give a charge upon the Zamindari free of the payment of allowances of Rs. 66,000 and possibly Rs. 76,000, and that this is what the co-adjutor meant by postponement. These telegrams were followed by a letter of 29th September 1897 in which the later telegram was confirmed, and the co-adjutor again states that the Raja is quite willing to do what Messrs. Lovelock and Lewes propose, namely, to give a charge on the Zamindari free from the payment of Rs. 66,000, or possibly Rs. 76,000, out of the allowances of Rs. 1,30,000, referred to in the trust deed. The position taken up by the intending lenders on the question of the allowances is explained in a letter of 25th November 1897 which was brought to the notice of the trustee, and to which the trustee refers in a letter of 24th December 1897. It is stated that the intending lenders are prepared to proceed with the negotiations for the loan provided that all the allowances in favour of the Raja and the members of his family are postponed to the security to be given to the debenture holders, both as regards the current payment required for the service of the loan and also in the event of the security having to be enforced. The consent of six members of the Raja's family was not obtained to the postponement of the allowances, but the consent of the other allowance holders was accepted as sufficient after the intending lenders had obtained an opinion from Mr. Mayne that such consent was not required having regard to the terms of the trust deed.

The material factor is that the letter written by the Raja on 25th April 1898, after receiving the promise of a payment or consideration of Rs. 4,00,000 secured by mortgage bond on a suitable portion of Ramnad Estate, does not give any

undertaking beyond that contained in the telegrams and letter of September 1897. Under these circumstances their Lordships are of opinion that the appellant has failed to prove the first step which is necessary to justify the placing of a charge of Rs. 4,00,000 on the trust estate.

In the second place the appellant has failed to establish that the consent of the allowance holders was required to enable the trustee to postpone their rights to the security of the debenture holders, or that the intending lenders would have pressed their objection if the legal position had been explained to them. This point was not argued at any length before their Lordships, though it was evidently a main point in the argument in the High Court. The relevant paragraphs of the voluntary settlement are 7, 23 and 24. In Paragraph 23 the settlement sets out in the sixth place a trust to make payment of the allowances specified in the second schedule, but these allowances are placed for the purpose of payment after (in the fifth place) the specified debts and the interest on the principal of such other debts and sums of money as shall be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money, although under paragraph 21 the trustee is not bound to make the payments in the order mentioned in the deed. Paragraph 7 provides that notwithstanding anything contained in the voluntary settlement, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him, in the premises thereby assigned free and discharged of the trusts provisos, directions, and declarations therein contained except, as otherwise expressly provided in such assignment. The joint effect of sections 7 and 23 is that the trustee had power to place the loan security for the payment of the specified debts in priority to the allowance payments and that the assign for value would hold the estate or interest conveyed or assigned to him assured free and discharged of the trusts contained in the voluntary settlement except as otherwise expressly provided.

Section 24, which provides that the trustee shall make the several payments under the voluntary settlement as and when the same shall be required, cannot be construed to curtail the discretion given to the trustee in paragraph 23. It is material to observe that the trustee in a telegram to the co-adjutor on 18th March 1898, said that he and the co-adjutor must point out to the London people that under the trust deed they are empowered to attend to the payment of interest prior to payment of allowances. A similar opinion was expressed by Sir V. Bashyam Ayyangar on 30th June 1898, and by Mr. Mayne on 20th September 1898. The Counsel for the appellant justified the action of the trustee in giving consideration for the consent of the Raja to postponement, although such consent was not legally required, on two grounds. In the first place he said that, apart from questions of strict right, the intending lenders insisted on the postponement of the specified allowances. The answer is that there is no evidence that the intending lenders would not have altered their attitude if the true legal position had been insisted on throughout the negotiations. They did alter it so far as regards six of the allowance holders, after obtaining the opinion of Mr. Mayne. In the second place it was said that, although the trustee might have had the power to postpone the payment of allowances, he was justified in his action out of regard to the position of the Raja and his family, and his unwillingness to incur the ill-will of the Raja and of the other allowance holders, which he might have incurred if he had used his power without their consent. Their Lordships cannot accept this explanation as justifying the trustee in placing a burden of Rs. 4,00,000 on the trust estate, or come to any other conclusion than that the trustee was not acting properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage bond to that amount in favour of the Raja.

The next question is whether the agreement of compromise of 16th January 1899, and the two mortgages of the 8th and 16th July 1899 can be supported if the promise to give the mortgage bond of Rs. 4,00,000, on the security of the trust estate is invalid as not being within the powers of the trustee. The recitals of the compromise deed recite the agreement with the Raja to give a mortgage bond for Rs. 4,00,000, on the trust estate, thus giving the appellant full notice. Moreover the compromise deed is based, not on imposing a new charge on

the trust estate, but on utilising the charge, already promised to the Raja. The deed carries out this proposal by providing for the payment of certain sums to the appellant so soon as the English loan, is obtained and by giving as security a third mortgage on the trust estate, a first mortgage being executed to secure the English loan, and a second to secure the loan of Rs. 1,00,000 due to another creditor. In other words the compromise deed assumes the validity of the agreement with the Raja and there is no evidence that the trustee or the co-adjutor had any intention, apart from the agreement with the Raja, to place an additional charge in favour of the appellant on the trust estate.

The mortgage of 6th July 1899 was executed in pursuance of the provision contained in the deed of compromise. The amount thereby secured was Rs. 4,73,143, with further interest thereon less the sum of Rs. 50,000 which the trustee agreed to pay in one week. Towards this sum the trustee paid to the appellant Rs. 20,000, and secured the balance by a mortgage on crops on the 13th July 1899. This is the second mortgage to which this appeal relates. On the second mortgage the appellant has received certain payments from the trustee and has been ordered to repay the sums to the credit of the trust estate. It is impossible that these mortgages can be regarded as valid and binding upon the properties therein comprised if the deed of compromise is not valid and their Lordships concur in the conclusion of the High Court both as to the validity of the deed of compromise and of the two mortgages and as to the amount of the repayment ordered to be made by the appellant to the credit of the trust estate.

If on other grounds the deed of compromise could be supported, it is invalid in not complying with the condition imposed by section 462 of the Code of Civil Procedure applicable when the compromise was made. One of the parties to the suit, was a minor, the Raja's son, the present appellant, and the trustee of the voluntary settlement was appointed his guardian *ad litem*. Section 462 of the Code of Civil Procedure enacts "that no next friend or guardian for the suit shall, without the order of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian." In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v. *Jadunath Singh* (1).

"It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained."

Reference may also be made to the more recent case of *Ganesha Row* v. *Tuljaram Row* (2).

In the opinion of their Lordships these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

D. D. *Appeals dismissed.*

Solicitor for Appellant.—Douglas Grant.

Solicitors for Respondent.—Chapman, Walker and Shepherd.

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* *A.I.R. 1915 Privy Council.

(FROM MADRAS)

17th November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Venkatanarayana Pillay—Plaintiff—Appellant.

v.

Subbammmal and *another*—*Defendants*—*Respondents.*

Privy Council Appeal No. 92 of 1913.

** (*a*) *Will—Revocation—Subsequent disposition.*

An alternative inconsistent subsequent disposition which is not valid or effectual in itself, does not revoke an earlier disposition of the same property. *Alexander* v. *Kirkpatrick* (1874) 2 H.L.S. 394 Appl. [P. 39, C. 2.]

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(1) [1906] 28 All. 585=33 I. A. 128=4 C. L.J.8 =8 Bom. L. R. 489=10 C. W. N. 898=90.C. 219=16 M. L. J. 291=3 A. L. J. 710 (P. C.)

(2) [1913] 36 Mad. 295=19 I. C. 515=40 I. A., 132 (P. C.).

* *(b) Hindu Law—Adoption—Power to adopt contained in prior Will—Second will making no mention of such power—Power under earlier is unaffected.*

Where a testator authorised by his will his wife to adopt a son after his death and he made a second Will which was silent as to the power,

Held, that the power to adopt contained in the earlier will was unaffected. [P. 39, C. 2.]

Robert Finlay and *Dube*—for Appellant.

De Gruyther and *K. Brown*—for Respondents.

Lord Wrenbury.—At the date of the first testamentary instrument, *viz.*, the 8th September 1889, the testator, Vencatarama was sole surviving co-parcener of the property here in question. It was ancestral property, but a division had been effected, and of the testator's divided share he had no co-parcener. He could, therefore, dispose of it. Under those circumstances he made a will dated the 8th September 1889 which contained an appointment of his wife and his daughter to be executrices and for the present purpose consisted of two parts *viz.*, (1) a disposal of the property in a certain way, and (2) an authority to his widow in a certain event to take a son by adoption.

He had, and it appears by the will that he had, nominated as his son Venkatakrishna, who was a son of his daughter Rajammal, but he had not completed the adoption. By his will he directed that if he should die before completing the adoption, his wife Subbammal should, after his death, complete the necessary ceremonies, and take the said grand-son in adoption, and his will contained the following clause :—

"In case any danger may happen to my grandson, Chiranjeevi Venkatakrishna Pillay, during the lifetime of my wife Subbammal who is one of my executrices, my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons, and give my properties to that son."

An argument was tentatively put forward, but was not pressed by the appellant's counsel that this document was not a will. Their Lordships can entertain no doubt that it was a will. It contained an appointment of executors, and (as has already been pointed out) it was executed by a testator who at its date could dispose of the property of which he purported to dispose.

On the 9th February 1890 the testator completed the adoption of Venkatakrishna. Another member of a co-parcenary thus entered the joint family, and when the testator subsequently died, the property was ancestral property, of which he was not at that date competent to dispose. In this sense, and to this extent, the will of the 8th September 1889 became ineffectual.

On the 21st March 1890 the testator executed another will. It contains a new appointment of executors. They are the two executors appointed by the will of the 8th September 1889 and a third. It discloses on its face that the property of which it purports to dispose is ancestral, but nevertheless purports to dispose of it although at this date the testator had a co-parcener, and could not dispose of it. It contains in article (5) a gift that, in case Venkatakrishna shall happen to die at any time, his issues shall enjoy the property. It contains no words of revocation of the previous will ; is wholly silent as to adoption ; and does not refer in any way by revocation or otherwise to the clause in the will of the 8th September 1889 set out above, which gave the widow a contingent power of adoption.

On the 4th April 1890 the testator died. The will of the 8th September 1889 was not, and the will of the 21st March 1890 was, admitted to probate. On the 4th June 1891 Venkatakrishna died.

In 1893 the plaintiff in the present proceedings being the brother of Vencatarama and thus reversionary heir to Venkatakrishna instituted a suit, and on the 20th November 1894 obtained a decree that the will of the 21st March 1890 was null and void, and inoperative according to Hindu law. This must have meant as regards the disposal of the ancestral property.

In this state of facts the widow Subbammal, on the 13th August 1906, adopted the defendant Parthasarathi.

The present suit is one instituted by Vencatanarayana, as reversionary heir of Venkatakrishna, against Subbammal, the widow, and Parthasarathi, the son adopted by the widow, for a declaration, that his adoption was illegal and invalid.

The appellant advanced two contentions, (1) that the document of the 8th September 1889 was not a will—with this their Lordships have dealt above—and (2) that if it was a will, it was revoked by the will of 21st

of March 1890, and that no power existed in the widow in 1906 to make an adoption.

The appellant rests his case not upon any words in the will of 1890 revoking the will of 1889, for there are none, but upon such an inconsistency between the two wills as that the provisions of the earlier will cannot stand with the existence of the later will. It has already been pointed out that the will of 1889 consists of two parts, and assuming for the moment that the contention is well founded as to the one part, *viz.*, that which effects a disposal of the property, it does not touch the other part, *viz.*, that which gives a power to adopt.

Whether the contention is well founded as regards the other part, *viz.*, that which effects the disposal of the property, turns upon the application of the doctrine of dependent relative revocation. This is really a question of intention. If by his will a testator gives property to A and by a codicil gives the same property to B, and if in the event it turns out that B cannot take it has to be ascertained from the language, of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be displaced only in favour of B, and (if B cannot take) the gift to A should remain. If as in *Tupper* v. *Tupper* (1), the testator's language is that (1) he revokes the gift to A and (2) in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. If, as in *Quinn* v. *Butler* (2), the donee of a power to charge does by his will charge with £ 4,000, to be paid to A and £ 3,000, to be paid to B, C and D equally, and then by codicil revokes the aggregate charge of £ 7,000, made by his will and charges with £ 7,000, for A, the charge in the will is no doubt gone for all purposes. If, as in *Baker* v. *Story* (3), A takes absolutely under the will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by will is not gone altogether. But no one of these authorities is pertinent to the present case. *Alexander* v. *Kirkpatrick* (4), although a case upon two dispositions, of which the former contained a power of revocation, and not upon two wills, contains a principle applicable in their Lordships' opinion to the present case, *viz.*, that an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

It is admitted that by the will of 1890 the testator could not give his ancestral properties as he purported to do, but it is argued that from the fact that he purported so to give them there is to be inferred an intention that if he could not give them as he purported to do in 1890 his disposition in 1889 should nevertheless be revoked and the argument goes beyond this to affirm that not only disposition of property in 1889 but also the independent provision conferring a power to adopt given in 1889 is in like manner revoked. Their Lordships do not accept either argument as well founded. The effect of that which has taken place is that there are two testamentary instruments. The later must no doubt prevail over the earlier, but the contingent power to adopt in the earlier instrument is unaffected by anything in the later. In their judgment it has been rightly held that on the 13th August 1906 the widow had the power of adoption which she exercised, and the plaintiff's case fails.

Their Lordships will humbly advise His Majesty that the appeal fails and must be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitor for Appellant—John Josselyn.

Solicitor for Respondents—Douglas Grant.

(1) [1855] 1 Kay and J 665=3 W.R 616=1 Jur. (n.s.) 917=103 R.R. 311.
(2) [1868] 6 Eq. 225.
(3) [1875] 23 W.R. 147=31 L.T. (n.s.) 631.
(4) [1874] 2 H. L. Sc. 394.

***A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

23rd November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Seth Jawant Rai—Plaintiff—Appellant.

v.

Secretary of State for India—Defendant—Respondent.

* *Contract—Contract defining rate for carrying material—Evidence as to rate for carrying similar material paid to other contractor or to same contractor under another contract is irrelevant.*

Where the contract between carrier and consignor provides the rate for carrying materia

belonging to consignor, extrinsic evidence as to the rate of payment allowed for the carriage of such material to another contractor, or to the same carrier under a different contract is irrelevant. [P. 40, C. 1.]

De Gruyther and *J. M. Parikh*—for Appellant.

H. Earle Richards and *O'Gorman*—for Respondent.

Lord Parmoor.—The appellant, by a contract of the 15th August 1905, agreed to execute certain descriptions of work in accordance with specified conditions and in consideration of payment being made at the rate specified in a schedule. The Schedule was as follows:—

Schedule of Rates.

Description of work from Nagda.	Unit of calculation (Store Depot Site of work).	Rate.	Remarks.
		Rs. A. P.	
(I) Carting P.W. material and stores by kutcha road.	Per maund per mile ..	0 0 1½	
Loading into carts and unloading at destination.	Per maund ..	0 0 1	
(II) (*a*) Haulage, portable engine..	Per ton per mile ..	0 6 0	Portable engines on their own wheels.
(*b*) Loading, carting and unloading explosives (special) as per note at foot of agreement.	Seven pies per maund per mile or part of a mile.	0 0 7	See note at foot of agreement.

The note referred to in the above schedule is as follows:—

"Note for item (*b*) in rate column. Explosives and cement must be carried in accordance with special instructions to be given by the Executive Engineer. Detonators must not be carried along with dynamite, but in separate carts, not more than four maunds of dynamite shall be carried in one cart. Such consignments must be carried straight through with relays of bullocks in covered carts protected from the weather."

In fulfilment of his obligation under the contract, the plaintiff conveyed cement in bullock carts and claimed in respect of loading, carting, and unloading such cement, 7 pies per maund per mile or part of a mile. The Subordinate Judge held that the schedule of rates was not an exhaustive one, and that the plaintiff should be allowed at the rate of 3 pies per maund per mile for carting cement. The High Court overruled this decision, holding that the contract was clear and that the plaintiff was not entitled to be paid at a higher rate than 1½ pies per maund per mile for carting cement. Their Lordships concur in the conclusion of the High Court that the rate of payment for the carting of cement is determined by the terms of the contract and depends on the construction of the schedule of rates and the note quoted above. It follows that extrinsic evidence as to the rate of payment allowed for the carriage of cement to another contractor, or to the appellant under a different contract, is irrelevant, and their Lordships intimated during the hearing of the appeal that they regarded such evidence as inadmissible.

Cement is permanent-way material, and apart from the note the appellant would clearly be entitled for carting cement at a payment of 1½ pies per maund per mile, and 1 pie per maund for loading into carts and unloading at destination. Explosives come under a different head in the column of description of work, and for loading, carting, and unloading explosives, the appellant is entitled to payment at the rate of 7 pies per maund per mile or part of a mile. The contention of the appellant is that the note places cement in the same description as explosives, and that the appellant is entitled to be paid for loading, carting, and unloading cement at the rate of 7 pies per maund per mile or part of

a mile. Their Lordships cannot accept this contention. The note does not fix the rate of payment, but the conditions or carriage. The conditions which attach to the carriage of cement are not the same as those which attach to the carriage of explosives. It is true that both explosives and cement are to be carried under special instructions, and that the cartage of cement may consequently be more costly than the cartage of other permanent-way materials, but the rate of 1½ pies per maund per mile is fixed as an over-all price, and the fact that one article may be more costly to handle than another does not affect the question of the rate of payment under the terms of the contract.

In the course of the argument it was said that if the appeal were dismissed the appellant might be deprived of his right to a payment of 1 pie per maund for loading cement into carts and unloading at destination. Their Lordships have no doubt that, so far as the work of loading the cement into carts and unloading at destination has been performed by the appellant, he is entitled to the rate of payment of 1 pie per maund, and that the appellant should not be precluded from the opportunity of substantiating any claim which may be open to him under this head. In their opinion the amount, if any, due to the appellant under this head should be settled between the parties, but unless it is so settled they reserve liberty to the appellant to apply in this suit to the Subordinate Court to settle and determine the amount. Sir Earle Richards, who represented the respondents, very properly undertook on behalf of his clients not to raise any technical difficulty. Subject to the reservation of the above liberty to apply should it be necessary, their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

D.D. *Appeal dismissed.*

Solicitor for Appellant— E. Dalgado.

Solicitor for Respondent— The Solicitor, India Office.

****A.I.R. 1915 Privy Council.**

(FROM BOMBAY.)

26th November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Nagindas Bhagwandas—Plaintiff—Appellant.

v.

Bachoo Hurkissondas—Defendant—Respondent.

Privy Council Appeal No. 16 of 1915.

**(*a*) *Hindu Law—Succession—Adopted son takes less only in competition with subsequently born natural son of adopter.*

The doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural born son of the same father. 4 Cal. 425 not Appr. 9 W. R. 423 Ref. [P. 42, C. 1.]

*(*b*) *Hindu Law—Adoption—Adopted son becomes son of adopter for all purposes except marriage and competition between him and subsequent natural born son.*

According to Hindu law an adopted son becomes for all purposes the son of the father by adoption. An adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father.
3 Knapp 55 Foll. 8 Cal. 302 (P.C.) and 10 Cal. 232 (P.C.) Ref. [P. 44, C. 2.]

Roberts Finlay, De Gruyther and *Dunne*— for Appellant.

J. A. Clyde and *Raikes*— for Respondent.

Sir John Edge.—The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujerathi Hindus, of which the plaintiff by adoption and the defendant by birth are the male members. The question in this appeal is one as to the share in the joint family property to which the plaintiff is on partition entitled.

The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissondas Nagardas died on the 14th September 1900, leaving his wife surviving; she was then pregnant, and the defendant, who was the posthumous child was born on

the 18th December 1900. Bhugwandas Nagardas died childless on the 17th December 1900, leaving his widow surviving him; he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the plaintiff as a son to her deceased husband. The parties are governed by the Mitakshara, as altered or interpreted by the Vyavahara Mayukha. The plaintiff claimed that he was entitled on partition to a moiety of the family property. On the other hand the defendant contended that the plaintiff, as an adopted son, was entitled to a reduced share only of the family property; in support of that contention the defendant relied upon paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* (1).

This suit was tried in the High Court at Bombay by Macleod, J., who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural born son of the same father (which is not the case here), and he gave the plaintiff a decree for an equal share. From that decree the defendant appealed.

On appeal Sir Basil Scott, C.J., and Batchelor, J. holding, as their Lordships understand their judgment, that there is nothing in the Mitakshara which is inconsistent with paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as these paragraphs were construed by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* (1), adopted the construction of Markby and Prinsep JJ. of those paragraphs, and decided that the plaintiff as an adopted son was on partition entitled only to a reduced share in the family property. From their decree this appeal has been brought.

The learned Judges of the High Court on the appeal from Macleod J. in this suit had before them Sutherland's translation of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika, the translation of those paragraphs which was relied upon by Markby and Prinsep, JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* (1), and a translation made by Sir Ramkrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit. Sutherland's translation was not a complete translation of the Sanskrit text. The translation which was relied upon by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* (1), and is apparently accepted as a correct translation by Mr. Mayne in paragraph 169 of his Hindu Law and Usage, is as follows :—

Paragraph 24 :—

"Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son. Where such son may not exist, the adopted son takes the whole estate even."

Paragraph 25 :—

"Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grand-father, is entitled to an equal share even with a paternal uncle, who is also such description of son; therefore a grandson who is an adopted son may (in all cases) inherit an equal share even with an uncle. This must not be alleged (as a general rule). For there would be this discrepancy: where the father of the grandson were an adopted son, he would receive a fourth share; but the grandson, if he were such son (of him) would receive an equal share (with an uncle in the heritage of the grand-father). And accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question (*viz.*, the adopted son of one adopted) succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also."

The translation which was made by Sir Ramkrishna Bhandarkar is as follows :—

"It should be understood by this that an adopted son acquires the ownership wherever possible of his proper share by a relation similar to the relation, brotherhood, etc., by which a natural-born son acquires a right to the property of his brothers, etc., similarly, an adoptive grandson whose adopting father is dead acquires the ownership of the share proper for an adopted (son) when the owner of the property has got another son or other sons and of the whole when he has got no son or sons. It should not be argued that because a grandson is necessarily the owner of the share proper for his father, the taker (in adoption) of the adoptive son being a natural-born son of the grand-father and entitled to a share equal to that of the uncle similarly born, the adoptive grandson should take a share equal to that of the uncle; for it involves impropriety, inasmuch as the adopted son gets one-fourth and the adoptive grandson an equal share. Therefore that share is proper for a son's father which he would get by law if he were of the same description (adopted or natural-

(1) (1878) 4 Cal. 425=3 C.L.R. 534.

born) as the son. This way should be followed in the case of great grandsons also."

Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the Dattaka Chandrika other than that at which their Lordships have arrived.

The author of the Dattaka Chandrika was in paragraphs 24 and 25 of section 5 of his commentary, relying upon the text of Vasishta according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." The text of Vasishta is quoted by Nanda Pandita in paragraph 1 of section 10 of the Dattaka Mimansa, who added, "on the death of him (the naturally-born son) he (the adopted son) is entitled to the whole." It is obvious that Vasishta and Nanda Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally-born son of a brother or a nephew of the adoptive father.

The author of the Dattaka Chandrika expressed his views somewhat obscurely and confusedly in paragraphs 24 and 25 of section 5 of his commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was. For the purposes of his commentary he paraphrased the text of Vasishta that "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," and in paragraphs 24 and 25 of section 5 he illustrated the text of Vasishta, as he understood that text, by examples of its application.

His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son. The author of the Dattaka Chandrika, applying the well-established rule of Hindu law that a son takes no greater share than his father if a qualified person would have been entitled to, illustrated the application of the principle of the text of Vasishta by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive father's adoptive father, in other words his uncle through the adoption of his adoptive father. In the first case, as the author of the Dattaka Chandrika pointed out, the adopted son would take a share equal to that of his uncle by adoption; in the latter case, as a son cannot take a greater share than his father would have been entitled to, the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally-born member of the family, and who would have taken a greater share than his brother by adoption.

As their Lordships construe paragraphs 24 and 25 of section 5 of the Dattaka Chandrika those paragraphs are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasishta in paragraph 1 of section 10 of the Dattaka Mimansa. To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep, JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* (1) would bring them into conflict with what are now well-established principles of Hindu Law. The attention of Mr. Markby and Prinsep, JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* (1), which was decided by them in 1878, does not appear to have been drawn to the case of *Tara Mohun Buttacharjee* v. *Kripa Moyee Debia* (2) which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse, JJ. held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral relative of his adoptive father. In *Tara Mohun Bhattacharjee* v. *Kripa Moyee Debia* (2) the plaintiff by birth and the defendant by adoption were in equal relationship to the deceased collateral; their respective grandfathers were the first cousins of the collateral

(2) [1868] 9 W.R. 423.

and their respective fathers were his first cousins once removed. Loch and Hobhouse JJ. were pressed in argument to put a construction upon paragraph 25 of section 5 of the Dattaka Chandrikha adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born; and that there was no reason why the plaintiff and the defendant in the suit before them should not each take the share to which their respective fathers were entitled. The parties to the suit which was in appeal before Loch and Hobhouse, JJ. were governed by the law of the Dayabhaga, but that fact does not distinguish that case in principle from the case which is now before this Board. The decision in *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Dibia* (2) was followed in 1881 by McDonell and Field JJ. in *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (3) In *Raja* v. *Subbaraya* (4) which was, however, a case relating to Sudras, Sir Charles Turner, C.J. and Muttusami Ayyar J. in 1883 doubted that paragraph 25 of section 5 of the Dattaka Chandrika had been correctly construed in *Raghubanund Doss* v. *Sadhu Churn Doss* (1). Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep JJ. of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika has been adopted.

In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the defendant that the position of a member by adoption in a joint Hindu family and his interest in the joint family property are inferior to the position and interest of a member by birth of the family, and it was suggested that an adopted son does not on his adoption become a coparcener in the joint family property. It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could, now be ascertained, would be beside the point and could throw no light on the construction of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika or upon the position and rights of an adopted son. Hindu law and customs have not stood still, and what we are now concerned with is the position at the present time of an adopted son in a Hindu family. As early as 1833 this Board in *Sumboo Chunder Chowdry* v. *Naraini Dibeh* (5) considered that according to Hindu law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881 in *Pudma Coomari Debi* v. *Court of Wards* (6) approved of the decision of this Board in *Sumboo Chunder Chowdry* v. *Naraini Dibeh* (5) and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. To the same effect is the decision of this Board in *Kali Komul Mozumdar* v. *Uma Sunker Moitra* (7). In the last-mentioned case when it was before the Full Bench of the High Court at Calcutta, Romesh Chunder Mitter, J. held that—

> "According to Hindu law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it."

(3) [1881] 8 Cal. L.R. 57.

(4) [1883] 7 Mad. 253.

(5) [1835] 3 Knapp. 1. Suther. 25. (P.C.)

(6) [1881] 8 Cal. 302=8 I. A. 229=6 Ind. Jur. 148=4 Sar. 285 (P. C.).

(7) [1883] 10 Cal. 232=10 I. A. 138=13 C. L. R. 379=4 Sar. 458=7 Ind. Jur. 553 (P.C.)

With that statement as to the Hindu law of adoption their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside and the decree of Mr. Justice Macleod should be restored.

The respondent must pay the costs of this appeal and of the appeal in the High Court.

D.D. *Appeal allowed.*

Solicitors for Appellant—Hughes and Sons.

Solicitors for Respondent—Latteys and Hard.

*A.I.R. 1915 Privy Council.

(FROM STRAITS SETTLEMENTS, PENANG)

9th March 1915.

LORD DUNEDIN, SIR GEORGE FARWELL AND SIR ARTHUR CHANNELL.

Chuah Hooi Gnoh Neoh—Plaintiff—Appellant.

v.

Khaw Sim Bee—Defendant—Respondent.

* *Evidence Act, S. 32 (6)—Birth-day books prepared for astrological purposes are admissible in evidence—Straits Settlements Ordinance (3 of 1893).*

Birth-day books which are prepared in Straits Settlements under a practice to make entries of dates of births, in order to obtain the opinion of astrologers as to good or ill fortune are admissible in evidence.

The Straits Settlements Ordinance No. 3 of 1893 is identical so far at any rate as the sections material in such case are concerned with the Indian Evidence Act, and under it the birth-day books, if the parol evidence concerning them was accepted, are admissible. [P. 47, C. 1.]

Where the parol evidence of the appellant's husband was held admissible under that Code to prove appellant's age,

Held, that a prior affidavit by the husband to the same effect was also admissible. [P. 47, C. 1.]

* *(b) Evidence Act, S. 115—Minor accepting after becoming major, division of property by executors under will of her ancestor cannot challenge the same after having dealt with the property got under the partition.*

Where a minor legatee accepted, after coming of age, the division of the property of the testator which was in fact made by independent arbitrators and she had valuable property allotted to her under it, which she sold at a profit some time after she came of age, and it was only when the greater part of what she had received had been dissipated that she complained about the distribution.

Held, that there was no more ground for reopening the part of the arrangement complained of than there is for reopening the settlement generally. [P 47, C 2.]

Sir Arthur Channell.—This is an appeal from an order of the Court of Appeal of the Supreme Court of the Straits Settlements, dated 21st August 1911, whereby it was ordered that an action brought by the Appellant in the Supreme Court should be dismissed with costs. This order in substance, although on different grounds, affirmed the judgment of Mr. Justice Thornton before whom the cause had been tried so far as that judgment related to the matters in dispute in the Court of Appeal and here, one matter dealt with in the judgment below having been disposed of by a cross-appeal allowed by consent.

The action was brought by the Appellant, a married woman, for the administration of the estate of one Khaw Soo Chang, her great grand father (hereinafter called the Testator) who had died possessed of considerable property at Penang in the Straits Settlements and also at Renong in the Kingdom of Siam. By his Will he directed that his business should be carried on for 16 years after his death (which took place on the 25th May 1882) and that there should then be a distribution, and he gave to one of his sons Khaw Sim Chuan, the grandfather of the Appellant, five-sixticths of the residue. The Will contained a clause to the effect that if any son should die in the Testator's lifetime or before the period of distribution, such son's share was to go to his issue. The Appellant's grandfather did so die, and she claims through him five-sixtieths of the residue. The Will is in several respects far from clear, and amongst other things the translation of the clause under which the Appellant claims her grandfather's share was in doubt; proceedings in Court were taken by originating summons before the present action, which resulted in a decision in the Appellant's favour on the construction of this clause, and it is not now disputed that she did become entitled to the five-sixtieths of the residuary estate. This makes it unnecessary to consider further the family pedigree.

The estate of the Testator was not wound up at the end of 16 years, and so far as appears, the estate at Renong has not been wound up yet, but the Penang property was in fact distributed in 1904.

The Appellant, who had been married to her present husband in December 1901, executed on the 15th January 1904 a power of attorney whereby amongst other things

she authorised her husband to represent her in all matters connected with the estate of the Testator and to execute deeds in her name. Her husband to some extent, at any rate, investigated the accounts, and ultimately on the 18th May 1904 executed a release to the executors. The estate had been divided into portions, and it had been arranged that the beneficiaries should draw lots for the order of choice of the portions.

The appellant was fortunate enough to get first choice and she, or her husband for her, chose, a lot including a valuable hotel which she afterwards sold for considerably more than it had been valued at in the apportionment. No complaint was made by or on behalf of the appellant as to this distribution until the 1st September 1910 (after the sale of the hotel), but the appellant had on the 25th April 1908 commenced the present action for administration of the Testator's estate. She, however then complained only of the Renong estate not having been distributed, and in her first statement of claim she alleged that the executors had duly distributed the Penang property and that a release had been executed.

On the 1st September 1910 she delivered an amended statement of claim alleging for the first time that she was under 21 years of age at the time of the execution by her of the power of attorney, and that by reason of her infancy she was not bound by it, or by the release executed on her behalf under it. She and her husband alleged that although they knew her age, they had only just discovered the legal effect of it, as there was a Chinese custom to treat a married woman who had borne a child, as the appellant had, as being of full legal capacity whatever her actual age. They also alleged that the husband had been induced to execute the release by misrepresentations made to him by one of the executors, and that there had been wilful misconduct and breaches of trust in the administration.

These allegations were denied by the respondents and the case went to trial before Thornton, J. The trial lasted nine days and there was a large body of evidence, the effect of which so far as now material, can be stated quite shortly. On the question of infancy the principal witness was the appellant's grandmother, who stated that the appellant was born on the 19th December 1885. She was present at the birth, and gave as the reason for remembering the date that it was her first and only grandchild. She seemed not very accurate in her estimates of the periods which elapsed between various events of which she spoke. In particular she spoke of one period as "several months" when if all her other statements of periods and the date of her grandchild's birth were correct, the period described as several months must have been about four years. Two so-called birth day books, were produced, each of which contained an entry of the appellant's birth at the date spoken to by the witness. The evidence showed a practice to make entries of dates of births, in books more or less of this character, in order to obtain the opinion of astrologers as to good or ill fortune, but one at least of the two books was of a somewhat suspicious character, and neither seems of very good weight.

The appellant's husband also gave evidence as to his wife's age, which obviously was in the nature of hearsay, and there was produced, and received in evidence, subject to an objection to its admission, which does not appear to have been afterwards argued or dealt with, an affidavit by the husband sworn on the 16th August 1902, in which he stated that his wife, the appellant, was then a minor of the age of 17 years only, which of course corresponded with the date spoken to of her birth.

There was no evidence on the other side on this point of date of the appellant's birth, and on this Thornton, J., found that the appellant had proved that she was an infant in 1904. He found on the evidence before him that the alleged misrepresentation was not proved, and he held that notwithstanding her infancy, no ground was shown for disturbing the distribution of the Penang property which had been made in 1904. He, however, made an order as to the Renong property. The appellant appealed to the Court of Appeal, and the respondents gave notice of a cross-appeal as to the Renong property, on the ground that the property was out of the jurisdiction of the Court and also on the merits, and the appellant consented to the cross-appeal being allowed.

The Court of Appeal differed from the finding of Thornton, J., as to the infancy, holding that it was not satisfactorily proved. There is no contemporaneous note of the

reasons for the judgment of the Court of Appeal, but there is a note made by one of the Judges from his recollection about a year after the judgment was delivered. The Judges seem to have considered that the judgment below was open to review on the question of fact on the ground, first, of wrong admission of evidence, and, secondly, because the learned Judge stated his conclusion without giving reasons in detail.

The Board have a difficulty in holding these grounds to be sufficient for setting aside the finding of the Judge who had heard the witnesses. There does not seem to have been any evidence wrongly received. The objections go rather to the weight of the evidence than to its admissibility, and the learned Judge had expressly stated that he relied little on the documents in question. The Strait Settlements Ordinance No. 3 of 1893 is identical so far at any rate as the sections material in the present case are concerned with the Indian Evidence Act, and under it the birth-day books, if the parol-evidence concerning them was accepted, appear clearly admissible.

The parol evidence of the appellant's husband was also admissible under that Code. The affidavit could not have been admissible as a material document if the deponent had not been called or if his parol evidence had not been admissible, but as he was called and his statement as to his wife's age was admissible for what it was worth (which, of course, was very little), he could not have been prevented from saying that he had sworn to the same date before the question now in issue arose, and that, of course, was the materiality of the affidavit. The Board have not heard Counsel for the respondents on the question of the admissibility of evidence or on the proof of infancy generally, but if it had not been for the view they entertain on the remaining questions, they must have done so, as they are not satisfied that the Court of Appeal was right in the reasons given for dismissing the appeal to them.

Their Lordships, however, are of opinion that assuming the fact of infancy to be proved, the appellant failed to show sufficient ground for re-opening the settlement of the Penang property, and in substance they agree with the judgment of Thornton, J., on this point, which was not gone into in the Court of Appeal. There can, of course, be no ratification by the infant after coming of age of the invalid power of attorney, but the infant may have, and in their Lordships' opinion, has after coming of age, adopted the division of the property which was in fact made and made by independent arbitrators. She had valuable property allotted to her under it, which she sold at a profit some time after she came of age, and it was only when the greater part of what she had received had been dissipated that she complained. She has been acting throughout with her husband and has not complained of his acts, and as pointed out by Thornton, J., if the infancy had been known, the husband would no doubt have been appointed guardian of his wife instead of attorney, and as guardian would have acted exactly as he did as attorney.

It is impossible now for the appellant to restore the property she has received, and a general redistribution of the property divided could not possibly be ordered. In fact the appellant's counsel did not argue strongly for a general administration, but pressed this Board to make an order that the executors should account for profits they had made by carrying on the testator's business under the name of a company, or that they should be charged with some sum which in fact they had never received, for the goodwill of the business taken over by the company. Taking the translation which is on the record of the Will of the Testator, a doubt arises as to whether the strict carrying out of the testator's directions in the 4th clause to "stop" the Penang business, and specifically divide the assets, would not destroy any good-will, but it would not be right to decide against the appellant's contention on that ground, without some inquiry as to the exact effect of the Chinese words used. The answer to the appellant's contention is that the transaction under which the company was formed, without making any specific payment for good-will, was not concealed in any way, and was part of the settlement by which the appellant must be held bound. It does not appear how the good-will of the hotel which the appellant took was dealt with, but it is stated that the valuation of the hotel was a low one, and there is nothing to show that the distribution as a whole was an unfair one.

It appears to their Lordships that there is no more ground for re-opening the part of the arrangement now complained of than

there is for re-opening the settlement generally.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant—Rawle, Johnson & Co.

Solicitors for Respondents—Loghborough, Gedge, Nisbet & Drew.

****A.I.R. 1915 Privy Council.**

(FROM LOWER BURMA)

3rd November 1915.

VISCOUNT HALDANE, LORD WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

A. K. A. S. Jamal—Appellant.

v.

Moola Dawood Sons and Co.—Respondents

Privy Council Appeal No. 70 of 1914.

* * (*a*) *Contract Act, S. 73—Contract for sale by shares—Breach—Seller holding on to the shares after breach cannot recover difference below market price from purchaser.*

In a contract for sale of negotiable securities, if the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, and the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

* * (*b*) *Contract Act, S. 73—Breach of contract—Plaintiff must take reasonable steps to mitigate loss—Loss is to be ascertained at the date of the breach—Plaintiff's action on the date mitigating damages benefits defendant but not subsequently.*

A plaintiff who sues for damages for breach of contract of sale owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at the date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract.

Lord Wrenbury.—Under six contracts made at various dates between April and August 1911 the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 1,84,125-10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at the Exchange at the next meeting," etc.

By the 30th December the share had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding:

"Failing compliance with this request by today our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby."

The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925-10, and called for a transfer of the shares. On the 2nd January 1912 the seller repudiated the claim to a set-off, and repeated:

"We have now to give you notice that our client intends to re-sell these shares and to institute a suit against you for the recovery of any loss which may result from that course."

The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to 26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows:—

"71, Phayre Street, Rangoon,
26th February 1912.

"Messrs. Moolla Dawood and Sons.

"Dear Sirs,

"We are instructed by Mr. A. K. A. S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that this claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of this week.

The amount claimed is arrived at by deducting Rs. 74,906-4, the value of 23,500 shares at 4 *s.* 3 *d.*, from Rs. 1,84,125-10, the agreed price of the shares.

Yours faithfully,
Giles and Coltman."

The 4*s.* 3*d.* a share there mentioned was the market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218-12 as damages for breach measured by the difference between the contract price of the shares and their market price (4*s*. 3*d*. a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219-6 mentioned in the letter.

Immediately after the letter of the 26th February, 1912, *viz*., on the 28th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one case the sale was at less than 4*s*. 3*d*. (*viz*., at 4*s*.). In one case it was at 4*s*. 3*d*. in every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realized, by giving him credit in reduction of the damages for the increased prices in fact realized over the market price at the 30th December, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual terms as to re-sale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was, in their Lordships' opinion, only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares, with a consequential obligation to account to him for the price, but was selling shares belonging to the seller which the purchaser ought to, but failed to take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a re-sale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to re-sale.

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at the date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth* v. *Lyall* (1) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract: *Yates* v. *Whyte* (2), *Bradburn* v. *Great Western Railway* (3), *Jebsen* v. *East and West India Dock Co.* (4).

The decision in *Rodocanachi* v. *Milburn* (5) that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams Bros.* v. *Agius Ltd.* (6). The breach in *Rodocanachi* v. *Milburn* (5) was breach by the seller to

(1) [1830] 7 Bing. 169=9 L.J. (O. S.) C.P. 23=4 M. & P. 829=33 R.R. 420.
(2) [1838] 4 Bing (N. S.) 272=7 L.J.C.P. 116=5 Scot. 640=44 R.R. 708.
(3) [1874] 10 Ex. 1=31 L.T. 464=44 L.J. Ex. 9=23 W.R. 68.
(4) [1875] 10 C.P. 300=32 L.T. 32=44 L.J. C.P. 181=23 W.R. 624=2 Asp. M.C. 505.
(5) [1886] 18 R.B.D. 67=56 L.T. 694=56 L.J.Q.B. 202=6 Asp. M.C. 100=35 W.R. 241.
(6) [1914] A.C. 510=110 L.T. 865=19 Com. Cas. 200=83 L.J.K.B. 715=30 T.L.R. 351=58 S.J. 377.

deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that sections 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards section 107, their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them *in transitu*. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

As regards section 73, it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach, the seller remained entitled to the shares and became entitled to damages such as the law allows. The first of these two properties, *viz.*, the shares he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the Original Court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondents ought to pay the costs in the Courts below and of this appeal.

D.D. *Appeal allowed.*

Solicitors for the appellant—Messrs. Arnold & Sons.

Solicitors for the respondents—Bramall & White.

***A.I.R. 1915 Privy Council.**

(FROM SOUTH AFRICA)

20th July 1915.

VISCOUNT HALDANE, LORDS DUNEDIN AND SUMNER.

British South Africa Co.—Plaintiffs—Appellants.

v.

Lennon, Lim—Defendants—Respondents.

* (*a*) *Tort—Negligence—Contributory negligence—Goods wrongly labelled by consignor—Plaintiff consignee's servant acting on the description of the labels.—Injury caused to plaintiff's cattle—Servant is not guilty of contributory negligence.*

Where drums containing arsenite of soda were wrongly labelled by the consignor showing less quantity and the consignee's servant on the faith of the labels inferred that only less quantity was received by him, and that the balance of large quantity mentioned in telegrams received by him was on the way and consequently by the dip prepared by the servant, plaintiff consignee's cattle were injured.

Held, that the servant was not guilty of contributory negligence in not expecting that the labels affixed by a respectable firm, such as consignor was, would be wrong or in not ascertaining by enquiring at the consignor's office about the actual quantity. [P. 52, C. 1.]

* (*b*) *Practice—Appellate Court can differ from trial Court about truth of evidence given in trial Court.*

There are cases in which, in face of the irrefragable testimony of contemporary written communications or of a course of business, an appellate Tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the trial Judge's impression of the witness what it may. [P. 51, C. 2.]

Robert Finlay, C. H. Tredgold and *Douglas* (for *H. Greenwood*)—for Appellants.

Leslie Scott and *D. M. Hogg*—for Respondents.

Lord Sumner.—The single question in this case is whether *culpa* was imputable to the plaintiffs either in causing the damage sued for jointly with the defendants' *culpa* or in failing to avert the consequences of the defendants' *culpa* by the exercise of reasonable care. It has throughout been spoken of as contributory negligence to be tested by the English decisions. Whatever difference there may be in general between the English doctrine of contributory negligence and the Roman-Dutch doctrine of *culpa*, no confusion arises here from speaking of the one in terms of the other.

By a majority, the Supreme Court of South Africa held that Harrington ought to have understood from the telegrams, that he had received all the drums sent and that they contain 5½ cwts. of Arsenite of Soda; that he was accordingly negligent in acting on the assumption that they only contained 93½ lbs. of Arsenite of Soda, the labels notwithstanding; and that his statement, that he thought 5½ cwts. had only been sent off, and had not yet been delivered to him was an after-thought and an untruth. Mr. Justice Solomon adds as an alternative view that even if Harrington's explanation were true his conduct was nevertheless careless, and that he ought not to have mixed and used the dip till he had obtained explanation from Messrs. Lennon, since "A telegram to Lennons would have cleared up the matter in a day." A further and apparently a fresh argument was advanced at their Lordships' Bar in the form of a dilemma *first*, that Harrington was careless, as above stated: and *secondly*, if he was not, it was said that the appellants' "Farms" office at Salisbury was, because the officials there ought to have understood from Harrington's telegram what had occurred, and by applying to Messrs. Lennon at once could have cleared up the matter in time.

As to Harrington's negligence, it is to be observed that the question was one exceedingly personal to himself. The reasonableness of his conduct, under the circumstances, was very much dependent upon what he knew, thought and believed on September 11, when he mixed the dip, and on September 12th, when he had it used. He may have been stupid, but no case was really made that, being what he was, he ought not to have been employed. His judgment may have been honestly at fault, but that alone would be no defence. If a man of ordinary care, standing in his place, would have read the telegrams as he says that he did, have believed in the explanation in which he says that he believed, and would thereupon have acted as he acted, and if his account of his reading of the telegrams and of his belief in the explanation of them be true then the conclusion of fact that he was not guilty of negligence was fully supported by the evidence and was right.

Harrington was examined and cross examined at length. If he gave a flippant answer or two, the Trial Judge was best able to decide how far that impaired the general value of his evidence. In rejecting Harrington's explanation of his understanding of the telegrams, Mr. Justice Solomon observes that "nowhere does he state that at the time of the occurrence he believed that this was the true explanation." There appears to be some oversight here; for from the evidence, Harrington clearly meant to say that when he mixed the dip he believed that the drums sent had not all been delivered, and so the Trial Judge took it.

Their Lordships are far from saying that this conclusion was binding upon the Court of Appeal. There are cases in which, in face of the irrefragable testimony of contemporary written communications or of a course of business, an Appellate Tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the Trial Judge's impression of the witness what it may. The present, however, is by no means such a case. The telegrams which Harrington received state that 5½ cwts. of Arsenite of soda had been despatched in two lots. They do not say in how many drums this quantity was contained. Nicely scrutinised, they might disclose that it was contained in eleven drums, the very number which Harrington had in hand, and, therefore, that it had all been delivered to him; but this riddle was by no means plain for a stockman to read. South Africa is familiar with two tons—the ton avoirdupois and the metric ton—and under the names of the "long" hundred weight and the "short" it enjoys two standards of weight. Unfortunately, not only is each called a hundredweight and its moiety half a hundredweight, but people write 50 lbs. when they mean 56 lbs. This was done in the Salisbury office telegram of September 9, but no one has suggested that this was negligence or that it affected the cause of action. Accordingly, if Harrington was to identify the eleven drums, weighing 616 lbs., which were in his hands, with the unspecified number of drums containing the quantity of arsenite of soda mentioned in the telegram, he had to divine that in the expression "one 50 lbs. the other 5 cwts.", the hundredweights were "long" though the half hundredweight appeared to be, and really might be "short," and that the half hundredweight really was

"long" though it was expressed as "short." So understood, the telegram certainly told him that 616 lbs. had been sent, and 616 lbs. was the quantity which he had received. If, however, the 5 cwts. were "short" hundredweights, as the 50 lbs. appeared to be a "short" half hundredweights, all that had been sent was 550 lbs. and then at 8½ lbs. of arsenite of soda to the drum, which he said he believed to be the case on the faith of the label, a large quantity must have been still on the way. Probably he went through no particular mental process, but simply accepted the explanation which occurred to him. That would be neither astonishing nor careless in itself. Certainly such telegrams are not so clear and convincing as to warrant the conclusion that Harrington could not have been truthful, and that he had deceived the Trial Judge.

The alternative suggestion that an enquiry of Messrs. Lennon would have been a quick and certain way of solving the puzzle, depends on whether Harrington or the Salisbury office made it, and on Messrs. Lennon's willingness and ability to give the correct answer when applied to. When a claim was made for the loss against Messrs. Lennon, based on an allegation of negligence in labelling the drums, twenty-three days elapsed before they admitted, and then as to one drum only, "that one of our staff inadvertently placed a label properly belonging to an 8½ lbs. tin on the 56 lbs. drum," at the same time charging Harrington with gross carelessness or incapacity. There is certainly nothing here to show much willingness on their part to admit an error on September 11 even if they then knew of it. Even down to December 16, Messrs. Lennon confined their admission of error to one drum, disputing that any error could be proved as to the other ten. Though the defendant's servants were carefully asked if any enquiry about the label had been made of them before the cattle were dipped, they were equally carefully not asked whether, if an enquiry had been made, they could and would have cleared up the mystery then. Owen, the egregious person who committed this blunder, was never asked to say that upon enquiry from outside he would have made a clean breast of what he had done. It is true that the Trial Judge says "an enquiry would almost immediately in a few minutes if they had sent a man down to Lennon have elicited the fact that these drums were wrongly labelled." This, however, rests on nothing in the evidence, and is true only if it be assumed that the enquiry would have reached Owen and that Owen would have confessed what he had done. In their Lordships' opinion this point, as a ground for finding negligence against Harrington himself, has no foundation, for it was never suggested that he should have disregarded the regular routine and have telegraphed to any one but the 'Farms' office; and as regards the officials there it is only a plausible speculation, which is not really supported by any substantial evidence.

It ought to be remembered throughout this case that, admittedly, Messrs. Lennon's reputation in their business is high, and that their clerk's blunder was as extraordinary as it was unpardonable. Persons in Harrington's position, or in the position of the officials at Salisbury, were warranted in putting great faith in the correctness of the labels under which Messrs. Lennon sent out their goods, and, however they might be perplexed by the discrepancy between the label and the weight of the drum, could not be reasonably expected either to hit on the true explanation of it or to hold their hands or fear that a description proceeding from so respectable a firm might yet be so grossly erroneous. If no such idea occurred to them, they cannot be stamped as negligent in consequence. Harrington was pre-occupied, and not unreasonably, by the fear that he had not arsenite of soda enough, not that the label was false or that he had far too much. His duty was to make and use a dip with the arsenite of soda ordered by the Salisbury office and sent in by Messrs. Lennon. If the dip was too weak, it might not kill all the ticks, but, at any rate, it would not kill any cattle. Why should he be expected to divine that, on the contrary, thanks to the defendants' fault, his dip was too strong and his surmises were mistaken? After careful examination of the evidence their Lordships have been unable to avoid the conclusion that the decision of the Trial Judge was not reasonably open to exception, and that there was no sufficient ground for interfering with it, and they will humbly advise His Majesty that it should be restored, and the judgment appealed against should be

reversed and the present appeal should be allowed, with costs here and below.

Appeal allowed.

Solicitors for Appellants—Coward and Hawksley, Sons and Chance.

Solicitors for Respondents.—Slaughter and May.

**A.I.R. 1915 Privy Council.

(From Canada)

20th April 1915.

Viscount Haldane, Lords Dunedin and Parmoor, Sir George Farwell and Sir Arthur Channell.

Grand Trunk Railway Co. of Canada—Defendants—Appellants.

v.

Albert Nelson Robinson—Plaintiff—Respondent.

(a) Railway Act (Canada) Ss. 284 and 340—Contract restricting liability for carriage must be approved by Railway Board—If approved Companies can contract for complete freedom from liability.

Apart from statute a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of the contract to carry, unless he has effiectively stipulated that he shall be free from such liability. The freedom so to stipulate has been restricted in Canada by the Railway Act. Under S. 340 no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board. Under the Act the companies are, by S. 284, put under a general obligation to carry and deliver with due care and diligence, and any one aggrieved by a breach of this duty is to have a right of action, from which the companies are not to be relieved by any notice, condition, or declaration of the damage arising from negligence or omission. This right is expressed by the section to be given "subject to this Act." Where, under S. 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board, and the conditions for making them binding have been duly complied with, the companies are enabled in such cases to contract for complete freedom from liability for negligence. [P. 54, C. 1.]

** *(b) Railway—General duty to carry passengers with safety can be superseded by special contract freeing company from all liability—Such contract has to be assented to by the passenger either directly or through agent who is then bound by the terms printed on the ticket or pass offered to him.*

(1) If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. But this general duty may, subject to such statutory restrictions, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable. The specific contract, with its incidents, either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him. (2) Where any such contract is made, the railway must discharge the burden of proving that the passenger assented to the special contract. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. If the agent has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by the company, be bound, and his principal will be bound through him. To hold otherwise would be to depart from the general principle of necessity recognised in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them. [P. 55, C. 2. and P. 56, C. 1.]

D. L. McCarthy and *E. F. Spance*—for Appellants.

R. Younger and *T. H. Wills Chitty*—for Respondents.

Viscount Haldane.—The question raised in this appeal relates to the right of the respondent, who was plaintiff in an action in the High Court of Justice for Ontario, to recover damages against the appellants for injuries suffered by him in an accident on the appellants' railway. He was travelling in charge of a horse consigned under what is known as a "Live-stock special contract," in a form authorised by the Railway Commissioners for Canada. The terms of the contract purported to relieve the appellants from liability for injuries arising from accident, even where caused by negligence, to a person travelling with the live-stock, in case he had been permitted to travel at less than full fare.

The course of the litigation disclosed much difference of judicial opinion. The Court of first instance decided in favour of the respondent. The Court of Appeal for Ontario by a majority (Garrow, Maclaren and Meridith, J. J. A.) reversed this decision, Magee and Lennox, J.J.A., dissenting. There was an appeal to the Supreme Court

of Canada, and in that Court, by a majority (Davies, Idington, Duff, Anglin, and Brodeur, JJ., the Chief Justice dissenting), the judgment of the Court of Appeal for Ontario was reversed. On an application for special leave to appeal to the King in Council this Board thought fit, in view of the importance of the question raised, to recommend that special leave should be given, but, in the circumstances, only on the terms that the appellants should, whatever the result of the appeal might be, pay the whole costs of this appeal as between solicitor and client.

Before adverting to the facts out of which the litigation arose, it will be convenient to refer to certain provisions of the Railway Act of Canada. Apart from statute a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of the contract to carry, unless he has effectively stipulated that he shall be free from such liability. The freedom so to stipulate has been restricted in Canada by the Railway Act. Under s. 340 no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board, which is empowered to determine the extent to which such liability may be impaired, restricted, or limited, and generally to prescribe by regulation the terms and conditions under which any traffic may be carried. Standard and special freight tariffs are to be filed with the Board and to be subject to its approval, and are to be published, and made open to the inspection of the public at the railway companies' stations and offices. Under the Act the companies are, by S. 284, put under a general obligation to carry and deliver with due care and diligence, and any one aggrieved by a breach of this duty is to have a right of action, from which the companies are not to be relieved by any notice, condition, or declaration if the damage arises from negligence or omission. It is, however, to be observed that this right is expressed by the section to be given "subject to this Act." Their Lordships think that where, under S. 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board, and the conditions for making them binding have been duly complied with, the companies are enabled in such cases to contract for complete freedom from liability for negligence.

In 1904 the Board approved a form of live-stock special contract, and the order approving it was duly published. The appellants adopted this form, and so far as appears, have complied with the conditions described for its use. It is out of a contract in the approved form that the present question arises.

The facts of the case are shortly as follows: —The respondent lives in the town of South River, in Ontario. He undertook to Dr. McCombe, who resides in that town, to go to Milverton and bring back a horse by rail from there. Dr. McCombe had arranged with Dr. Parker of Milverton, to buy the horse for him. When the Respondent arrived at Milverton, he went with Dr. Parker to see the horse, and it was thereafter brought to the appellants' siding to be put on one of their cars under arrangements made by Dr. Parker with their local agent. The Respondent and Dr. Parker placed the horse in the car. Dr. Parker had originally been under the impression that the horse could travel without any one accompanying it, but he had been informed by the agent that, for a long journey, it must be accompanied by some one. Arrangements had therefore to be made between Dr. McCombe, Dr. Parker, and the respondent that the latter should travel with the horse. After putting it on the train Dr. Parker went with the respondent to the agent's office, and Dr. Parker and the Agent signed a contract in the presence of the respondent. Dr. Parker folded it up and said that he should send it to Dr. McCombe by mail, but the agent told him in the Respondent's hearing to give it to the latter to carry with him as it showed that he was travelling with the horse. The document was accepted by Dr. Parker, but he did not think it necessary to take the trouble of reading it through. The respondent himself did not read it, but simply put it in his pocket, where it remained till some time after the accident when he gave it to Dr. McCombe. The officials on the train appear to have recognised the respondent, who looked after the horse, as the person travelling with it. He was not asked for any ticket or fare. In the course of the jouney there was a collision due to the negligence of the appellants' servants and the respondent was injured.

The case was heard before Latchford, J., and a jury. There was no dispute as to the

negligence, and the only question left to the jury, was the amount of the damages. These, the verdict assessed at '3,000 dollars. The learned Judge afterwards gave judgment for the respondent. In order to appreciate the significance of what he decided, it is necessary to turn to the terms of the special contract.

This, as has already been stated, was substantially in the form prescribed by the Railway Board. It was expressed to be made between the appellants and Dr. Parker. It acknowledged the receipt from him of a horse which the appellants undertook to transport to South River on the terms that their liability in respect of the horse should be restricted to a specified amount, in consideration of a rate lower than the full rate being agreed on. It went on to provide, as one of the stipulations on its face, that, in case the appellants should grant to the shipper, or any nominee of the shipper, a pass or privilege at less than full fare to ride in the train on which the horse was being carried, for the purpose of taking care of it while, in transit and at the owner's risk as before mentioned, then as to every person so travelling on such pass or reduced fare, the appellants were to be entirely free from liability in respect of his death, injury, or damage, whether it was caused by the negligence of the appellants, or their servants, employees, or otherwise howsoever. The contract concluded with a declaration, signed by Dr. Parker as shipper, that he fully understood its meaning. Across it was printed in red ink, "Read this special contract." On the margin was put, "Pass man in charge 'half fare'". The document thus contained the authority to travel for the man as well as the horse. The practice was for the railway companies in such cases to obtain payment from the consignee on delivery, and Dr. McCombe some days subsequently paid the appellants the amount of the freight, including the half-fare for the respondent.

These being the material facts, the learned Judge held that the respondent was not debarred from what he called his common law right. Any other view, he said, appeared to him to imply that by a contract to which he was not a party and of the terms of which he had no knowledge, his right to be carried without negligence was taken away. The Court of Appeal for Ontario by a majority reversed this judgment, on the ground that a contract excluding liability even for negligence had been made and was binding on the respondent. Their judgment was, however, overruled by a majority in the Supreme Court of Canada, who held that although the language of the contract purported to exempt the appellants from their liability, it did not contain the real terms on which the Respondent travelled in the train which met with the accident.

It is obvious that the question on which this appeal turns is one as to the terms on which the Respondent was accepted by the appellants as a passenger.

There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But, in either view, this general duty may, subject to such statutory restrictions, as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable, by a Court of Justice. The specific contract, with its incidents, either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

A second proposition is that if the contract is one which deprives the passenger of the benefit of a duty of care which he is *prima facie* entitled to expect that the company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be

taken to have left everything to his agent. In such a case it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to.

The company may infer his intention from his conduct. If he stands by under such circumstances that itwill naturally conclude that he has left the negotiation to the person who is acting for him, and intends that the latter should arrange the terms on which he is to be conveyed, he will be precluded by so doing from afterwards alleging want of authority to make any such terms as the law allows. Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by the company, be bound, and his principal will be bound through him. To hold otherwise would be to depart from the general principle of necessity recognised in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them.

In a case to which these principles apply, it cannot be accurate to speak, as did the learned Judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it, he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined.

Applying these principles to the facts of the present case, what is the construction to be put upon them by a Court of Justice? It may well be that the respondent did not actually know the latitude allowed by the law of Canada to railway companies. It is highly probable that he did not think of any such question as has arisen. But he must have known that he required to obtain permission from the company in order to travel with the horse, and for the rest, the law imputes to him the duty of knowing its principles. He had taken a single ticket only when he came to Milverton.

The proper inference appears to be that when he and Dr. Parker had put the horse into the train, he went with Dr. Parker to the Agent's Office with the intention that Dr. Parker should make, as regards both the horse and himself, the whole of the necessary arrangements at the office. If Dr. Parker had been acting for himself, there can be no doubt that he would have been bound by the terms of the document he received from the agent and by his signature expressly told the company that he understood. Can the respondent be in a better position? On the evidence, can he say that the company's agent was not led by him to believe that Dr. Parker, by whose side he stood while the contract was being made, was making it with his assent:

"I was standing right there,"

he says in his cross-examination

"alongside Dr. Parker."

"*Q.*—What did Dr. Parker say after he had signed the contract?—*A.* He folded the contract up and said he would send that to Dr. McCombe by mail, and "it will be there before you will be there," and he says, No. 'You must give it to this man, he must carry it with him, and it shows that he is travelling with this car.' They just handed it to me and I put it in my pocket."

Under such circumstances the true inference is that the respondent accepted the document knowing that it contained the contract obtained by Dr. Parker for his journey, and in accepting it accepted all the terms which were set out on the face of the document, and which he would have seen had he taken the trouble to look at what was handed to him. It does not appear possible to say, in this case, that he was misled in any way, or that the agent need have done more than he did when he handed over a document which set out the terms offered for acceptance with great distinctness, in the form which the Railway Board had directed.

Such view is not inconsistent with any finding of fact by the jury, or even by the learned Judge who tried the case. It is based on the legal consequences which

flow from facts about which there is no controversy. The majority in the Court of Appeal for Ontario appear to have interpreted these consequences in [the only way which the law warrants.

Having regard to the conclusions at which their Lordships have thus arrived, they will humbly advise His Majesty that the appeal should be allowed, and the action dismissed with costs in all the Courts below. The appellants must, however, under the terms on which special leave to appeal was given, pay the whole of the costs of the appeal to the King in Council as between solicitor and client.

Appeal allowed.

Solicitors for Appellants—Batten, Proffitt and Scott.

Solicitors for Respondent—Blake and Redden.

A.I.R. 1915 Privy Council.

(FROM CALCUTTA)

2nd November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Ravaneshwar Prasad Singh—Appellant.

v.

Chandi Prasad Singh and *others*—Respondents.

Privy Council Appeal No. 1 of 1914.

(a) Civil P.C., O. 41, R. 33—One of the plaintiffs failing to make out his title—Suit should not be dismissed especially if rights of other plaintiffs would be barred.

If one or other of the plaintiffs is entitled by succession to the property in suit, it would not be right that the suit should be dismissed, because one of the plaintiffs alone has failed to make out a title, particularly when as the result of so holding, the right of the co-plaintiffs would be barred. [P. 58, C. 2.]

(b) Hindu Law—Widow—Alienation by—Transferee must prove necessity or that he made bona-fide *enquiries and was satisfied—Lapse of time may be an excuse for scanty proof of necessity—Payment of full price is not conclusive proof in favour of transferee.*

It is for the transferee from a widow to establish either that there was legal necessity for borrowings by her or that from sufficient enquiries made, he honestly believed that there was such necessity. Mere lapse of time does not affect such a matter except in so far as it might give rise to a presumption of acquiescence or save the transferee from adverse inferences arising from the scanty proof offered. Further it is not sufficient to establish that in fact there were litigations and expenses must have been incurred. It must be shown what the expenses were, that they could not have been met from the income of the estate, and that they were reasonable. The circumstance that full price was paid for the conveyance though in favour of the transferee is insufficient by itself. [P. 58, C. 2.]

De Gruyther and *J. M. Parikh*—for Appellant.

H. E. Richards and *B. Dube*—for Respondent.

FACTS.—The first plaintiff claimed an estate called taluk chakai, originally the property of one Tikait Dharam Narain Singh. He claimed to be the great great grandson of Raghubir Singh, the second son of Tikait Dharam Narain Singh. The last male holder of the property was one Tikait Garbh Narain Singh, who died while a minor and who was the great grandson of Jagarnath Singh, the eldest son of Tikait Dharam Narain Singh. The family was governed by the Mitakshara and the property was impartible. Tikait Fateh Narain died on the 18th April 1863 leaving three wives. A posthumous son (Garabh Narain) was born in July 1863. On the latter's death, his mother, Tikaitni Durga Kumari, succeeded as his heir and died on the 15th May 1907. During her life-time certain alienations were made in favour of the predecessor of the defendant, the Maharajah of Gidhaur. The first plaintiff claimed to be entitled to these properties on the ground that Durga Kumari had a limited interest only and that the transfers were not for legal necessity and were not transfers of the estate itself, which he claimed on the ground that lineal primogeniture applied to this estate and that he was the eldest representative of the eldest line of Tikait Dharam Narain Singh.

The first plaintiff joined with himself the second and third plaintiffs, Bhairo Singh and Tribhuvan Singh. These persons were nearer in descent to Dharam Narain Singh; but were members of junior lines, and the plaint alleged that they had executed deeds of relinquishment, in favour of the first plaintiff, of any right they might claim, though in fact they had no right except to maintenance. The suit commenced on the 6th March 1908. The trial Court held that lineal primogeniture was applicable, that according to this rule the first plaintiff was entitled to the estate and that the

alienations were not made forany legal necessity and it gave decree in plaintiff's favour. The defendant Maharajah appealed to the High Court and the two questions that arose for decision in appeal were (1) whether the first plaintiff Chandi Prasad Singh, was the heir-at-law and (2) if so, whether the transfers under which the Maharajah claimed were binding on the inheritance. The relevant portion of the judgment of the High Court was as follows :—

"Upon the first point it is admitted that the result of the reported decisions is that, where impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. But it is contended that, in order that this rule should be applied there must be a joint family upon which the principle of survivorship may operate. It is conceded that, if the family were joint and the property impartible and the claim of the plaintiff had been based on co-parcenary, then in that case the plaintiff would be the heir-at-law. But it is contended, in the first place, that the plaint bases the plaintiff's title on family custom and not on the ordinary law applicable to the Mitakshara joint family, and secondly, that the first plaintiff's father was not in fact joint with the last male holder and that the decision of the High Court (5th January 1870), in Durga Kumari's suit of 1868 that the estate was not held jointly is *res-judicata*. It is then contended that the plaintiff's case must depend on the proof of the alleged family custom which he asserts, that on failure of such proof the succession would be governed by the law relating to succession to separate property, and that on the facts the first plaintiff is in this case excluded.

If, then, the plaintiff establishes the family custom alleged, or if he is not precluded from establishing and does establish that his father was joint with the last male holder, then he establishes his title to sue. If, on the other hand, the family custom is not proved and the plaintiff is precluded either by *res-judicata* or by his pleading from showing (or if not so precluded does not show) that the family was in fact joint, then he fails to establish his title....."

"We, hold, therefore, that the family custom alleged has been proved, and that the plaintiff's claim has been established. We, however, may here point out that, even if the first plaintiff's title had not been established, we have, as parties to the suit, the persons who would admittedly, on failure of the proof of his title, have been entitled to succeed and were joint plaintiffs with him. These persons have released their rights (if any) in favour of the first plaintiff. It has been held that these documents did not operate as conveyances. If they did so operate, then the first plaintiff's right to sue is established notwithstanding failure to prove his own right of succession. If they did not so operate (though under the circumstances it is not necessary to determine the point) then we should have been disposed in order to do justice in the case (for further litigation by the co-plaintiff's to assert their title would be barred), to accede to the application made to us that, in the event of our holding that the title of the first plaintiff had not been made out either in his own right or by virtue of the alleged transfer to himself, we should act under the provisions of O. 41, R. 33 of the Civil Procedure Code, or (if that rule be held to be inapplicable) that the co-plaintiffs Tribhuvan's sons) might have leave to appeal against the decree. If, as is admittedly the fact, one or other of the plaintiffs is entitled by succession it does not seem to us to be right that the suit should be dismissed because the first of the plaintiffs alone had failed to make out a title, particularly when as the result of our so holding, the right of the co-plaintiffs (who, if the first plaintiff were not joint with the last male holder, would) on failure of the first plaintiff's case, be entitled, was thereby barred....."

"The title of the first plaintiff, having been thus established we proceed to deal with the question whether the transfers by or through Durga Kumari bind the estate, of which he is the heir."

Then their Lordship of the High Court examined the evidence adduced on this point and continued—

"It will be observed that Durga Kumari thus borrowed between the years 1870 and 1871 a sum exceeding Rs. 1,60,000 and had during the last year alienated the most substantial portion of the estate, the remaining properties being of comparatively insignificant value. It is for the appellant to establish either that there was legal necessity for these large borrowings or that from sufficient enquiries made, he honestly believed that there was such necessity. It has been argued that the onus upon the appellant is lightened by the reason of the lapse of time. But lapse of time does not affect such a matter except in so far as it might give rise to a presumption of acquiescence or save the appellant from adverse inferences arising from the scanty proof offered. In the present case there was admittedly no acquiescence....."

"Then it is said that the expenses were incurred in the course of the litigation which took place between Durga Kumari and Durga Prosad. That there were such litigations is a fact, and expenses must have been incurred. But it is not sufficient to establish these two facts. It must be shown that the expenses could not have been met from the income of the estate, that they were reasonable and what they were....."

"We hold that no legal necessity in fact has been proved and we now pass to the question whether the Maharajah is protected by the enquiries he is alleged to have made."

Then their Lordships while dealing with this question remarked

"The Judge has found that the full price was paid for the first conveyance, and, if that be so good value was given for the conveyance of 1877; and this circumstance is relied on to show that the Maharajah was buying the inheritance. This, though a circumstance in his favour, is obviously insufficient by itself; for otherwise every transaction with a Hindu widow for full value would be valid....."

"He has not, in our opinion, established that he made a sufficient or *bona fide* inquiry and that

he did all that was reasonable to satisfy himself of the existence of the legal necessity alleged."

In the end the appeal of the Maharaja was dismissed and he appealed to the Privy Council from the judgment of the High Court.

Viscount Haldane.—In this appeal their Lordships see no reason to delay their recommendation to His Majesty.

The case has been very fully opened, and on the points argued, their Lordships do not find any reason to differ from the conclusions arrived at by the High Court.

They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant—Downer and Johnson.

Solicitors for Respondents—Watkins and Hunter.

**A.I.R. 1915 Privy Council.

(FROM BOMBAY)

3rd June 1915.

LORD ATKINSON, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMIR ALI.

Secretary of State for India—Defendant—Appellant.

v.

Bai Rajbai—Plaintiff—Respondent.

Privy Council Appeal No. 34 of 1914.

* (a) *Words—Kasbatis—These were dwellers in towns with lands in villages cultivated by tenants and probably had powers of management in village affairs.*

The term Kasbatis was used to designate dwellers in towns whose lands were cultivated not directly by themselves but by ryots, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, apparently invested with certain powers of government over their villages, including the management of village affairs. [P. 60, C. 2.]

** (b) *Crown—Territory ceded by Native ruler—Landholders therein cannot claim continuation of their old rights as under the old ruler unless there is express or implied agreement by Br. Govt. to that effect—Burden is on land-holders to prove such agreement.*

Where a territory is ceded by a native sovereign to the British Govt. the relation in which the landholders in that territory stood to their native sovereigns before the cession, and the legal rights they enjoyed under them, are, save in one respect entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstancial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these ante-cession rights and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for inquiry. [P. 62, C. 1.]

7 M.I.A. 476 and (1899) A.C. 572 Ref. The burden of proving consent on the part of the latter government is on the landholders. [P. 63, Cols. 1 and 2.]

Where the British Government granted to such landholders leases of the land they held and such leases were renewed from time to time,

Held that from these facts moral obligations may arise, but the mere repetition of such acts of grace cannot *per se* create legal right to their continuance. [P. 63, C. 2.]

* (c) *Jurisdiction—Annexation of territory—Obligations under treaty are not enforceable by courts.*

The annexation of territory is an act of State, and any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which Municipal Courts are authorised to enforce. [P. 63, C. 1.]

* (d) *Lease—Construction—Lease expressly providing for restoration after lease term—No covenant for renewal expressed—Right to renewal and right to hold on were held as negatived.*

Where on cession of territory by Native ruler to British Government an old landholder was given a lease for a term of seven years at a jamabandi of Rs. 100 with a covenant by the lessee that he should not sell or mortgage the village, or give, or allow any one to give any land of the village in Pasayta, or keep any debt upon the village, but should make it prosperous, and should hand it over to the Government in the year 1831, *i.e.*, at the end of seventh year.

Held, that these terms of the patta absolutely negative the existence of any legal right enforceable in an Indian tribunal either to have the leases of the village from time to time renewed, or to continue in possession of it after the leases had expired. [P 63, C. 2.]

* (e) *Lease—Construction—Lease for a term implies its termination at the end of the term.*

Prima facie a lease for a term does not import any right to a renewal of it. On the contrary, it *prima facie* implies that the lessee's right to the promises demised ends with the term.

(f) *Bombay Ahmedabad Talukdars Act (6 of 1862)—Act does not apply to kasbatis.*

Act 6 of 1862 does not apply to Kasbati lessees of the Pargana Viramgaon, in District Ahmedabad, at all since they never were Taluqdars of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the Grassias, and therefore did not suffer the injustice which the Statute was designed to remedy.

(g) Bombay Land Revenue Code (5 of 1879), Ss. 68 and 73—Kasbatis are entitled to hold land only for the lease period—Bombay Gujarat Talukdars Act (6 of 1888).

Ss. 68 and 73 of the Revenue Code mean that Kasbatis of the Viramgaon Pargana in District Ahmedabad are bound by the terms of the lease, one term of which is that the lessee shall only occupy for the term of years for which the lease is granted and *prima facie* no longer.

E. Richards and *Lowndes*—for Appellant.

De Gruyther and *Parikh*—for Respondent.

Lord Atkinson.—These are consolidated appeals from preliminary and final decrees of the High Court of Judicature of Bombay, dated respectively the 16th of April 1909, and 11th of April 1911, modifying a decree of the District Judge of Ahmedabad, dated the 30th of November 1907, in Suit No. 7 of 1898 in his Court.

The question in issue in the action for an injunction, out of which these appeals have arisen, is whether the plaintiff, like her male ancestors, is not entitled to the continued possession, management, and enjoyment of a certain village called Charodi, about 2,200 acres in extent, situated in the pargana Viramgam, in the District of Ahmedabad in the province of Gujarat. In her plaint she bases her right on her absolute ownership of this village. In argument before this Board and in the judgments of the Courts below her right has been also based apparently upon the following title, namely this, that though her ancestors took from time to time several leases of this village from the Bombay Government, each for a term of years, they were not, as the appellant contends, mere lessees bound to give up to their lessors at the end of each term the possession of the demised village; but were legally entitled as each lease terminated, to have a new lease granted to the last lessee or his representative. Either title, if possessed by her, would enable her to succeed in this action. In order to arrive at a conclusion on the issue thus in dispute between the parties it is necessary to examine briefly the history of this district of Ahmedabad before its cession by the Gaekwar, with the concurrence of the Peishwa, to the British Government in the year 1817, and to examine more in detail the dealings of the Bombay Government after that date with a certain class of its inhabitants, Mahomedans in religion, said to have originally come from Delhi under the Great Mogul, and styled indifferently Casbatees and Kasbatis, and especially their dealings with the ancestors of the respondent, who belonged to that class, touching this village of Charodi.

The ancestor of the respondent in possession of this village at the time of this cession was one Jehangirbhai *alias* Bapuji. One Fatumyia, his grandson, died in the year 1891 childless, leaving him surviving his widow, Nandbai, one of the plaintiffs in the action, who has died during the course of the litigation. One Bapuji, the brother of Fatumyia, died some years ago, leaving his son, Bapa Bhai, his only issue him surviving, and Bapa Bhai himself died in the year 1893, leaving his daughter, Bai Rajbai, the other plaintiff, his only child him surviving. This lady, who subsequently married and was left a widow, has thus become the sole surviving descendant of the member of the Kasbatis class who was in possession of this village of Charodi at the date of the aforesaid cession. The term Kasbatis, it is not disputed, was used to designate dwellers in towns whose lands were cultivated not directly by themselves but by ryots, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, apparently invested with certain powers of government over their villages, including the management of village affairs. At the time of the cession the Kasbatis were possessed of seventeen villages within the pargana of which Charodi was one. The settlement of the territories ceded, was not practically undertaken till the year 1822–1823.

In the interval an accredited public official of the Company was put in charge, duly authorised to investigate the local conditions, and make suggestions and recommendations for the carrying through of this work. In the conduct of this business and in discharge of these duties he made reports to his superiors in which he sketched the history of the Kasbatis, the Grassias, and other classes or families amongst the inhabitants, and purported to describe the rights they had theretofore respectively acquired as against the ceding Sovereign, the Gaekwar, to the land of which they were in possession, and the villages over which they exercised some primitive powers of management and control. Some of these reports have been received in evidence

apparently without objection. On two of them, sent by Mr. Williamson, described as the Assistant Collector in charge, the first bearing date the 3rd of August 1822, to the Secretary of the Government of Bombay, and the second bearing date the 28th of May 1823, referring to the first, to the Collector of Ahmedabad, much reliance has, naturally, been placed. In the first he reports, amongst other things, that there were seventeen villages in the Viramgam pargana, held for a considerable number of years by several families of *Casbatees* or *Kasbatis* under a peculiar kind of tenure; that their possession had been frequently interrupted, and had not therefore been sufficiently continuous to found prescriptive rights; that as soldiers of some property, family, and character, they had acquired a partial influence in the affairs of the pargana, and often had obtained from the local managers leases of villages on favourable terms, in the granting of which nothing further had been intended than that the villages should remain in their temporary charge; that after the grant of the farm of Ahmedabad by the Peshwa to the Gaekwar, the Kasbatis had enjoyed the produce of some of these villages for twenty-five or thirty years on a revenue which was increased or lowered according to the pleasure of the local managers; that in 1804 they were dispossessed of these latter by one Babaji Appaji, a manager of the Peishwa, who demanded a higher *jumma* than the *Kasbatis* would consent to pay, but were restored to possession ten years later; that thus by a train of circumstances of such an undefined nature that it was difficult to describe them, the class had acquired a sort of claim to the villages of which they were found in possession when the country was delivered to the Bombay Government; that since the authority of that Government had been established at Ahmedabad Revenue settlements had been made with them, except where they refused to pay an adequate *jumma*, "but being men of ignorance or bad circumstances and of very indolent habits," they were altogether incompetent to conduct village concerns; that their villages were of vast extent and capable of much improvement; that they were well aware of the precarious tenure by which they held their villages (as they were merely what might be called lease-holders), and that he had every reason to believe they would be well satisfied with an arrangement which would secure to them permanent possession of a portion of their villages.

Mr. Williamson then proposed for the consideration of the Government a plan to this effect: to give to each Casbatee one, or according to the circumstances and claim of the particular person, two, of the smaller villages on a jumma, less than that which they had hitherto paid, thereby keeping up their name and respectability as landowners, and enabling them to devote their whole attention to cultivating and improving their properties, while the small amount of revenue levied on the villages remaining in their hands would compensate them for the loss of those surrendered to the Government.

This plan was not approved of by the Government. On the contrary, the Government Secretary wrote to the Assistant in charge of the collectorate of Ahmedabad (presumably this same Mr. Williamson, as he so described himself) a letter bearing date the 22nd of November 1822, acknowledging the receipt of the latter's letter of the 3rd of August previous, and informing him that though the plan he suggested might be agreeable to the Casbatees, the Governor in Council doubted whether it would afford any permanent relief; that it was considered that a more desirable arrangement would be to give to the Casbatees pensions to be fixed by the Government, for a life or a number of lives, but that if these latter should be unwilling to accept pensions Mr. Williamson's plan should be adopted. The Casbatees refused to accept pensions, but Mr. Williamson's plan, though adopted in part, was not adopted in its entirety. One of its provisions of vital bearing on the present controversy was not adhered to. He had suggested that the *Kasbatis* should be secured in permanent possession of such of their seventeen villages as should be left to them. Whereas on the 28th of May 1823 he wrote to the Collector of Ahmedabad informing him that he (Williamson) "had concluded an arrangement with the Casbatees of Viramgam by which they are to retain, during the pleasure of the Government, nine of the villages found under their management when the Pergunna fell into our possession."

He proceeded to point out that by this arrangement the interference of the Casbatees

would be removed from eight of their villages, the produce of which was valued at Rs. 13,800, while that of those remaining with them was only valued at Rs. 5,300, but that the *jumma* in respect of these latter was so small, namely, Rs. 1,925, that there would remain for their maintenance Rs. 3,375, a sum differing but little from that of Rs. 3,820, which, according to his calculation, was all that would have been available for their maintenance had they continued in possession of their seventeen villages. Then follows this passage: —

> "The lease being granted for seven years affords the Casbatees an opportunity of availing themselves of these capabilities (*i.e.*, the capabilities of their villages of improvement). The condition of the villages and the rules respecting leases laid down by Government guided me in fixing the term."

On the 23rd of June 1813 the Secretary of the Government of Bombay wrote to the Collector of Ahmedabad informing him that the Governor in Council approved of Mr. Williamson having made an "agreement with the Casbatees by which they are to retain during the pleasure of Government nine of the villages found under their management when the Pergunna fell into our possession."

The expression "at the pleasure of Government" is not very happily chosen. Since leases for terms of seven years were to be given to the *Kasbatis*, it obviously could not have meant that they were to hold these nine villages merely as tenants-at-will of the Government. What it must, in their Lordships' view, have meant in this connection was that they should receive at once leases for a term of seven years, and that after the termination of these leases the Government would be free to deal with them as it pleased to renew their leases or to permit them to continue in possession without leases, or to dispossess them altogether, as the Government might in its discretion think fit. If that be so, then there could not have been on the part of the Government a more emphatic assertion of their resolve that the lessees should not have any legal right, as against it, to a renewal of their leases or the permanent possession of their villages.

Before dealing with the action which the Government of Bombay took in reference to this village of Charodi on receipt of these reports it is essential to consider what was the precise relation in which the *Kasbatis* stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new sovereign, of which they were thereafter possessed. The relation in which they stood to their native Sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and only those, which that new Sovereign, by agreement expressed or implied or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new Sovereign has recognised these ante-cession rights, of the *Kasbatis*, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for inquiry in this case. This principle is well established, though it scarcely seems to have been kept steadily in view in the lower Courts in the present case. It is only necessary to refer to two authorities on the point, namely, the case of *Secretary of State for India* v. *Kamakhee Boye Sahaba* (1), decided in the year 1859, and *Cook* v. *Sprigg* (2), decided in the year 1899.

In the first this Board had to deal with the action of the East India Company in seizing in exercise of their Sovereign power, in trust for the British Government, the Rajah of Tanjore, and the whole property of the deceased Rajah, as an escheat, on the ground that, by reason of the failure of the male heirs of the latter the dignity of the Rajah was extinct, and that the property of the Rajah had thereby lapsed to the

(1) [1859] 7 M.I.A. 476=13 Moo. P.C. 22=1 Suther 373=4 W. R. 42=1 Sar. 684 (P.C.)
(2) [1899] A.C. 572=81 L.T. 281=68 L.J. P. C. 144.

British Government. Lord Kingsdown, delivering the judgment of the Board, is, at page 540, reported to have expressed himself thus:—

"The result, in their Lordships' opinion, is that the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy."

Now, in that case the act complained of was of a tortious character.

In the second case the Judicial Committee had to deal with a concession given by the ceding Sovereign the paramount chief of Pongoland. The appellants sought to enforce in a Court of law their rights under this concession against the English Government to which the territory over which the concession had been given was ceded by this chief. The decision in the first-mentioned case was followed, the above quoted passage from the judgment of Lord Kingsdown approved of, and it was held that the annexation of territory was an act of State, and that any obligation assumed under a treaty either to the ceding Sovereign or to individuals is not one which Municipal Courts are authorised to enforce. As far, therefore, as the legal rights of the *Kasbatis*, enforceable against the Indian Government in Indian Courts, are concerned, the above-mentioned cession of territory must be taken as a new point of departure. Mr. Williamson's conclusions as to the positions, rights, and interests of the *Kasbatis* may have been quite erroneous. The *Kasbatis* may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own regime.

In their Lordships' view, putting aside legislation for the moment, the burden of proving that the Bombay Government did so consent to any, and if so, to what extent, rests, in this case, upon the respondent. The *Kasbatis* were not in a position in 1822 to reject Mr. Williamson's proposal, however they might have disliked it, or to stand upon their ancient rights. Those rights had for all the purposes of litigation ceased to exist, and the only choice, in point of law, left to them was to accept his terms or be dispossessed. There is nothing, therefore, to support the contention that they never would have accepted Williamson's terms had the permanent possession of their villages not been promised to them. It may well be that the Bombay Government did not intend to disturb them, and even intended, if all things went well, to grant to them, as acts of grace, new leases as the old leases expired, and it may also well be that the *Kasbatis* fully believed and trusted that this would be done, as indeed for many years it was done. From these facts, if they existed, moral obligations, (with which this Board is not concerned) may arise, but the mere repetition of such acts of grace cannot *per se* create legal right to their continuance.

Though notice was served on the two plaintiffs to produce all documents in their possession touching the issues raised in the suit, no *patta* or *kabuliyat*, executed in 1823, was produced or given in evidence, but two Government records of that year were produced as secondary evidence of the contents of a *patta* granted to the *Kasbatis* then in possession of the nine villages retained by them, including this village of Charodi. According to these records a *patta* of the village was then given to Bapabhai, the father of Fatumyia, for a term of seven years, at a *jamabandi* of Rs. 100, with a covenant by the lessee thathe should not sell or mortgage the village, or give, or allow any one to give, any land of the village in Pasayta, or keep any debt upon the village, but should make it prosperous, and should hand it over to the Government in the year 1831. If these be the true contents of the *patta* they absolutely negative the existence of any legal right enforceable in an Indian tribunal, either to have the leases of the village from time to time renewed, or to continue in possession of it after the leases had expired.

As to this village of Charodi, one must start then on the inquiry as to what rights were granted by the Bombay Government

to the respondent's ancestors, with this admitted fact, that in the sixty-eight years which have elapsed between the year 1822 and the institution of this present suit not even in one of the several *pattas* granted to them is any provision to be found to the effect, that upon its expiration a new *patta* is to be granted to the lessees or their representatives or successors, while the very first of these *pattas* contained a clause expressly negativing the existence of such a right. The reasonable and proper inference to be drawn from the silence of the *pattas* on this important point is, Sir Erle Richards on behalf of the appellants contends, that the legal right to obtain renewals of the *pattas* was never conferred upon the respondent's ancestors. And, no doubt, if the draftsmen of these instruments had even a rudimentary knowledge of their business, one would have expected that such an important matter as that would have been provided for, but unfortunately for this contention, those experts have drawn these instruments in language so obscure that the instrument could scarcely have been more obscure, had obscurity been aimed at, and have resolutely omitted from every *patta* but the first the ordinary provision to be found in every properly-drawn lease, that the lessee shall deliver up possession at the end of the term. Mr. De Gruyther, on behalf of the respondent, on his side not unnaturally contends that the inference to be drawn from the continued omission of such a provision is that the lessees had a legal right to continue in possession after the *patta*, or lease, had terminated. He puts forward, moreover, as their Lordships understood him, this additional contention, namely, that in 1822 a settlement was made with the ancestor of the respondent then in possession of this village of Charodi, in which the amount of *jumma* was fixed, that the effect of such a settlement is that the person in possession by whom the *jumma* is to be paid was fixed or settled permanently in the possession, at all events, of this village, with a right to manage it, that the *pattas* could not have been designed to take away the rights thus conferred, and that the only way of reconciling the grant of them with the relation created by the settlement is to hold that the *patta* only dealt with the *jumma* and the mode of management of the village, not with the tenure of it, if that term may be used. To determine which, if any, of these contentions is well founded, it is necessary to examine in detail the provisions of those *pattas* the contents of which are satisfactorily proved.

First, then, as to the *pattas* granted on the 21st of August 1833: In the year 1827, during the currency of the first lease a report was made to the Taluqdari Settlement officer by Lieutenant Melville, of the 7th Regiment, in which he described the *Kasbatis* of Viramgam as proprietors of certain villages. He apparently was not aware that they then actually held under *pattas* for terms of years granted to them by the Bombay Government. No importance can therefore be attached to his use of the word "proprietors." In July 1831 the question of the increase of the *jumma* fixed by the first batch of leases was under consideration. Several *Kasbatis* presented a petition to the Government insisting that the *jumma* fixed in 1822 was then fixed permanently, and should not be increased, also asserting that it was part of the arrangement made by Williamson that the eight villages taken from them in the first instance should, at the end of the seven years, be restored to them, and claiming that this arrangement should be carried into effect. The reply of the Government to this petition, dated 16th September 1831, was to the effect that the order made by the Government on the 16th of November 1822 could not be set aside. Sometime thereafter the above-mentioned lease was granted to Bapabhai, the father of Fatumyia, and his brother, Miabhai, as the lessees. It is endorsed as having been delivered to the latter. The *jumma* is increased to Rs. 142, payable in eight instalments, at different times, and in unequal amounts. The term is seven years, commencing in the year 1830–31 and terminating in the year 1836–37.

By the second clause of the lease it is provided that on failure to pay any instalment on the day named, the Government are to "take back" the *patta*, and cause the revenue of the village to be collected by other hands, the lessees being responsible for any deficit in the year in which the *patta* is taken over, and that at the end of that particular year the Government "would if it so pleases give the village to some person other than the lessees who it was asserted shall not get it" but should be held liable for any loss which might accrue to the Government during the remainder of the term.

The seventeenth clause provides that if the Government should find that the lessees were spoiling the village, or did not abide by the clauses of the lease, the Government would send arbitrators to inquire into the matters, and if they should find that the village would be spoiled if allowed to remain in the hands of the lessees the *pattas* would be taken back from them and they would have to pay such a penalty as the Government might choose to impose.

The facts that the granting of a *patta* for seven years was part of the arrangement made with Mr. Williamson, and that the *pattas* then granted contained a clause that the village should be given up to the Government at the end of the term, coupled with the clauses of the lease of 1833, providing for the transfer of the village in certain events to persons other than the lessees, are quite destructive of the theory that these *pattas* merely regulated the amount of the *jumma* but not the tenure, and that independently of them altogether this family of *Kasbatis* was fixed in permanent possession of this village of Charodi. In the year 1838 a new *patta* was apparently granted for seven years, but neither the original, nor any copy of it was forthcoming at the trial. On the expiration of this term in the year 1845, the Collector forwarded to the Revenue Commissioner of Ahmedabad a report, dated the 8th of September 1845, proposing, amongst other things, to increase the *jumma* of this village. In it he sets forth in paragraph 5 that *Kasbatis* being sent for in order to enter into a fresh settlement, declared that the settlement made by Mr. Williamson was permanent and that the *jumma* was not to be increased. They were unwilling to take leases, on any terms other than the original. The Collector thereupon refused to renew the leases and limited the privileges of the *Kasbatis* to the receipt of 20 per cent. on the revenue pending the pleasure of Government. In the 10th paragraph of the report he proceeds to add:

"This long enjoyment of the villages at the same rental has increased their (*i.e.*, the *Kasbatis*) real or feigned impression that the original settlement was permanent, which it certainly was not."

He then proposed that the rent of the villages should be slightly increased and that if the *Kasbatis* did not accept the leases offered, the village should continue under the direct management of the Government, and the *Kasbatis* should be allowed 20 per cent. of the revenue.

It will be observed that both parties to this dispute took their stand respectively on Mr. Williamson's arrangement. They only differed as to its terms. The *Kasbatis* insisted that according to it, the eight villages taken from them were to be restored to them at the end of the term of the first lease, and that the rent should not be increased, while the Government insisted that the grant of any lease after the first was entirely a matter at their discretion.

The Government refused to yield. The position they took up clearly appears from a letter, dated 24th February 1847, addressed by the direction of the Governor-in-Council to the Revenue Commissioner of this district, Mr. A. Blane, pointing out that the *Kasbatis* did not appear, from the former proceedings connected with the settlements previously made with them, to have any valid title to

"A permanent continuance of the terms upon which they have hitherto held their villages"

And suggesting that the *jumma* should be increased by 5 per cent., that if they consented to this their term might be renewed for seven years, but that the Governor-in-Council desired that a distinct reservation should be inserted to the new lease endorsing the right of the Government to raise the rent if circumstances should show it to be expedient, and that if they refused to consent to this the villages should be retained under Government management, an allowance being made to the *Kasbatis* during pleasure to an amount equal to the profit which Mr. Williamson settled would have been left them. There could scarcely be an assertion more absolute than this of the power of the Government to alter the terms of any leases they might make to the *Kasbatis* as they themselves should deem fit, to give or withhold such leases at will, and to dispossess the *Kasbatis* and take the management of these villages into Government hands.

The existence, however, in the Bombay Government of the power and right which they assert in this letter of the 24th of February 1847 belonged to them, is equally inconsistent with the existence in the respondent or her ancestors either of the absolute ownership of this village or of the right to have the leases of it perpetually renewed. The Government terms were ultimately accepted, and a new *patta* of the village, bearing date the 4th of September 1849, was

granted to Fatumiya and Bapuji, his brother (the respondent's grandfather), to hold for a term of seven years from (1844–45) to (1850–51) at the increased yearly rent of Rs. 144-1-9, payable by five instalments on the days therein named. The lease is executed by the lessees. It will be found at page 68 of the Record. Had not the draftsman of this instrument been, like his predecessor, almost enamoured of obscurity, one would have expected that he would have laid at rest all matters of dispute on this point by simply inserting in this lease the proper and usual provision that at its termination the lessees would deliver up possession of the demised premises to the lessor. Through ignorance or carelessness he resolutely abstained from doing this. He did, however, insert some clauses which merit attention. It isprovided first, that if the instalments of the rent be not paid when due, attachment will be levied on the village by the Government, and "the management" will be carried on, presumably, by the Government. *Secondly*, that the lessees shall not alienate or pledge the village or the land composing it to anyone. *Thirdly*, that the lease was granted out of kind consideration for the lessees' maintenance, that they, the lessees, should therefore make good arrangements for the prevention of crime in the village, or otherwise the (tharav) settlement would be cancelled. *Fourthly*, that if an attachment for arrears of rent were levied by the Collector, or if a creditor by an application to the Courts caused an attachment to issue against the village, the management of the village would be taken out of the hands of the lessees and carried on by the Government, the (tharav) settlements would be cancelled, and the whole income of the village to be taken charge of by the Government.

Then follows a clause, No. 10, inconsistent to some extent with the succeeding clause, No. 11. but evidently introduced to put an end for the future to all controversy touching the increase of the *Jumma*. It provides that the village is given to the lessees on *patta* according to the settlement or agreement thereinbefore set out, that when the lease expired the lessees should hold charge of all income and produce of the village, and should agree to the payment of the amount of the revenue which the Government might fix, and that if they failed to pay this the income should be taken charge of by the Government. The eleventh clause provided that the village was given on *patta* to the lessees on the agreement thereinbefore set out, and that if they did not act according to the agreement the *patta* should be void.

The existence of the statement that the *patta* was granted out of kind consideration for the maintenance of the lessees is due to this, that during the dispute about the increase of the rent, the two lessees and another person had presented a petition to the Revenue Commissioner stating that they were in very indigent circumstances, that attachments had gone out against their villages, and that they had not left in their houses corn for their sustenance or any wearing apparel.

If the evidence of the case stopped here it would, in face of this lease, in their Lordships' opinion, be quite impossible to contend that the *patta* merely fixed the amount of the rent, and that by the settlements the lessees or their ancestors had acquired as against the Bombay Government a right to the property in,or to the permanent possession of, this village of Charodi. The granting of a lease was part of the original settlement or agreement, and these leases are treated in several places as the instruments by which the estate or interest in the village is conveyed to the lessees.

This clause 10 is the only piece of written evidence produced, indicating even in the most remote way that the lessees were entitled at the end of each lease to have a renewal of it granted to them. *Prima facie* a lease for a term does not import any right to a renewal of it. On the contrary,it *prima facie* implies that the lessee's right to the premises demised, ends with the term. In order that the respondent should succeed, therefore, on this point, she must find sufficient evidence, apart from legislation, of an agreement, express or implied, with the Bombay Government imposing on them a legal obligation to renew for all time, if required, these leases as they terminate, and conferring on each lessee the correlative legal right to demand that renewal. In their Lordships' view it would require something much more clear, plain and explicit than this confused, and almost unintelligible clause, to be treated as, in effect, a covenant by the lessor for a perpetual renewal of the lease of this village.

No new *patta* was granted in 1851. The lessees continued to hold possession and to

pay the rent till 1860. Fresh *pattas* for one year each, were given in the years 1860 and 1861, at an increased rent of 160 rupees, and again from 1862 to 1865; between 1860 and 1870 yearly renewals appear to have been granted, the rent being sometimes increased. In the year 1874 there was a failure of issue in the case of the holders of two of the nine villages retained by the *Kasbatis* under Mr. Williamson's settlement, namely, the villages of Keela and Leah, or Lea. The said Facumiya claimed the former village as the nearest collateral heir of the last holder. The Revenue Commissioner reported upon this matter to the Government of Bombay, and the Governor in Council passed a resolution, dated the 27th November 1874, by which it was declared that the tenure of the *Kasbatis* was merely leasehold, and that their villages lapsed to the Government on failure of heirs. He accordingly directed that this village of Keela should be resumed by the Government.

This direction was on the 5th of July 1877 approved of by the Secretary of State. But Fatumyia and Bapuji, unwilling to submit to this decision, instituted in the year 1878 a suit against the Secretary of State for India in Council claiming to be entitled to this village as heirs of the last holder, and they supported their claim by a document purporting to be a *sanad* granted by one of the Mogul Emperors some centuries earlier. The District Judge who heard the suit decided that this *sanad* was a forgery, and that the last holder, through whom the plaintiffs claimed, was a mere leaseholder, and dismissed the action with costs. The plaintiffs acquiesced in that decision. They never sought to question it in any Court of law. The question of the renewal of the leases of the *Kasbati* tenants was brought before the Government of Bombay about this time by the Revenue Commissioner, and a formal resolution was on the 25th of July 1877 passed by that Government to the effect that it appeared all the leases had expired, that there was no necessity to make any change, it being quite clear that the villages were held on leasehold tenure at the pleasure of the Government; that it was desirable to renew for periods of seven years the leases which had expired, a very slight nominal increase of rent being made in each case, to show that the Government maintained their rights and would continue to do so, and directed that words should be inserted in the new leases making this perfectly clear. This resolution was carried out. A form of lease in the English language was drawn up, and on the 7th of October 1878 approved of by the Bombay Government. It contained, amongst others, clauses restraining alienation and at last providing that on the termination or sooner determination of the lease, the lessee should, without objection or obstruction, yield up the village demised, unless the Secretary of State in Council should then be pleased to renew the lease, and also a condition of re-entry on the breach of any of the provisions of the lease.

A lease in this form on the 22nd of December 1879 was granted to Fatumiya and Bapuji, the respondent's father. The *kabulyat* was signed by them, but, as they subsequently asserted that they did not sign the document of their own free will and pleasure, the appellant does not therefore desire to treat them as bound by it. It can only be looked at as containing a renewed expression of the view consistently entertained by the Government in reference to the true position and rights of the *Kasbatis*. No further leases were granted. The lessees and those who succeeded them continued to pay the rent reserved, notice was served in 1898 upon the two ladies, Bai Nandbai and Bai Rajbai, requiring them to quit and deliver up possession of the village of Charodi on the 31st of July following. It was not disputed that if these ladies had by the continued payment of their rent become tenants of this village from year to year, this notice was adequate and sufficient to determine that tenancy. Up to this the evidence touching the administrative dealings of the Bombay Government and its accredited officials with the *Kasbatis* and their villages, including that of Charodi, has alone been dealt with.

Their Lordships are of opinion that the just and reasonable inferences to be drawn from it when properly considered are, that not only has the respondent failed to discharge the burden which, as already stated, rests upon her, but that the Bombay Government never departed from the position in which they were left by Mr. Williamson's arrangements; that they never by an agreement, express or implied, conferred upon the respondent or any of her ancestors the proprietary rights in, or ownership of, the village of Charodi claimed by her; that they never recognised or admitted the existence

of such rights, or of any rights analogous to them, in them or her ; that the only rights in this village which the Government conferred upon her ancestors were those conferred by the leases which the Government from time to time, at their own will and pleasure, chose to grant to them (save such rights as are conferred by the creation of a tenancy from year to year in manner already mentioned) ; that the Government never conferred upon any of the lessees of the said village a legal right to insist, at the termination of his lease, upon a new lease of the village being granted to him ; in other words, that the Bombay Government never were under any legal obligation to grant any lease of this village ; and that the granting or withholding of a lease of it rested from the first, solely in their discretion.

It was contended, however, on behalf of the respondent that her case is much strengthened by a consideration of the Bombay Government's dealings with the *Grassias*. They were ancient Rajput proprietors, and before the cession of the Ahmedabad Zilla, stood to their native sovereigns in that relation, their lands being cultivated by ryot tenants from year to year and at will. They and the *Mewassies* were clearly distinguishable from the *Kasbatis*. The last-named held their lands by contract, neither by *sanad* nor by defiance, and Colonel Walker, the first official appointed to deal with this district, was well aware that there was no analogy between the holdings of the *Grassias* and those of the *Kasbatis*. The word "Taluq" was first applied to these Rajput proprietors by the British themselves. Notwithstanding the ancient proprietary rights of the *Grassias*, they took leases of their lands from the Bombay Government, and thenceforward their legal rights were, in accordance with the principle laid down in the authorities already quoted, determined entirely by the contract which they had made with that Government, altogether irrespective of what their position and rights may have been before the cession of their territory.

All this is stated at length in the account by J. Peile, Taluqdari Settlement Officer of the Taluqdari of Ahmedabad Zilla, and the measures adopted for their restoration under and in connection with the Act VI of 1862 of the Bombay Legislature, published in 1867, pages 7, 9, 14, 42, 43–47, 64 and 67. Indeed in the preamble of that Statute it is recited that these Talukdari estates are only held on leasehold tenure determinable at the pleasure of the Government. So that the case of the *Grassias* makes against the case of the respondent instead of in her favour, inasmuch as it shows clearly that after the cession of territory to a new Sovereign, when it comes to be a question of legal right the contract with the new Sovereign is conclusive and the rights against the old Sovereign avail nothing.

It only remains to consider the effect of any of the legislation of the Bombay Government on the question in issue on this appeal. Act VI of 1862, for the reasons given in the abovementioned publication of Mr. Peile, does not apply to *Kasbati* lessees at all. They never were Taluqdars of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the *Grassias*, and therefore did not suffer the injustice which the Statute was designed to remedy.

The Statute of 1888 is entitled an Act to provide for the revenue administration of estates held by superior landlords in the districts of Ahmedabad, etc. In the preamble it is recited that it is expedient to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code of 1879 to estates held by certain superior landlords in the abovementioned districts, and to make special provision for the administration of the said estates and for the partition thereof. In the first section a Taluqdar is defined to include "a *thakur*, *mehwassi*, *kasbati*, and *naik*." Section 23 provides that nothing in the Act shall be deemed to affect the validity of any agreement entered into before the passing of the Act by or with a Taluqdar and still in force as to the amount of his jumma nor of any settlement of the amount of jumma made by or under the orders of Government for a term of years and still in force. Every such agreement and settlement is to have effect as if the Act had not passed. And section 33 enacts that certain sections of the Bombay Land Revenue Code of 1879 are not to apply to the estates to which this Act applies. By section 33 it is also provided that the word "Taluqdar" shall be substituted for the word "occupant," the words "registered Taluqdar" for the words "registered occupant" and the words "Taluqdars holding," or such words to that effect as may be required by the context, for the

word "occupancy" when applying this Code of 1879 to the estates to which this Statute of 1888 applies. The seventy-third section of the Code provides that "the right of occupancy" shall, subject to the provisions contained in section 56, and to any conditions lawfully annexed to the occupancy, save as shall be otherwise prescribed, be deemed to be a hereditable and transferable property.

It is seriously contended, as their Lordships understood, that the effect of this substitution of the words "the right of occupancy" for the words "the right or the interest of a Taluqdar" in or to his holding, is that a *Kasbati's* interest in a leasehold held for a term of years is changed in its nature and becomes a hereditable and transferable property, notwithstanding that by the very conditions of the lease his interest is limited to a term, and he is restrained from alienation; and notwithstanding also that by section 68 of this Code it is enacted that an occupant is entitled to the use and occupation of his land for the period, if any, to which his occupancy is limited. These two sections, in their Lordships' view, plainly mean that a lessee, whether a true "*Taluqdar*," or a "*thakur*," "*mehwassi*," "*kasbati*," or "*naik*," is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted and *prima facie* no longer. Section 73 was amended by the Act of 1901, but the amendment is immaterial on this point.

Their Lordships are clearly of opinion that these Statutes do not bear in any way on the issue raised in this case. They think that the decree of the High Court cannot be sustained, and that the decision of the District Judge is equally erroneous. The fallacy underlying the former on the point as to the right of the respondent to occupy permanently is clearly revealed in the passage printed at page 496 of the Record in which the High Court deals with the lease of 1833:—

"There are no other provisions for forfeiture of the management. There is no provision for renewal of the *patta*, but it is to be inferred from the nature of the management and from the fact that the *patta* was for a term, that renewal was contemplated. This inference is supported by both previous and subsequent events; by previous events, because in 1823 permanent possession by the *Kasbatis* was contemplated; by subsequent events, because the renewal did, in fact, take place."

Their Lordships, dealing with the legal rights of the parties alone, are clearly of opinion that the decrees of both Courts are erroneous and should be reversed, that the main appeal, that of the Secretary of State, should be allowed and the cross-appeal dismissed, and that judgment should be entered for the Secretary of State, dismissing the respondent's action. And they will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for Appellant—The Solicitor, India Office.

Solicitors for Respondent—Messrs. T. L. Wilson & Co.

***A.I.R. 1915 Privy Council.**

(FROM BOMBAY)

25th February 1915.

LORDS DUNEDIN AND SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Moti Lal Shivji—Defendant—Appellant.

v.

Bombay Cotton Manufacturing Co., Ltd.—Plaintiffs—Respondents.

* *Company—Manager or Managing Director cannot purchase a stranger's liability.*

The manager or Managing Director of a mill company has no implied authority to purchase on behalf of his mill the liability of a stranger and still less of their own manager or manager's partner in a private transaction of his own.

[P. 70, C 1.]

Robert Finlay, K. Brown and *Raikes*—for Appellant.

Upjohn and *Dunne*—for Respondents.

Sir George Farwell.—This is an appeal from a judgment and decree, dated 20th August 1912, of the High Court of Bombay affirming a judgment and decree of the High Court in its Original Jurisdiction made on 4th March 1912.

In 1909, the date of the transactions in question in this appeal, the appellant was a banker and money-lender in Bombay having as his business manager there, one Dani. At the same time the respondent Company had as its secretaries, treasurers and agents the firm of Jiwandas & Co., consisting of two partners, Dwarkadas Dharmsey and Purshotam, and Dwarkadas

was also agent and managing director of the Tricumdas Mills Company and the Lakshmidas Mills Company ; both of these companies were then quite insolvent, while the respondents were perfectly solvent.

On the 13th February 1909, Dwarkadas applied to Dani for a loan to himself or either of the two mills of Rs. 50,000 ; Dani refused to make the advance to Dwarkadas but agreed to make it to Purshotam, and, accordingly, on a receipt signed by Purshotam for Rs. 50,000 bearing interest at 8 per cent., Dani, on behalf of the respondents, paid the sum of Rs. 50,000 to Dwarkadas, who at once applied it for his own use and benefit by reducing his own indebtedness to the Tricumdas Mills. On due date, the 14th April 1909, Dani, by his son, applied for payment to Purshotam who referred him to Dwarkadas. Dwarkadas was quite unable to pay, and thereupon Dani, Dwarkadas and Purshotam prepared a number of documents and paper entries in the books of the respondent company and the Tricumdas Company for the fraudulent purpose of transferring the liability to pay the amount due on the receipt from Purshotam and the Tricumdas Company to the solvent respondent Company. A receipt for Rs. 50,666-10-8 was signed by Purshotam on behalf of the respondents and was given to Dani in discharge of the bill then due, and entries were made in their books by Dwarkadas and Purshotam crediting the said sum to the appellant as received from him and debiting Rs. 68,666-10-8, which included this Rs. 50,666-10-8. Various other entries were made in the books of the Tricumdas Mills and in those of Dwarkadas and of the respondents, but both Courts below agree in regarding them as fraudulent and there is no question left for their Lordships' consideration except that of authority of the respondents' agents. It is said that the liability of Purshotam was duly transferred to the respondents by Dwarkadas as their agent. Their Lordships, however, are of opinion that Dwarkadas had no such authority ; it is not suggested that he had express authority, and the manager or managing director of a mill company has no implied authority to purchase on behalf of his mill the liability of a stranger and still less of their own manager or manager's partner in a private transaction of his own.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant—Latleys & Hart.

Solicitors for Respondents—T. L. Wilson & Co.

**** A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

29th July 1915.

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Buddah Singh and *others*—Plaintiffs—Appellants.

v.

Lallu Singh and *others*—Defendants—Respondents.

Privy Council Appeal No. 110 of 1914.

*** (a) Hindu Law—Succession — Great-grandfather's grandson is postponed to paternal uncle's grandson.*

Between the grandson of the great-grandfather of the propositus and the great-grandson of his grandfather, *i.e.*, the grandson of his paternal uncle, the latter is a preferential heir.

** (b) Hindu Law—Succession—Santana.*

Vijnaneswara has used the word *santana* in the sense of lineal male descendants.

** (c) Practice—Reference to Judge not a party to decision is not approved.*

It is an undesirable course to introduce the opinion of another Judge not a party to the judgment for the purpose of enforcing the conclusion arrived at.

*** (d) Hindu Law — Succession — Putra in Benares School is used in generic sense.*

In the Mitakshara, as expounded in the Benares School, the word *putra* and its synonym, employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the *third* degree before making the ascent to the line next in order of succession. 5 Mad. 291 : 25 Mad. 152 not Appr.

** (e) Hindu Law—Succession—Capacity to offer oblations is the test.*

Under Mitakshara, whilst the right of inheritance arises from sapinda-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the gotrajs the test to be applied to discover the preferential heir is the capacity to offer oblations. 13 M.I.A. 273 Ref.

De Gruyther—for Appellants.

Robert Finlay—for Respondents.

Mr. Ameer Ali.—The question for determination involved in this appeal is one of considerable importance under the Hindu Law and relates to the order of succession under the Mitakshara as expounded in the Benares school, among the collateral kindred belonging to the same paternal stock as the deceased.

The suit out of which the appeal arises was brought by the appellant Buddha Singh *alias* Chaturi Singh to establish his right as the nearest reversioner to the estate of one Saheb Sahai, who died in 1873, without leaving any male issue. Saheb Sahai was a minor and unmarried at the time of his death; his mother, Rani Kishori Kunwar, who survived him, accordingly came into the possession of his estate, which she held for nearly 34 years. She died in 1907, when the succession opened to the male collaterals of Saheb Sahai:

The following genealogical table, on which both the courts in India have based their judgments, will explain the relative position of the parties to this action:—

NAINSUKHMAL.

- Nirpat Singh
  - Pura Singh
    - Buddha Singh
      - Laltu Singh, Defendant No. 1.
  - Raja Gur Sahai + Rani Kishori Kunwar (wife)
    - Saheb Sahai the *propositus*.
- Kunjilal.
  - Buddha Singh *alias* Chaturi Singh, Plaintiff No. 1.

The plaintiff, Buddha Singh, is thus the grandson of Nainsukhmal, the great-grandfather of Saheb Sahai, whilst the defendant Laltu is the great-grandson of Saheb Sahai's grandfather, Nirpat, and the grandson of his paternal uncle, Pura. The plaintiff's contention is that under the law of the Mitakshara he has a preferential title to the inheritance of Saheb Sahai as against the defendant, who is admittedly in possession of the deceased's estate since Rani Kishori's death. He bases his right on the following text of the Mitakshara:—"On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons" (Colebrooke's translation, Chap. II, section 5, v. 4). And he contends that the expression "sons" occurring in this verse must be strictly construed, and so construed, the devolution of the inheritance in Nirpat's line ceased with his grandson, Buddha, and did not come down to his great-grandson, the defendant Laltu, and that after Buddha, by virtue of the immediately following verse he, as the grandson of the great-grandfather of the deceased, has become entitled to the estate. Their Lordships will refer presently a little more fully to this text and examine its meaning by the light of other texts.

Both the courts in India have held against the plaintiff's claim; hence this appeal to His Majesty in Council.

The learned Judges of the Allahabad Court in two separate and able judgments have exhaustively reviewed the authorities bearing on the subject, and as their Lordships agree in the main with their deductions and the conclusion at which they have arrived on these deductions, they find themselves relieved of the necessity of discussing the law in any detail.

The Mitakshara of Vijnaneswara, who flourished about the end of the eleventh and the beginning of the twelfth century of the Christian era, purports to be a commentary on the Institutes of Yajnavalkya. Vijnaneswara analyses and discusses the text of his great predecessor, often at considerable length, explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of the law. The best example of his treatment of Yajnavalkya's text is to be found in the commentary on

the rule relating to the succession to the estate of a person who dies without leaving any male issue. After stating that the right of "sons, principal and secondary" to "take the heritage" had been already shown, he proceeds to quote the rule of Yajnavalkya declaring the order of succession in their default, which runs thus (Mr. Colebrooke's translation of the Mitakshara, Chap. II, Sec. 1, para 2) :—"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, a pupil, and a fellow student: on failure of the first among these, the next in order is indeed heir of one who has departed for heaven leaving no male issue. This rule extends to all persons and classes."

Mr. Mandlik's rendering of these two slokas of Yajnavalkya is more literal and is as follows (Mandlik's translation of the Institutes of Yajnavalkya, p. 220, vv. 135, 136) :—

"The wife, daughters, both parents, brothers and likewise their sons, *gotrajas* (gentiles) ; *bandhus* (cognates)—a pupil and a fellow student. Of these, the next following on failure of the preceding in order is heir to the estate of one who has departed for heaven, leaving no *putra*. This rule extends to all (males whether belonging or not to the four) classes."

The compound word *aputra* occurring in Yajnavalkya's text has been rendered by Mr. Colebrooke as "leaving no male issue"; by Mr. Mandlik as "leaving no putra." He was evidently anxious to avoid any English synonym, as the word *putra* here, according to all the commentators, conveys a larger meaning than is usually implied by the term "son." The Viramitrodaya says clearly that the word "sonless", which is the literal equivalent of *aputra*, signifies, "in default of son, grandson and great-grandson" (Chap. III, Part I, v. ii, Shastri Golap Chandra Sarkar's translation, p. 154) that, in other words, it comprehends three degrees in the direct line of descent. In fact, it is not disputed at their Lordships' Bar that the word *putra* as used in relation to the last owner signifies and includes son, grandson, and great-grandson. What is contended for is that the same word in connection with other relatives, such as brother, uncle or grand-uncle, must be construed in a restricted and literal sense.

Commentary of Vijnaneswara on the above quoted slokas of Yajnavalkya, extends over several sections in Mr. Colebrooke's translation, and makes the work more a digest than a mere commentary. In section 1 of Chap. II, the author deals exhaustively with the right of the widow to inherit the estate of "one who has died *aputra*." Her right of succession is dependent on his leaving no male issue to the third degree. In paragraph 3 the word ***putra*** is used again in the same generic sense. After treating of the rights of daughters and parents in sections 2 and 3 respectively, he deals in section 4 with the succession of brothers and "their sons." Here, again, the word *putra* is used, whether in the literal or in an extended sense is a matter for consideration.

Section 5 relates to the right of collateral kindred of the same paternal stock or *gotra*, and therefore called the *gotraja*, to take the inheritance of the *aputra* in default of "brother's sons." Admittedly both the plaintiff and the defendant are Saheb Sahai's *gotrajas*. Reference, therefore, is necessary to the rules embodied in section 5.

It is to be noted here that the word *putra* or more correctly *put-tra*, which literally means "one who releases from hell "(*put*)," is used by Vijnaneswara at the very beginning of his Book on Inheritance. In paragraph 3, section 1, Chap. I, describing the two kinds of property (*daya*, wealth) to which rights of inheritance attach, *viz.*, the "unobstructed" and "obstructed," he speaks thus of the latter class :—

> "but property devolves on parents (or uncles) and brothers and the rest, upon the demise of the owner if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession ; and on their ceasing, the property devolves (on the successors) in right of his being uncle or brother. This is an inheritance subject to obstruction."

And then comes the significant passage :—

"The same holds good in respect of their sons and other descendants," meaning, clearly, the sons and *descendants* of uncles and brothers. And this is the construction which Balambhatta, one of the best known commentators of the Mitakshara, appears to have put on these words.

As pointed out in the case of *Ramachandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1) the right of collaterals to succeed to the inheritance of a deceased person

(1) [1914] 42 Cal. 384=25 I. C. 290=41 I.A. 290 (P.C.)

is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest *sapinda*. The right of collaterals, therefore, is dependent on the existence of the *sapinda* relationship between the *propositus* and the claimant. It is now well settled by the decisions of this Board that under the Mitakshara *Lulloobhoy Bappoobhoy* v. *Cassibai* (2), *Ramchandra Martand* v. *Vinayak Venkatesh* (1) the *sapinda* relationship arises "between two people through their being connected by particles of one body," *viz.*, that of the common ancestor, in other words, from community of blood in contradistinction to the *Dayabhaga* notion of "community in the offering of religious oblations." But, as will be shown later on, the Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood.

Mr. Colebrooke has, in his translation of section 5, erroneously rendered the word *sapinda* as "relations connected by funeral oblations," and *samanodakas* as those connected by "libations of water," which has led to some confusion of ideas. Their Lordships, therefore, propose to follow the translation which was before this Board in *Lulloobhoy's case* (2).

The first paragraph stands thus :—

"If there be no brother's sons, *gotrajas* share the estate. *Gotrajas* are the paternal grandmother and *sapindas* and *samanodakas*."

Their Lordships understand that the word rendered "sons" in this paragraph is *putra* in the original. Then follows paragraph 2, in which Vijnaneswara develops the position of the grandmother in the following terms :—

"In the first place the paternal grandmother takes the inheritance." The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before cited. "And the mother also being dead, the father's mother shall take the heritage," (Section 1, paragraph 7). "No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text (the father's mother shall take 'the heritage') is intended only to indicate her general competency for inheritance ; she must, therefore, of course, succeed immediately after the nephew ; and thus there is no contradiction."

Paragraph 3 then states in general terms that after the grandmother the *sapindas* of the same paternal stock, *viz.*, "the paternal grandfather and the rest inherit the estate, for *bhinnagotra sapindas* (*i.e.*, sapindas belonging to another stock) are indicated by the term *bandhu*" (dealt with in section 6).

Paragraphs 4 and 5 deal specifically with the succession of the *samanagotra sapindas* and run as follows :—

"(4) Here on failure of the father's *descendants*, the heirs are successively the paternal grandmother, the paternal grandfather and their sons."

"(5) On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their *issue*, inherit. In this manner must be understood the succession of the *samanagotra sapindas*."

It is clear from the observations of both Mr. Mandlik and Dr. Jolly (Mandlik's Hindu Law, p. 379 ; Dr. Jolly's Tagore Law Lectures, p. 124) that Mr. Colebrooke in his translation of paragraph 5 has omitted towards the end the important words "up to the seventh," which makes a material difference in the sense of the passage.

Mandlik translates the last sentence as follows : "In this manner up to the seventh (*sapinda*) the taking of wealth by the *samanagotra sapindas* should be known." Only instead of expression *samanagotra*, which is in the original, he uses the abbreviated terms *sagotra*.

Paragraph 6 then provides as follows :—

"(6) If there be none such, the succession devolves on samanodakas, and they must be understood to reach the seven degrees beyond *sapindas*, or else as far as the limit of knowledge and name extend. Accordingly Vrihat Menu says : 'The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas* extends to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra*.'

It is contended on behalf of the appellant on the strength of these several passages that the word "son" used in conjunction with brothers must be literally construed, for otherwise, it is urged, the position assigned to the grandmother in the order of succession would be displaced. The effect of this argument (which by parity of reasoning must apply also to uncles), if well founded, is that the succession in the father's or grandfather's line must cease *ipso facto*

(2) [1880] 5 Bom. 110=7 I.A. 212=7 Ch. D. 445 (P. C.).

on the failure of descendants of the second degree, and the inheritance must be diverted to another line ascending first to the female ancestor.

In their Lordships' opinion it begs the very question which they have to determine, *viz.*, in what sense Vijnaneswar has used the term "son" in these passages; and that question can be answered only first by examining his own method of employing the word, and secondly, by inquiring in what sense other Hindu jurists of the same school or cognate schools have understood the expression. Before proceeding with their examination of Vijnaneswara's own words, their Lordships desire to make one observation, as it strikes them, regarding the place of the grandmother in his scheme of succession.

In Yajnavalkya's rule, already quoted, to which Vijnaneswara refers as "the compact series of heirs," the paternal grandmother is not included as an heir. Vijnaneswara finds a place for her among the gotraja, on the authority of an enunciation of Manu, which he quotes in paragraph 7 of section 1, Chap. II, and which runs thus:—

"Of a son dying childless the mother shall take the estate; and the mother also being dead, the father's mother shall take the heritage."

According to Manu, then, if his words are to be literally construed, the paternal grandmother would take immediately after the mother. This difficulty Vijnaneswara himself recognizes; in order to reconcile the conflict between Yajnavalkya, who omits the grandmother altogether from his "compact series of heirs," and Manu, who would place her directly after the mother, he places her somewhat arbitrarily, as Messrs. West and Bühler also indicate, after the "brother's sons." The question, however, whether he intended his declaration to be imperative can be solved only by a less free translation than Mr. Colebrooke's. Anyhow, the meaning to be attached to the word "sons" is left subject to explanation.

Now, in paragraph 1 of section 5, where Vijnaneswara says "if there be not even brother's sons," the word used is *putra*; in paragraph 2, where the grandmother's place is declared, the expression employed is brother's *suta*, a synonym of *putra*. In paragraph 4 again the word *putra* appears to be used in connection with uncles.. In paragraph 5, where the expression "his sons and their issue" occurs, the original words are said to be *tat putras*, "his sons," and tat *sunavas*, (plural of *sunu* "offspring." *Sunu* is the old Indo-Aryan word which survives in the English "son") "their sons".

The word "descendants" in Mr. Colebrooke's translation is in the original "*santana*," which means race, lineage, or posterity, and is still used among Hindus to mean male progeny without limitation. Mr. Justice Telang construes it as meaning "continuation" *Rachava* v. *Kalingapa*(3); other learned Sanscritists interpret it to signify "an uninterrupted series" (of progeny or heirs). Their Lordships have no doubt that Vijnaneswara has used it in the sense of lineal male descendants. *Sunavas* translated by Mr. Colebrooke as "issue," connotes the same idea.

Having regard to the fact that this great legist, whose logical acumen judging from his work seems to have been remarkable, has used the term *putra* in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why, if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *auras*, which their Lordships understand, mean "son of one's loins" (See Mandlik, p. 380; and Sutherland's translation of the Dattaka Mimansa (Stoke's Hindu Law Books, p. 547). Nor can their Lordships appreciate the argument that the meaning of such words as *santana* and *sunavas*, which mean lineal male progeny without limitation should be arbitrarily cut down to two degrees.

There seems to be great force then in Sir Robert Finlay's contention that the limitation is to be found elsewhere. The rule of Manu supplies one limitation:—To three (ancestors) water must be offered, to three funeral cake is given, the fourth (descendant is) the giver of these (oblations), the fifth has no connection with them" ("Sacred Books of the East," Vol. XXV, v. 186, p. 36). The other is deduced by Mr. Harrington (see *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (4), the well-known author

(3) [1892] 16 Bom. 716.
(4) [1837-41] 2 M. I. A. 132=2 Suther 1=Sar. 161 (P. C.)

of the "Analysis," and one of the most erudite judges of the old Sudder Court of Bengal, from the enunciations of Vijnaneswara himself in paragraph 6, section 5, where he declares that the succession of the *sammanagotra sapindas* extends "in this manner" to "the seventh degree." It is not necessary in their Lordships' opinion to examine the force of the criticism that has been levelled at Mr. Harrington's construction of Vijnaneswara's dictum, for if the view based on Manu's doctrine or rule be well founded, as the High Court has considered it to be, it would be sufficient to dispose of this appeal.

In this connection their Lordships desire to make another observation. If it be correct, as has been suggested, that the words *putra-pautra* ("son-grandson"), used by Vijnaneswara in section 1, Chap. I, did not comprehend originally a great-grandson, but that it has been included by the commentators, as the *Viramitrodaya* shows, on the strength of analogical reasoning, then, in their Lordships' opinion, the objection to the High Court's reading of text, based on the necessity of strict adherence to a literal interpretation, loses considerably its force, and the Courts are compelled to resort to other texts to extract the meaning of undefined expressions.

Turning now very briefly to the other authorities to which their Lordships' attention was called, they observe that Apararka, another scholiast of Yajnavalkya, who flourished about a century later than Vijnaneswara, dealing with the same text on which the author of the Mitakshara has commented at such length, construes, as pointed out by the High Court, the expressions "brother's sons" and "uncle's sons" in a wider sense. That Apararka's authority is acknowledged by the expositors of the Benares school is clear from the fact, to which Mr. Mandlik refers, that Visweswara Bhatta, the author of the Subodhini, a commentary on the Mitakshara, has used Apararka's work among others for the compilation of his Madanapariijata. Parts of Apararka's treatise and of the Madananarijata have been translated by Dr. Sarvadhikari and are to be found in his Tagore Lectures for 1880.

Nanda Pandit, "an esteemed writer of the Benares school," and the author of the noted work on the Law of Adoption, called the Dattaka Mimansa, a standard treatise among the followers of the Mitakshara, has written commentaries both on the Mitakshara as well as on the Institutes of Vishnu, a predecessor of Yajnavalkya, who is frequently quoted by Vijnaneswara. In this latter work, called the Vaijayanti, in giving the order among the *sagotras*, he states that "in the father's line, on failure of the brother's son, the brother's son's son is heir." And he bases this rule on the prescriptions of Manu already quoted. It is to be noted that this writer, who must have had Vijnaneswara's words in his mind, certainly did not limit the term *putra* to two degrees. Varadaraja, whose authority is said to be great in Southern India, and whose enunciations appear to be received with respect also by the expounders of the Benares school, has given expression to the same view. Vidyabhusan Shama Charan Sarkar, a learned Hindu scholar who for many years held the post of principal Oriental Interpreter in the High Court of Calcutta, and at one time occupied the chair of Tagore Law Professor in the Calcutta University, also deals with the subject in his well known work called the Vyavastha Chandrika.

This learned Hindu writer states in Principle 153 that "a brother's grandson succeeds in default of a brother's son," and refers to the decision of the Calcutta High Court in *Kureem Chand Gurain* v. *Oodung Gurain* (5), without taking any exception to its correctness. In the note to the Principle he states the reason why the brother's grandson succeeds on failure of a brother's son in these words:

> "Because the term brother's son is inclusive also of the brother's grandson and because he is *sapirda* and the nearest of the persons understood by the term *gotraja*."

The significance, however, of the statement lies in the question which Shama Charan Sarkar propounds in the footnote:

> "It may be asked that when in law the term 'son' (*putra*) is inclusive of the grandson and great-grandson, why then the term "brother's son" does not include also the 'brother's great-grandson?"

The answer which he gives to his own question is both interesting and instructive. "The answer is," he says, "that in law calculation is made from the son of the common ancestor, which here is the father of both the deceased and his brother,

(5) 6 W. R. 168.

consequently the term 'son' (of that ancestor) is inclusive of his great-grandson, who is the brother's grandson."

Dr. Raj Kumar Sarvadhikari, whose authority as an expounder of the Hindu Law has been recognized by the Calcutta High Court and this Board, in his Tagore Law Lectures, gives emphatic expression to the view that the word 'son' includes three degrees of descendants.

Devananda Bhatta, the author of the Smriti Chandrika, whose doctrines, however, are not recognized in Northern India holds the contrary opinion; and Visweswara Bhatta in the Subodhini certainly appears to say that the father's line ceases with the brother's son; and probably the same meaning is to be attached to his statements in the Madanaparijata. With regard to these two writers, their Lordships deem it necessary to observe that Devananda Bhatta, who is supposed to have been a contempo rary of Apararka, admittedly differs from the author of the Mitakshara in several essential rules of law. It seems, to say the least, doubtful whether an enunciation in the Smriti Chandrika can be safely applied, except perhaps by way of analogy, to explain a dubious or indeterminate phrase or term in the Mitakshara. The Subodhini stands on a different footing; it, no doubt, professes to be a commentary on the Mitak shara, but it is equally clear that in several instances it diverges from the acknowledged interpretations of its doctrines. The view of Visweswara Bhatta and Devananda Bhatta have been propounded with much force by Mr. Mandlik and Golap Chandra Shastri, both of whom take their stand on the literal construction of the word *putra*. This thesis has been elaborately worked out by the former writer, but in substance it amounts to this, that as Vijnaneswara has used the expression 'son' in conjunction with "brothers" and "uncles" it must be restricted to their direct male issue, and no extension of its meaning is permissible.

Their Lordships agree with the High Court of Allahabad that this reasoning proceeds on a very narrow basis and materially ignores the chief ground on which the opposite doctrine is based. Dr. Raj Kumar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the Mitakshara propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest *sapindas*) inherit in succession in the first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous *sapinda*-relationship before the next in order can take; so that the parents and "their three successive descendants" take first; then the paternal grandmother and the paternal grandfather and "their three successive descendants" come next, and so on.

It may be noted here that two recent Hindu writers of repute (Dr. Jogendra Nath Bhuttacharjea, M.A., D.L., in his Commentaries on the Hindu Law, p. 444; Mr. Jogendro Chander Ghose, Hindu Law, p. 119) and Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University, and is one of the translators of "The Sacred Books of the East", are in substantial agreement with Dr. Raj Kumar Sarvadhikari.

As regards the decided cases there seems to be a conflict of opinion between the High Courts of Allahabad and Calcutta on one side and that of Madras on the other. The latter High Court has upheld the narrow construction propounded by the Smriti Chandrika and the Subodhini, and though it purports to confine its interpretation to Southern India, the opinion it has expressed has a wider application and deserves, therefore, careful attention.

Their Lordships do not consider it necessary to refer to the earlier decisions of the Sudder Dewany Adalut of the North-West Provinces; they think it sufficient to treat the judgment of Mr. Harrington in *Rutcheputty Dutt Jha* v. *Rajunder* (4) as a starting point in the current of decisions in Northern India. The question at issue in that case related to the right of Bandhus or cognates under the Mitakshara to the succession to a deceased person in the presence of a *gotraja*. Mr. Harrington in dealing with the question examined exhaustively the meaning of the word *putra*, and came to the conclusion that it had been used by Vijnaneswara in a generic sense. His judgment was affirmed

on appeal to this Board ; and there appears to be no challenge of his interpretation of the law. It again received the approval of this Board in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (6). Perhaps Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu. As already observed their Lordships do not, however, consider it necessary for the purposes of the present case to consider whether the principle suggested by him is correct or not.

In *Kureem Chand Gurain* v. *Oodung Gurain* (5) also the exact point in issue was not identical with the one involved here, but Mr. Harrington's construction of the word *putra* was accepted ; and it was held that in the scheme of the Mitakshara, the term "brother's son" includes "brother's grandson."

In *Kalian Rao* v. *Ram Chander* (7) the point at issue directly concerned the position of the brother's grandson in the line of descent, and the learned Judges of the Allahabad High Court (Burkitt and Chamier, JJ.) came to the conclusion that under the law of the Mitakshara, as accepted and expounded in the Benares school, the brother's grandson had the right of succession to the deceased before it ascended to the second line, *viz.*, the grand-parental line.

This decision has been followed in the case under appeal.

In the Bombay Presidency also the doctrines of the Mitakshara are recognized subject to the interpretation of the *Vyavahara* Mayukha of Nilkantha Bhatta, and although on many points there is considerable divergence between the Benares and the Maharashtara schools, as regards the question involved in the present case one decision at least of the Bombay High Court indicates an agreement with the Allahabad High Court.

Mr. Justice Telang, a Sanscritist of high order, in *Rachava* v. *Kalingapa* (3) explains thus the order of descent among the *gotrajas* (enunciated in Chap. II, section 5, paragraphs 4–5 of the Mitakshara), although, as he points out, each ascending line begins with a female (*gotraja*) ancestress.

"In the Mitakshara, Chapter II, section 5, Pl. 4–5, it is laid down that the propinquity of *gotrajas* is to be determined by lines of descent—that is to say, the inheritance is to go first in the line" (the word in the original *santana* literally, "continuation") "of the paternal grand-father, then in default of any one in the line, of the paternal great grand-father, then of the paternal great great grand-father, and so forth."

The Madras High Court in two cases named respectively *Suraya Bhukta* v. *Lakshminarasamma* (8) and *Chinnasami Pillai* v. *Kunju Pillai* (9), has held, as already stated, the direct opposite. The *ratio decidendi* in both judgments, which are elaborate and closely reasoned, is of a two fold character; in the first place the learned Judges say that when a word purports to bear two meanings, one primary, the other secondary, it must be understood in the primary sense unless there is anything in the context to show that it was not used in that sense. In the second place they seem to consider the opinions of Devananda Bhatta and of Visveswara Bhatta in the Smriti Chandrika and Subodhini respectively as conclusively showing that the Mitakshara must be taken to limit collateral descent to two degrees in each line. Their Lordships have already made their remarks on these two authorities; they do not feel disposed to attach any canonical authority to the rule of the Subodhini. Curiously enough there is no reference in either of the Madras judgments referred to above to previous decision *Parasara Bhattar* v. *Rangaraja Bhattar* (10) of the same Court to which Turner, C.J. was also a party. In that case the rule of the Smriti Chandrika was not accepted nor was the literal construction of the Mitakshara followed. It is usual in such cases where a difference of opinion arises in the same Court to refer the point to a Full Bench, and the law provides for such contingencies. Had that course been followed their Lordships would probably have had more detailed reasoning as to the change of opinion on the part at least of one Judge.

In ***Surya Bhakta*** v. *Lakhshminarasamma* (8) the Judges say they had "consulted their learned colleague, Mr. Justice

(6) [1867-69] 13 M. I. A. 373=5 B. L. R. 293 =14 W. R. 1=2 Suthur 330=2 Sar. 566 (P. C.)
(7) [1901] 24 All. 128=1901 A. W. N. 189.
(8) [1882] 5 Mad. 291.
(9) [1912] 35 Mad. 152=21 M.L.J. 856=11 I. C. 885=10 M. L. T. 226.
(10) [1878-80] 2 Mad. 202.

Muttusami Ayyar," and acknowledged their obligation to him for his assistance. Their Lordships cannot help remarking that it is an undesirable course, which has not been approved of by this Board, to introduce the opinion of another Judge not a party to the judgment for the purpose of enforcing the conclusion arrived at. The recorded opinion of Muttusami Ayyar, J. would have been of great value had he been associated in the decision.

However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the Mitakshara, as expounded in the Benares school, the word *putra* and its synonym employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the *third* degree before making the ascent to the line next in order of succession.

It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the *manes* of the common ancestor. Now, it is absolutely clear that under Mitakshara, whilst the right of inheritance arises from *sapinda*-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the Viramitrodaya (Golap Chandra Shastri's translation, p. 91, Ch. II, Part 1, S. 23A), an authoritative commentary on the Mitakshara, lays down this doctrine in express terms. He says when there are many claimants to the heritage among *gotrajas* and the like (Dr. Raj Kumar Sarvadhikari construes the word "like" as meaning "other classes of heirs") then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits." Dr. Raj Kumar Sarvadhikari renders the last part of this passage thus: "The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance." ("Tagore Law Lectures," for 1880, p. 629.)

In the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (6) the Board affirmed this rule in the following words:—

"When a question of preference arises as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

For these considerations their Lordships are of opinion that the conclusion arrived at by the High Court is well founded, and this appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

D. D. *Appeal dismissed.*

Solicitors for the Appellants—Ranken Ford, Ford and Chester.

Solicitors for the Respondents—Pyke Parrott & Co.

**** A.I.R. 1915 Privy Council.**

(FROM BOMBAY)

19th January 1915.

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE, AND MR. AMEER ALI.

Shivalingappa Basappa Shintre—Plaintiff—Appellant.

v.

Revappa and *others*--Defendants—Respondents.

Civil P.C., O. 41, R. 27—Admitting additional evidence—Sufficient reasons must be given.

Where an application for the reception of new evidence was made after a final judgment in a suit which had already lasted for a period of over three years. [P. 78, C. 2].

Held, that it cannot be allowed in absence of sufficient reasons.

Robert Finlay and *Arthur Gray*—for Appellant.

DeGruyther and *Lowndes*—for Respondents.

Lord Shaw.—Their Lordships do not think it necessary to call upon the respondents.

As to the application for the reception of new evidence in this case, their Lordships are clearly of opinion that the rejection of that application was correct. The application itself was made after a final judgment in a suit which had already lasted for a period of over three years. It is enough to say that no sufficient reasons appears from the affidavits themselves to show why the proposed new evidence was not timeously submitted.

Upon the merits of the appeal, having considered the judgments in the Courts below, their Lordships are of opinion that that of the First Class Subordinate Judge of Belgaum cannot be supported. They agree with the judgment of the High Court, which appears to state correctly not only the presumptions arising from the history of the family, but also to appraise properly the documents and transactions, and particularly the releases themselves. These releases are not proved to be forgeries. On the contrary their Lordships agree with the High Court in holding that the attack upon their genuineness rest purely upon conjecture. This being so, their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs, including the costs of the application to postpone the hearing.

D.D. *Appeal dismissed.*

Solicitors for Appellant.—Ranken, Ford, Ford and Chester.

Solicitors for Respondents:—T. L. Wilson & Co.

****A.I.R. 1915 Privy Council.**

(FROM AJMER MERWARA)

2nd November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Thakur Umed Singh and *another*—Appellants.

v.

R. B. Seth Sobhag Mal Dhadha and *another*—Respondents.

Privy Council Appeal No. 103 of 1914.

** *Civil P. C., Sch. 2, Art. 1—Party minor—Reference consented to by his guardian but not signed—Reference is good—Civil P.C., O. 32, R. 7.*

Para 1. of 2nd Schedule, Civil P. C. which provides that the parties to a suit may apply in writing to the Court for an Order of Reference, does not require that the writing should of necessity be signed. Where therefore one of the parties was minor and his guardian was in Court and assented to the application, but the application was not signed by him,

Held, that the reference was not invalid on that ground. [P. 80, C. 2.]

Dube—for Appellants.

Respondents—Ex parte.

Viscount Haldane.—In this appeal the question is whether the Officiating Chief Commissioner of Ajmer-Merwara has properly set aside the award in certain arbitration proceedings. The respondents had brought a suit to recover from the appellants Rs. 88,320 alleged to be due under a mortgage. The appellant first on the record is the father of the second appellant, who was at the time of the proceedings a minor. The trial Judge appointed one Bhur Singh guardian *ad litem* of this minor appellant. Before the trial came on, all the parties entered into agreement to refer the question in dispute to two arbitrators and, in the event of these differing, to an umpire. The agreement was signed by the appellants and respondents each with his own hand excepting in the case of the minor appellant, on whose behalf it was signed by the guardian *ad litem*. The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian *ad litem* was present in Court and was a party to the application. The Trial Judge thereupon made an order of reference. The arbitrators differed, and the parties then concurred in an application to refer the dispute to the umpire, and an order was made accordingly. The umpire, made an award allowing the respondents' claim to the extent of Rs. 17,510 only. This award was filed in Court. The respondents, being dissatisfied with it, applied to the Trial Judge under the provisions of S. 15 of the Second Schedule of the Code of Civil Procedure, 1908, to set the award aside. The Trial Judge refused the application. He held that all the parties to the suit, including the guardian *ad litem*, had been consenting parties to the application, and further that there was no ground for the objections made on the merits to the award. The order was made under S. 16 of the Second Schedule to the Code already referred to. This section provides that—

"(1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award."

The respondents then presented an application to the Chief Commissioner under

section 115 of the Code of Civil Procedure. This section provides that :—

"The High Court, may call for the record of any case which has been decided by any Court subordinate to such High Court, and in which no appeal lies thereto, and if such subordinate Court appears (*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested, or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fi"

The Chief Commissioner dismissed the application. He held that the point taken that the application to the Court for reference to arbitration was not signed by the guardian *ad litem*, was not a good one, having regard to the fact that the agreement itself was signed by all parties concerned. Moreover, he thought that it was for the minor or his guardian, and not for the applicants, to raise such an objection. He also held that even if an agreement or compromise entered into on behalf of a minor without the leave of the Court was voidable against all parties other than the minor, that did not make it necessarily void against the minor. As to the merits he was of opinion that there was nothing in the case made for the applicants, the present respondents, based on misconduct or irregularity on the part of the arbitrators and umpire.

The respondents then applied to the Court of the Chief Commissioner for a review of this order, relying on S. 114 of the Code which, subject to such conditions and limitations as may be prescribed, allows a person aggrieved to apply for a review of any decree or order from which no appeal is allowed by the Code, and relying also on Order XLVII, R. 1 (1) of the First Schedule to this Code which provides that he may apply for such review on :—

"The discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason."

These rules are, under S. 121 of the Code, to have effect as if enacted in it, until altered as the Code provides.

This application for review was heard, not by Sir Elliot Colvin, the Chief Commissioner, but by Mr. Stratton who was officiating in his absence. The appellants were not represented on this hearing. The main point urged was that in dismissing the application for review, the *Chief Commissioner* was in error in regarding the omission to sign the application for arbitration by the minor or his guardian as unimportant, and as covered by the agreement which all the parties had signed. The Officiating Chief Commissioner acceded to the application, and set aside the whole of the arbitration proceedings, on the ground, apparently, that this error in the proceedings, though technical only, was fatal. The only other arguments before him appear to have been that even if the umpire had proper jurisdiction his action was illegal, because he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree, and because he had not taken evidence, although he called for it.

Their Lordships have had to hear the appeal *ex parte*, as the respondents, the plaintiffs in the suit, did not appear on the appeal, but they have examined closely the documents and the various judgments in the Courts below. They are of opinion that the decisions of the Trial Judge and of the Chief Commissioner were right, and ought not to have been interfered with by the Acting Chief Commissioner.

In the first place the Second Schedule to the Code of Civil Procedure, which provides, by S. 1, that, where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an Order of Reference, does not require that the writing should of necessity be signed. As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They think, therefore, that there is no substance in the technical objection relied on. Nor can they find any defect on the face of the award, or any misconduct of the arbitrators or umpire, or concealment of facts by any of the parties which would bring the case within those provisions in the Second Schedule which might enable the Court to set it aside. They have accordingly arrived at the conclusion that the Acting Chief Commissioner was not justified in interfering with the order refusing revision made by the Chief Commissioner.

They are, therefore, of opinion that the appeal must be allowed with costs here and

in the Courts below, and they will humbly advise His Majesty to that effect.

D.D. *Appeal allowed.*

Solicitors for the Appellants.—Barrow, Rogers and Nevill.

****A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

13th July 1915.

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Ganga Sahai—Defendant—Appellant.

v.

Kesri and *others*—Plaintiffs—Respondents

Privy Council Appeals Nos. 83 and 84 of 1912.

** *(a) Civil P.C., S. 66—Mortgage decree—One of several decree-holders executing and purchasing property himself—He cannot prevent others recovering their share—Civil P.C., O. 21, R. 15.*

The provisions of S. 317 of the Code of 1882 (corresponding to S. 66 of the Code of 1908) were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase. 19 W.R. 356 P.C. Ref. [P. 82 C. 1.]

Where one of several mortgage decree-holders executes the decree under O. 21, R. 15, and purchases the property himself, he cannot defeat the claims of other decree-holders by seeking the aid of this section. [P. 82 C. 1.]

** *(b) Hindu Law—Succession—Paternal uncle of half blood is preferred to sons of full paternal uncle.*

Preference of the whole blood to the half blood applies to sapindas of the same degree of descent from the common ancestor, and does not apply to persons of different degrees, and therefore a paternal uncle of the half blood is entitled preferentially to the exclusion of sons of full paternal uncle. 19 All. 215 Expl. [P. 82. C. 2.]

Lowndes—for Appellant.

De Gruyther and *Dube*—for Respondents.

Mr. Ameer Ali.—These several consolidated appeals from certain decrees and judgments of the High Court of Allahabad arise out of three suits brought in the court of the Subordinate Judge of Farrukhabad. The plaintiffs in two of these suits, claiming adversely to each other to be the heirs of one Bahadur Singh, deceased, sought to recover from the appellant Ganga Sahai a one-third share of the properties specified in their respective plaints, which he had purchased at a sale held in execution of a decree upon a mortgage to which reference will be made presently. The third suit was brought by Kalka Prasad, one of the plaintiffs in the above suits, to recover from the respondent Chunni Lal certain shares in mouza Malkapur belonging to the estate of Bahadur Singh which had been conveyed to him by one Gulab Kunwar, Bahadur's step-mother.

Their Lordships propose to deal first with the two suits in which Ganga Sahai was the defendant.

The mortgage bond referred to above was executed so long ago as the year 1869 by one Jai Chand Chaudhri, in favour of Bahadur Singh and Debi Din the ancestor of Ganga Sahai, hypothecating two villages named respectively Tahsipur and Bilaspur. One-third of the amount advanced on this transaction admittedly belonged to Bahadur Singh, and the other two-thirds to Debi Din. On default of payment by Jai Chand, a suit was brought in 1891 by Bahadur Singh in conjunction with Bhima Singh and Ganga Sahai, the heirs and representatives of Debi Din (who had died in the meantime). Bahadur Singh died during the pendency of the suit, and his widow, Lachman Kunwar, was brought on the record in his place. On the 21st of November, 1891, the usual mortgage decree under section 88 of the Transfer of Property Act (IV of 1882) was made by the Court. This was followed on the 27th of April, 1893, by the final decree under section 89 of the Act.

It appears from the record that Lachman Kunwar died somewhere in 1894. On the 20th of December, 1897, Ganga Sahai applied for execution of the mortgage decree against the heir and representative of the mortgagor. In his application he expressly reserves the rights of Lachman Kunwar's heirs. The passage in question is important in view of the contention now raised by him. He states:

"Bhaman Singh, another decree-holder, has died a natural death. His sons, Mauji Ram and Raj Kunwar, are his heirs; but they do not join in the application, hence, under (section) 231 of the Code of Civil Procedure, this decree-holder alone makes this application, and prays that the decree may be executed, subject to the rights of the heirs of Musammat Lachman Kunwar and Bhaman Singh."

Bhaman Singh is evidently the same person Bhima Singh.

The mortgaged properties were accordingly put up to sale on the 20th of February,

1899, and purchased by Ganga Sahai. The sale appears to have been duly confirmed and two sale certificates were issued to him in respect of Tahsipur and Bilaspur respectively, and he is admittedly now in possession of the properties.

The two sets of plaintiffs, as already stated, claim to be the heirs of Bahadur Singh adversely to each other; but as against the appellant Ganga Sahai, they seek identical relief. They say that the purchase by Ganga Sahai of the properties in question was not exclusively for himself, but for the benefit of the heirs and representatives of both mortgagees. The courts in India have upheld their contention. Ganga Sahai has appealed to this Board and takes his stand on the first clause of section 317 of the Code of Civil Procedure, 1882, which was in force when the sale took place. That clause provides as follows:—

> "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase. An example of this will be found in the case of *Bodh Singh Dodhoria* v. *Ganesh Chunder Sen* (1), decided by this Board in 1873.

The courts in India were perfectly right in refusing to allow Ganga Sahai to perpetrate a fraud against his co-decree-holders under cover of this section. His application for execution was under section 231 of the Code, and it was made subject to their rights. Had he not even embodied this reservation in his petition, the court executing the decree would have of its own motion protected the interest of the other decree-holders. Their Lordships agree with the courts in India that the heirs and representatives of Bahadur Singh are entitled to recover from Ganga Sahai a one-third of the properties purchased by him in execution of the joint mortgage decree.

(1) [1873] 12 B.L.R. 317=19 W.R. 356=3 Sar. 253 (P.C.).

The question then arises who among the two sets of plaintiffs are entitled to the inheritance of Bahadur Singh. At the time of his widow's death in 1894, when the succession passed to the collaterals, Raja Ram, his uncle by the half blood, was alive; and he claimed the properties in preference to Kalka Prasad and Jivan Lal, the sons of a full paternal uncle named Ganga Prasad. Raja Ram has since died and is now represented by his sons and grandsons, who are plaintiffs in one of the suits and respondents before this Board. Jivan Lal has also died, and his son Munshi Lal, now stands in his place. Kalka Prasad and Munshi Lal were the plaintiffs in the second suit, and they claimed in opposition to Raja Ram to be the heirs of Bahadur Singh by virtue of their relationship to him being of the whole blood.

As the question of heirship was involved in all the three suits they appear to have been tried together; and the court of first instance held in favour of Jivan Lal and, Kalka Prasad mainly on the authority of a decision of the Allahabad High Court, which, it considered, had settled the rule of succession in favour of the heirs related by the whole blood. The District Judge affirmed this decree. On appeal, however, to the High Court, the learned Judges explained that in their judgment in *Suba Singh* v. *Sarfaraz Kunwar* (2), on which the lower courts had relied, they had laid down no such principle as had been inferred; what they meant to decide was simply this, that under the Mitakshara the distinction of the whole blood was not confined to the brother and his sons, but extends further. And on an examination of the doctrines of the Mitakshara, they held in effect that this preference of the whole blood to the half blood applied to sapindas of the same degree of descent from the common ancestor, and did not apply to persons of different degrees. They were accordingly of opinion that Raja Ram being paternal uncle of the half blood was entitled preferentially to the inheritance of Bahadur Singh to the exclusion of his cousins, although they were the sons of an uncle of the whole blood. They accordingly dismissed the claim of Munshi Lal and Kalka Prasad in their suit against Ganga Sahai and others, as also the claim of Kalka Prasad in his suit against Chunni Lal. They at the same time decreed the claim of Raja

(2) [1896] 19 All. 215=1897 A.W.N. 53.

Ram's representatives against Ganga Sahai. Munshi Lal and the representatives of Kalka Prasad, who died during the pendency of the suit, have appealed to His Majesty in Council from these decrees of the High Court dismissing their claim; and the main contention advanced on their behalf is that, although the Mitakshara expressly provides for the succession of the half brother in preference to nephews of the whole blood, there is no such provision in respect of uncles; and further that as it provides for the succession of the grandmother on failure of the father and his descendants, it must follow that by the words "The uncles and their sons" Vijnaneswara meant that uncles of the whole blood and their sons should succeed in preference to the issue of another wife of the paternal grandfather. This argument, in their Lordships' opinion, would apply with equal force to the case of half brothers and the sons of brothers of the whole blood. But it is conceded that the author of the Mitakshara has expressly declared that brothers of the half blood, come before nephews of the whole blood, and in principle they see no reason to differentiate between the brothers of the *propositus* and the brothers of his father. Having regard to the geneal scheme of the Mitakshara, their Lordships think that the preference of the whole blood to the half blood is confined to members of the same class, or, to use the language of the judges of the High Court in *Suba Singh* v. *Sarfarz Kunwar* (2) to "sapindas of the same degrees of descent from the common ancestor," and that, therefore, on the death of Lachman Kunwar, Raj Ram, as uncle of the half blood, became entitled to the inheritance of Bahadur Singh to the exclusion of his cousins.

In the result all the appeals will be dismissed. Kesri and the other respondents in appeal 83 of 1912 will have all their costs from the appellant Ganga Sahai. There will be no order as to costs with regard to the other parties.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors for Appellant— T. L. Wilson & Co.

Solicitors for Respondents— (1) Douglas Grant and (2) Barrow, Rogers and Nevil.

****A.I.R. 1915 Privy Council.**

(FROM BOMBAY)

6th December 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Jamshed Khodaram Irani— Plaintiff—Appellant.

v.

Burjorji Dhunjibhai— Defendant—Respondent.

Privy Council Appeal No. 113 of 1914.

* * *Contract Act, S. 55—Equity will look to substance to determine if time is of essence—But it will not tolerate undue delay—Facts prior to contract may be looked to.*

S. 55 does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But such stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits proscribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified. But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice, that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract (English cases followed). [P. 84, C 2; P. 85. C. 1 & 2.]

Robert Finlay and *Brown*— for Appellant.

Leslie Scott and *Raikes*— for Respondent.

Viscount Haldane.—The question in this appeal is whether the appellant, who was the plaintiff in an action for specific performance, is entitled to the relief he has claimed. Macleod, J., decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action.

The facts may be stated briefly. The Government of Bombay, in 1898, granted to one Mothabai Bhikaji a reclamation lease of over 2,000 acres of land near Bombay for a term of 999 years. The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910. He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to the satisfaction of the local Collector. The lessee was, further, not to assign or underlet, until the reclamation was complete, without the consent in writing of the Collector. In case of breach of any covenant or condition or provision of the lease, the lessor had the right to re-enter and determine the lease. The lease was transferred in 1908 to the respondent, who had purchased it from the lessee.

On the 8th July 1911 the respondent agreed in writing by a document in Gujrati, a translation of which was before their Lordships, to sell the leasehold interest to the appellant for Rs. 85,000, and the appellant paid Rs. 4,000 of this sum as a deposit or earnest. This agreement provided, by clauses 1 and 2, that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid, and after its registration the remaining Rs. 500. The 5th clause provided that on payment of the Rs. 81,000, as provided by clause 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period above mentioned he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell.

There was a subsidiary agreement that the respondent should buy certain land belonging to the appellant for Rs. 30,000, to be deducted from the Rs. 81,000, but on this nothing turns.

The appellant's solicitors proceeded to investigate the title, and they made requisitions. Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father, one of certain mortgagees of the interest of Mothabai Bhikaji. Another of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. This requisition was made on the 3rd October 1911, more than two months after the date of the contract. The respondent did not comply with these requisitions, but on the 6th October, through his solicitors, asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed.

If these requisitions were made in time their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question therefore lies at the root of the controversy, and the answer to it is decisive of the appeal.

The law applicable to the point is contained in section 55 of the Indian Contract Act, 1872, which provides that—

> "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should

take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v. *Napper* (1) which was adopted by Knight Bruce L.J. in *Roberts* v. *Berry* (2). The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v. *Thomas* (3), and by the House of Lords in the recent case of *Stickney* v. *Keeble* (4). Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley* v. *Thomas* (3).

"The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion,or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry* (2)) there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds.....mentioned by Lord Justice Turner, 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particluar case."

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merley an illustration of the general principle of disregarding the letter for the substance which Courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. *Tilley* v. *Thomas* (3) where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific peformance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the plaintiff bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself, without dwelling on a possible point in the plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of

(1) [1802] 2 Sch. & Lef. 682.
(2) [1853] 3 De G. M. & G. 284=22 L. J. Ch. 398=98 R. R. 139=20 L. T. (O. S.) 215.
(3) [1867] 3 Ch. 61=6 W.R. 60=17 L.T. 422.
(4) [1915] A. C. 386.

the conveyance, as distinguished from completion, they agree with Macleod J. in the view that there is nothing said in it sufficient to exclude the equitable cannon of interpretation. And they agree in his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence. They are unable to concur in the opinion of the learned Judges of the High Court in appeal that there was evidence that the plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the plaintiff to insist on his right to complete the purchase.

These conclusions render it unnecessary to consider the other points dealt with in the High Court and elaborately argued at their Lordships' Bar. The result is that they think that the appeal ought to be allowed and that the judgment of Macleod, J., restored, and that the respondent should pay the costs of this appeal and in the Courts below. They will humbly advise His Majesty accordingly.

D. D. *Appeal allowed.*

Solicitors for Appellant—Latteys and Hart.

Solicitors for Respondent.—T. L. Wilson & Co.

**** A.I.R. 1915 Privy Council.**

(FROM EAST AFRICA AT MOMBASA)

3rd December 1915.

EARL LOREBURN, VISCOUNT HALDANE AND LORD WRENBURY.

Abdurahim Haji Ismail Mithu—Defendant—Appellant.

v.

Halimabai—Plaintiff—Respondent.

** (*a*) *Mahomedan Law—Applicability—Mahomedans at Mombasa in East Africa—Mahomedan Law applies though special custom of succession may be proved by the immigrant.*

At Mombasa the succession to Mahomedans is in general governed by Mahomedan Law, although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession. In this case the custom was held as not proved.

** (*b*) *Mahomedan Law—Migrating family—Family migrating to another country and settling among their co-religionists—Presumption that they accepted their law is legitimate.*

Where a Hindu family migrates from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India.

[P. 87, C. 2.]

E. Richards and *Austen Cartwell*—for Appellant.

Respondents—Ex-parte.

Viscount Haldane.—This is an appeal from a judgment of the Court of appeal for Eastern Africa reversing a judgment of the High Court of East Africa at Mombasa. The question to be decided is whether the succession to the estate of one Haji Ismail Mithu, deceased, is governed, as the appellant, who is a son claims, by Hindu Law, or whether such succession is governed by Mahomedan Law, as the respondent, who is the widow, asserts. This question arose in an action brought by the respondent against the appellant claiming administration and a declaration that she was entitled, on the footing that Mahomedan Law applied, to an eighth of her husband's estate. On the appellant's contention the respondent, as widow of the deceased, became entitled to no more than maintenance.

The deceased was a merchant, who had settled at Mombasa and was a member of the Indian sect known as Memons. According to the case as stated by the appellant's Counsel, some 400 or 500 years ago the "Luwanas," a sect of Hindus located in Scinde, became converted to the Mahomedan faith and took the name of Memons. A century or so later they migrated to Cutch, where they settled. There were two migrations. Those who first migrated, and their descendants became known as Cutchee Memons, while those who migrated on the second occasion, and their descendants, were called Nassapooria Memons. Both sets of migrants held to religious tenets and customs which are common to the Memon community, and for the purposes of the present appeal, the distinction between the two sets is immaterial.

Upon their conversion to Mahomedanism the Memons did not adopt the Mahomedan Law as to succession, but retained the Hindu Law of succession as a customary law which remained binding upon the entire Memon community at Cutch. Over half a century ago Memons began to migrate from Cutch to East Africa, and there are now, so it is stated, at least a hundred Memon families at Mombasa.

The deceased's father was a Nassapooria Memon who about half a century ago, with his wife and children, including the deceased, migrated to Mombasa, where they settled. At Mombasa the succession to Mahomedans is in general governed by Mahomedan Law, although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession.

The action was tried before Hamilton, C.J. The appellant and respondent both called evidence. It was shown that in some cases, of which eleven appear to have been fully proved, succession among the members of the Memon community at Mombasa had taken place according to Mahomedan Law. The only documentary evidence was also in accordance with this view. On the other hand, oral evidence was given for the appellant and accepted by the learned Judge who tried the case which showed that in a few cases distribution in accordance with Hindu Law had taken place. It was also established that there had been a custom, or at least a practice, that ornaments given to a wife in her husband's lifetime were allowed to remain with the widow only during her life or until remarriage, a custom or practice more nearly resembling the rule which obtains among Hindus than any which regulates such cases among Mahomedans. Upon consideration of the evidence Hamilton, C.J., decided in favour of the appellant. He took the view that the burden of proof lay on the respondent to show that there was a Mahomedan custom which applied to the Memons in Mombasa, that this custom was ancient and invariable, and that it had superseded the custom which governed the Cutch Memons in such cases before migration.

The Court of appeal were of a different opinion. They held that Hamilton, C.J., had, having regard to the facts as established, wrongly stated the character of the burden of proof. They took the view that if the present respondent simply produced sufficient evidence to show that the custom of Hindu succession had ceased to be generally observed by the Memons in Mombasa, that was sufficient to entitle her to succeed, if the other side failed to bring forward sufficient evidence in answer. They commented on the indications, adverse to the present appellant, furnished by the documentary records, and on what they considered to be on the whole the preponderance in trustworthiness of the oral evidence against him. That on certain occasions females should have been proved to have preferred maintenance to a share of a very small estate they regarded, as in the circumstances, inconclusive; nor was the special custom or practice as to ornaments enough to displace the presumption that the general rule was that of Mahomedan Law.

Their Lordships are in agreement with the conclusions reached by the Court of appeal for Eastern Africa. It seems to them that the learned Judge who tried the case misconceived what, having regard to the circumstances of the Memon migration to Mombasa, was the real question for the Judge who had to try the case.

Where a Hindu family migrates from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrates to another country, and, being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems, to their Lordships, to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances. In the present case it is to be observed that it does not appear that the

Memons in Mombasa have at any time established any distinctive political or social organisation for themselves. Such organisation as has been formed appears to have been formed mainly, if not entirely, for purposes of worship. There seems to be no sufficient reason in what has been brought before the Courts in this case for regarding the Memons who have emigrated from Cutch to Mombasa as other than a number of individual Mahomedans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturaliy follows from that religion, and so prevails among the Mahomedans at Mombasa.

Their Lordships have examined the oral evidence brought forward on behalf of the appellant. It relates to very small estates and is of an inconclusive character. There is lacking in it, indication of intention to assert a principle. A good deal of the evidence for the respondent is open to the same observation. But several of the documentary records distinctly support the contention that some at least of the Memon families had treated themselves as governed in point of succession by Mahomedan law, and the balance of the oral testimony appears to be on this side. Under these circumstances their Lordships think that the presumption which arises from the facts proved, and the weight of evidence are both in favour of the conclusion reached by the Court of appeal.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed.

D.D. *Appeal dismissed.*

Solicitors for Appellant.—Harrison, Powle and Tulk.

***A.I.R. 1915 Privy Council.**

(FROM CALCUTTA)

25th November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Amir Chand—Plaintiff—Appellant.

v.

Bakshi Harihar Prashad Singh and others—Defendants—Respondents.

** Civil P. C., S. 47 (Code of 1882), S. 244—Objections that could be raised in execution under S. 244 cannot be tried in a separate suit.*

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible and therefore objections to execution which could be raised under S. 244 in execution shall be determined by orders of the court executing a decree and not by separate suit. 19 Cal. 683 P. C. Ref.

Dube—for Appellant.

Respondents.—Ex parte.

Sir John Edge.—The plaintiff in the suit in which this appeal has arisen is Babu Amir Chand, the adopted son and representative of Babu Fakir Chand, deceased. On the 29th March, 1888, one Bakshi Ram Newaz Singh obtained a decree for sale, under S. 88 of the Transfer of Property Act, 1882 (Act IV of 1882), of certain immovable property of which he was a mortgagee. To the suit in which that decree was made Babu Fakir Chand was a defendant. An order absolute for sale, under S. 89 of that Code was made in the suit for sale on the 4th January 1902 by the Trial Judge, and was confirmed on appeal by the High Court at Calcutta on the 18th December 1903. The representatives of Bakshi Ram Newaz Singh thereupon applied for execution of the decree for sale. On the 18th May 1904 Babu Amir Chand, who was the representative of Babu Fakir Chand, then dead, presented to the Court executing the decree for sale a petition of objections under S. 244 of the Code of Civil Procedure, 1882, Act XIV of 1882. Some of Babu Amir Chand's objections were allowed, others of his objections were disallowed on the ground, amongst others, that he had failed to support them by sufficient evidence.

On the 23rd January 1907 Babu Amir Chand filed his plaint in the present suit in the Court of the Subordinate Judge of Arrah. In this suit he raises the same objections to the execution of the decree for sale of 1888 which had been put forward in his petition of objections of 1904 and which had been disallowed. The Subordinate Judge decreed in part the claims of Babu Amir Chand. On appeal the High Court at Calcutta on the 20th December 1909, holding that this suit is based on the very same objections that were made by Babu Amir Chand in his petition of objections of 1904, and further, finding that Babu Amir Chand had laid no foundation by reliable legal evidence for impleading in this suit

Abdur Razack and Gangan Kunwar, who were not parties to the previous suit or execution proceedings, dismissed this suit. From that decree of the High Court this appeal has been brought.

Abdur Razack and Gangan Kunwar were made defendants to this suit in an attempt to avoid the bar to this separate suit which was provided by S. 244 of the Code of Civil Procedure, 1882.

As was observed by this Board in *Prosunno Coomar Sanyal* v. *Kalidas Sanyal* (1).

"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in "India have not placed any narrow construction on the language of S. 244 of the Code of Civil Procedure, 1882."

The questions raised in this suit could have been and were raised by Babu Amir Chand under S. 244 of the Code of Civil Procedure, 1882, and whether then raised or not in his petition of objections of 1904, they are questions which relate to the matters which by S. 244 it was enacted—

"Shall be determined by orders of the Court executing a decree and not by separate suit."

The suit was properly dismissed by the High Court. The respondents, with one exception, have not entered an appearance in this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant must pay to the respondent who has entered an appearance such costs as he may be entitled to.

D.D. *Appeal dismissed.*

Solicitors for Appellant.—Barrow, Rogers & Nevill.

(1) [1892] 19 Cal. 683—19 I. A. 166 (P. C.)

**A.I.R. 1915 Privy Council.

(FROM BOMBAY)

22nd November 1915.

VISCOUNT HALDANE, LORD PARMOOR, SIR JOHN EDGE AND MR. AMEER ALI.

Haji Umar Abdul Rahiman—Plaintiff—Appellant.

v.

Gustadji Muncherji Cooper—Defendant—Respondent.

** *Practice—Pleadings—Decision should not rest on inferences at variance with plaintiff's case—Circumstances should be scrutinised while applying this principle.*

It would introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the case, has undertaken to prove. But in applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law. [P. 91, C. 2 & 92, C. 1.]

De Gruyther and *Raikes*—for Appellant.

E. Richards and *W. Garth*—for Respondent.

Viscount Haldane.—This is an appeal on questions of fact from a judgment of the High Court of Bombay, reversing the judgment of the First Subordinate Judge of Poona, who tried the case. The principal issue is whether a promissory note for Rs. 15,000, on which the appellant brought an action against the respondent, was a forgery. A good deal of the oral evidence was taken, not by the trial Judge, but before another Judge who acted for him. The case is, therefore, not one in which a Court of appeal has the full assistance of the impressions of a Judge who in trying the case has seen all the witnesses in the box. The High Court and this Board have had to weigh the evidence as recorded for themselves, with the aid of the views of the trial Judge on those occasions on which the witnesses were examined and cross-examined before him.

The appellant was a furniture dealer and money-lender at Poona. The respondent was a bookmaker on the turf, who also owned a fibre factory. The latter had frequent occasion to borrow money, and he borrowed from time to time from the appellant among others. Between the *Diwali* day in November 1906, with which the native financial year commenced, and the 5th November 1907 which ended that year, the respondent had borrowed from the appellant on promissory notes sums amounting to Rs. 19,000. Of this debt he had repaid Rs. 5,000 in August, and, Rs. 14,000 for principal remained unpaid on the *Diuali* day in 1907, the 5th November, together with Rs. 332 for interest. As to the security for this indebtedness there has been dispute. A good deal of the money had been advanced for the purposes of building

a bungalow on some land at Poona belonging to the respondent, and the evidence of the Appellant was that the title-deed to this land had been deposited with him as security for the advances, with a promise of a formal mortgage when his building was complete. However, on the 9th March 1907, the respondent got the deed back for the purpose, as he stated in a letter of that date, of showing it to his pleader, and on a promise to return it. He either did not return it, or if he did so he managed to get possession of it again, and he used it to enable himself to mortgage the property in August for Rs. 15,000 to a Dr. Modi. The appellant was not informed of this and after discovering it he brought the action in which this appeal arises to recover the amounts due for principal and interest, and for a declaration that these amounts were charged on the property. The contention of the respondent was that he had never agreed to give the appellant a mortgage, but had only negotiated about it. It is, however, difficult to reconcile this version of the transaction with the terms of the letter of 9th March in which he appears to treat the appellant as entitled to have the deed.

It is clear that the respondent had been borrowing on a large scale prior to November 1907 from other people as well as from the appellant. Indeed his case is that he so borrowed in order to pay off the latter. But he appears to have been in circumstances of some difficulty. He had sometime previously been declared a defaulter by the local Turf Club, a circumstance which could not but cause him difficulty in borrowing. However, his case is that he succeeded in raising enough money to pay the appellant in cash, two sums of Rs. 14,000 and Rs. 1,000 on the 5th of November, in small notes of Rs. 100 and less. An important question which has to be determined is whether he did this, or whether the appellant merely closed the account for the year by taking a fresh promissory note from him for the balance carried into the new account.

Their Lordships have had before them a translation of the account kept in the books of the appellant, relating to his transactions with the respondent. From the translation it appears that the Rs. 14,000 were credited as "in cash in full settlement of the account up to this day," *i.e.*, the 5th November 1907. At first sight this would seem to mean that the money was actually paid. But an examination of the accounts made out in previous years, shows that the expression "in cash" is far from conclusive inasmuch as it was the regular practice to enter as sums of cash received and credited the amounts of new promissory notes given by the respondent to the appellant in liquidation of earlier notes, just as though actual cash had been received. Their Lordships think that it must be taken that the practice was to close each yearly account entirely by treating any debit balance as paid off when there was credited as liquidating the cash balance due, a new promissory note which then became a debit item in the account for the ensuing year. They are confirmed in this view by what was said by the Trial Judge to the effect that he had had a long experience in which he had been familiar with the existence of this practice.

The appellant and his witnesses swear that this was the course adopted when the account was closed on the *Diwali* day of 1907 and a new account opened for the ensuing year. The respondent swears that he paid the Rs. 14,000 in cash, consisting of small notes which he got, not from his bank but from his house, where the money had been kept ready for three months. Their Lordships think that the probabilities are against the truth of this statement. The respondent had been borrowing money during this period, including a large sum of Rs. 15,000, as late as August from a Dr. Modi, and he had had an execution issued against him for a judgment-debt of Rs. 8,000 in October. This debt he had paid, but he says in his evidence that in order to do so he had borrowed Rs. 5,000. Besides this he had incurred other debts. For instance he had borrowed Rs. 1,000 from the appellant on 3rd September. This state of affairs does not render it probable that he was in a position to keep Rs. 14,000 or any other considerable sum in his house during the three months antecedent to the alleged payment of cash to the appellant. Again the body of the promissory note on which the Appellant sues is in the handwriting of the person who signed it, and the handwriting in the case both of the body of this note and its signature appear indistinguishable from the admitted handwriting of the respondent. Indeed the trial Judge came to the conclusion on a comparison of documents and after taking evidence, that the signature was genuine. Further, subject to

one important discrepancy which their Lordships will presently deal with, the appellant's books bear out his assertion that the balance was liquidated by means of the promissory note. The respondent ought, in the ordinary course, to have, in his turn produced his books to show the entries made by him at the time and so bear out the case of cash payment which he made. In addition to his business as a bookmaker he had, as already stated, a factory. His excuse for not producing the appropriate books was that they had been destroyed in a fire which took place at the factory on the 10th and 11th November, just after the transaction in question. He said that two books only had escaped destruction, but it appears that the entries in neither of these related to the transactions in question. As against this testimony the appellant called one Cawasji, who was agent for the insurance company from which the respondent recovered the amount of the damage caused by the fire. Cawasji said that he had produced to him by the respondent books other than the two referred to, including a cash book. The evidence taken renders it very doubtful whether the room in which the books were, was destroyed at all by the fire. Their Lordships cannot accept the story told by the respondent about the destruction of his books.

But on the other side the case made by the appellant was in its turn unsatisfactory. The promissory note on which he sued was for Rs. 15,000, being made out for the balance of Rs. 14,000 and Rs. 332 for interest due, the remainder being stated to have been paid in cash. But the note was dated, not on the *Diwali* day, the 5th but on the 7th November. The appellant and the witnesses whom he called insisted throughout that the date of the transaction was the 7th and that the note was signed then. They produced books which supported this statement. These books showed the Rs. 14,000 as paid in cash on the 5th November and the debit for Rs. 15,000 on the promissory note as made under date the 7th. But the respondent succeeded beyond question in completely disproving the allegation that he had signed the note on the latter date. He established conclusively that he was in Bombay and not in Poona on that day. It was not until this evidence had been given that the appellant's solicitor suggested in his reply that the date of the disputed note and the date assigned by the appellant for the transaction might have been a mistake, and that the note was post-dated and really signed on either the 5th or the 6th.

The trial Judge took the view that the appellant and his witnesses had perjured themselves about the date and that his books had been so fabricated as to support this story. But he held that the note was in fact signed by the respondent, and that the transaction had in reality taken place in the form alleged by the appellant, but on the 5th and not on the 7th. He considered that both parties had committed perjury, and to mark his sense of what had occurred, while deciding in favour of the appellant he deprived him of his costs.

The learned Judges of the High Court took a different view. They were of opinion that the trial Judge's finding that the disputed note was signed on a different date from that alleged by the appellant in his plaint, and the evidence given, constituted a fatal variance from the case pleaded and made. They thought that the receipt in the appellant's account on which the respondent relied, and by which the appellant purported to acknowledge receipt of cash in payment of the previous debt, was sufficient evidence of payment in cash as alleged by the respondent. They considered that the destruction of the respondent's books in the fire had been proved, and that there had been no suppression by him of facts. They thought that there was evidence that the respondent was in a position to have made the cash payment set up. As to the finding of the trial Judge that the note was signed by the respondent, they thought that the handwriting was similar to the handwriting of the respondent in other promissory notes produced for comparison and admitted by him, but that this circumstance was not sufficient to rebut what they regarded as the inference irresistibly arising from the other proved facts in the case, that the handwriting was the work of a clever forger. They laid great stress on the principle that it would "introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the case, has undertaken to prove."

Their Lordships are of opinion that the High Court has applied this principle in an

abstract and unsatisfactory way which has misled them in estimating the merits in the controversy before them. In applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law. In the case which the Board has on the present occasion to consider, the fundamental questions are whether the sum due was paid in cash, and whether the note was a forgery. No doubt the appellant was quite wrong in saying that the note was signed on the day on which it was dated, the 7th November 1907. On that date it is proved that the respondent was not in Poona, but he may have post-dated the note accidentally, or for some purpose, and have signed it on the 5th or 6th. It is going too far, in their Lordships' opinion, to infer, what the trial Judge inferred, that the books must have been fabricated, and that deliberate perjury was committed. It is quite possible that all that happened was that the appellant and his witnesses, whose testimony was given a year and a half after the event, had not made out the accounts until some interval had elapsed, and were then misled by the documents into making a serious but not conclusive slip. The accounts in the appellant's books may quite naturally have been erroneously, but in good faith, based on the date of the note. The natural inference from the documents and the evidence appears to their Lordships to be that the signature was genuine and that the transaction, like the previous transactions, was not a closing of this account by the payment of cash, but was a liquidation by means of a fresh note. In the view that they take of the evidence what they have stated appears to them to be the proper inference from what is established by the evidence. They are unable to agree with the High Court either in their view of the evidence or in thinking that the general principle on which the learned Judges relied can be decisive of a case in which the cardinal issues are in reality those stated. TheirLordships are not called on to interfere with the discretion exercised by the trial Judge as to costs, but they think that at all events on the main question he was right, and the High Court wrong.

They will, therefore, humbly advise His Majesty that the judgment of the Court of First Instance should be restored, and that respondent should pay the costs of this appeal and of the proceedings in the High Court.

D. D. *Appeal allowed.*

Solicitors for the Appellant—Lateys and Hart.

Solicitors for the Respondent—Downer and Johnson.

****A.I.R. 1915 Privy Council.**

(FROM ALLAHABAD)

14th December 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Parbhu Dayal—Plaintiff—Appellant.

v.

Makbul Ahmad and *others*—Defendants—Respondents.

Privy Council Appeals Nos. 75 and 76 of 1913.

Execution sale—Sale not objected to cannot be treated as nullity.

Judgment-debtors not objecting in execution to sale of their property in execution cannot treat the sale a nullity.

A mortgaged his property to B and sold the equity of redemption to C. C sued for redemption and got a decree. He deposited the decretal amount and got possession. In the meanwhile B had appealed and the appellate Court increased the decretal amount which C failed to pay in time. B then was restored to possession. He applied also for mesne profits for the period he was out of possession and his application was granted. He then executed this order for mesne profits passed in his favour, got the equity of redemption sold and purchased it himself. C continued to deal with the equity in spite of the sale and his purchaser sued for redemption.

Held that his suit was misconceived as the Court which awarded mesne profits had jurisdiction in that matter and the persons aggrieved had their remedy either by appeal or revision. [P. 93, C. 2.]

E. Richards and *K. Brown*—for Appellant.

De Gruyther and *Dube*—for Respondents.

Mr. Ameer Ali.—The facts on which the two suits that have given rise to the present appeals were brought in the court of the Subordinate Judge of Aligarh, are fully set out in the judgment of the High Court of Allahabad. It is sufficient, therefore, to state shortly the circumstances which form the basis of the appellant Prabhu Dayal's claim. He was the plaintiff

in one of the actions (24 of 1906), which was a suit for the redemption of a mortgage, whilst in the other (173 of 1906) he was joined as a defendant. Both suits, however, related to a village called Lodhamai. A half share of this property, in the nomenclature in vogue in this part of the country described as a 10 biswa share, belonged originally to one Ram Bakhsh. In the year 1863, Ram Bakhsh executed a usufructuary mortgage in respect of this share for a term of eleven and a half years in favour of one Debi Das, since deceased. It may be noted here that just as 16 annas constitute the integral unit in Bengal and other places, 20 biswas form the unit in most parts of Upper India; 20 biswansis going to a biswas. The mortgage deed in favour of Debi Das provided that the mortgagee should remain in undisturbed possession of the mortgaged property and take the rents and profits in lieu of interest. The principal money secured by the mortgage was never repaid and Debi Das continued to hold the share after the expiration of the term for repayment. In the meantime, Ram Bakhsh was dealing with the equity of redemption; in 1866, he assigned his right in 7 biswas of his 10 biswas to the minor sons of a person named Zahur Ahmad; a little later he sold to Zahur Ahmad himself 2 biswas, 19 biswansis, and subsequent thereto the remaining fraction left in his hands to the mortgagee Debi Das. The outstanding equity of redemption in respect of 9 biswas, 19 biswansis thus vested in Zahur Ahmad and his sons. Zahur Ahmad died shortly after, leaving as his heirs, besides his sons, several daughters and two widows. His estate, including the right to redeem the mortgage to Debi Das, accordingly devolved on his heirs. In 1877 his sons under the guardianship of their mother brought a suit for redemption against Debi Das; and in May, 1878, they obtained a decree for possession on payment to the mortgagee of a specified sum. This money appears to have been paid into court, and the plaintiffs obtained possession of the property in July, 1878. The decree of the court of first instance was, however, varied on appeal by the High Court, which directed payment by the plaintiffs of a further sum of Rs. 9,000. This they failed to do, and the mortgagee was restored to possession by an order of the court in April, 1880. Debi Das then applied to the court for an order for mesne profits for the period during which he was out of possession, and in March, 1881, he succeeded in obtaining a decree for a sum of over Rs. 5,000. In execution of this decretal order he caused the outstanding equity of redemption to be attached and sold, and at the auction sale purchased the same himself. After his purchase as aforesaid he purported to deal with the property as absolute owner; he mortgaged the property to one Sagar Mal, who obtained a decree on his mortgage, and in execution of that decree the defendants in suit 173 of 1906 purchased the share in question in 1897. In suit 173 of 1906, which has given rise to appeal No. 75, the heirs of Debi Das are the plaintiffs, and they seek to redeem the property on the ground that although Debi Das after his purchase in 1881 became the absolute owner, the defendants had in the auction sale held in 1897 only acquired his mortgagee right.

The sons of Zahur Ahmad, on the other hand, continued to deal with their right to the equity of redemption as still subsisting in them; and, by two deeds of sale, assigned to Parbhu Dayal, the appellant, a 5 biswas share of the property. Prabhu Dayal, after failing in one suit in 1905 on the ground of non-joinder of parties, brought in 1906 the present action to redeem the mortgage executed by Ram Bakhsh in 1863 and for ancillary reliefs. He contended in the courts below, as has been contended before this Board on his behalf, that the decree for mesne profits and all the proceedings thereunder, culminating in the sale at which Debi Das purported to purchase the equity of redemption, were made without jurisdiction and conveyed no title to the purchaser; and as they were mere "nullities" the right of his assignors was unaffected, and by virtue of the assignment to him he is entitled to redeem.

Both courts have overruled his contentions and dismissed his suit. Their Lordships fully concur in the reasons given by the High Court for disallowing the plaintiff's claim. As the learned Judges point out, the court which awarded the mesne profits had full jurisdiction in that behalf; if it exercised the jurisdiction wrongly, the persons aggrieved had their remedy under the provisions of the Indian Code of Civil Procedure, either by appeal to the High Court or by an application for revision.

Objection was in fact taken under section 311 of the Code of Civil Procedure (1882) to the sale for mesne profits, which was disallowed, and there was no appeal from that order. The present action, in their Lordships' opinion, is wholly misconceived. It was further urged on appellant's behalf that he was at any rate entitled to redeem the share of Zahur Ahmad's daughters, who were no parties to the suit of their brothers or to the subsequent proceedings held therein. Their Lordships are not satisfied that any right was in fact conveyed to Parbhu Dayal by those ladies, or that if any right was conveyed as alleged what its extent was.

The appeal will be dismissed with costs to be paid by the appellant, Parbhu Dayal, to the respondents who are represented at the hearing.

It is admitted that his judgment will govern appeal No. 75, which arises out of suit 173 of 1906, brought by the heirs of Debi Das. This appeal will also be dismissed, and their Lordships will humbly advise His Majesty accordingly.

D.D. *Appeals dismissed.*

Solicitors for Appellant—Douglas Grant.

Solicitors for Respondents 1 & 2—Barrow, Rogers and Nevill.

**A.I.R. 1915 Privy Council.

(FROM THE SUPREME COURT OF SASKATCHEWAN.)

21st December 1915.

VISCOUNT HALDANE, LORDS PARKER AND SUMNER.

Steedman—Defendant—Appellant.

v.

Drinkle and *others*—Plaintiffs—Respondents.

**(a) *Contract Act, S. 74—Contract for sale of land—Money payable by instalments—In case of default of any instalments, payment made till then to be forfeited—Term as to forfeiture is penal.*

A contract for the sale of land provided among other things that the purchaser would cultivate the land in manner specified, and would pay the instalments as they fell due on the days mentioned, that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor, and that in case the purchaser should make default in any of the payments to be made, vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges and expenses to be borne by the purchaser.

Held, that the stipulation that payments already made of instalments might, on forfeiture, be retained, is a stipulation for penalty, and should be relieved against.

(1913) A. C. 319 Apps. [P. 95, C. 1 & 2.]

**(b) *Contract Act, S. 55—Time made expressly of the essence—Equity Court will not decree specific performance unless parties have waived the provision as to essence.*

Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If indeed the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach. *Kilmer v. British Columbia Orchard Lands Ltd.* (1913) A. C. 319 Dist. [P. 95 C. 2.]

W. Nesbitt and *A. M. Stewart*—for Appellant.

Robert Finlay and *M. Macnaghten*—for Respondents.

Viscount Haldane.—This is an appeal from the Supreme Court of Saskatchewan reversing the judgment of Mr. Justice Newlands, who had dismissed an action for specific performance. The facts were shortly these: James Campbell White agreed by writing, dated December 9th, 1909, to sell 160 acres of land in the province to one Loveridge for 16,000 dollars, of which 1,000 dollars were paid on signing the agreement, and the balance was payable in annual instalments on December 1st in each year. Loveridge entered into the agreement on behalf of the respondent John C. Drinkle, who, along with one Hair, was the real purchaser. In January 1910 the interest of Hair under the agreement was acquired by the respondent W. R. Drinkle, and on January 24th, 1910, Loveridge assigned the agreement to the respondents. Just before this date, White died intestate. On April 18th, 1910, Letters of Administration to his estate were granted to Steedman, the appellant, in the Province of Ontario, and on May 25th, 1911, the grant was re-sealed in the Province of Saskatchewan on July 22nd, 1910: the appellent, as administrator purported to approve the assignment.

The material provisions of the agreement, in addition to those already stated, were that the instalments of purchase-money and interest thereon were payable at Hamilton, in the Province of Ontario; that the purchaser would cultivate the land in manner specified, and would pay the instalments as they fell due on the days mentioned. It was further provided that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor. On payment of the sums of money mentioned with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments.

It was further agreed that in case the purchaser should make default in any of the payments to be made vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges, and expenses to be borne by the purchaser. In case the vendor thought fit to declare the contract void under these provisions, he might make a declaration by notice to the purchaser addressed to a post office mentioned. It was also provided that time was to be considered as of the essence of the agreement. No assignment was to be valid unless approved by the vendor or his agent.

The first deferred instalment, falling due on December 1st, 1910, was not paid. The appellant thereupon, by his solicitors, gave notice cancelling the agreement. The respondent W. R. Drinkle thereupon, on December 21st, tendered the amount due, but the appellant declined to receive it, and repeated this refusal whereupon another and formal tender was made a few days later.

The respondents then brought the action in which this appeal arises, claiming specific performance, and in the alternative relief from forfeiture under the terms of the agreement. Mr. Justice Newlands thought that the appellant was entitled, under the terms of the agreement providing that time should be of its essence, to cancel it on the default which had been made. He was willing to relieve the respondents from forfeiture of the amount paid under the agreement. The respondents, however, did not accept this offer, and appealed. The Supreme Court held that the case was governed by the decision of this Board in *Kilmer* v. *British Columbia Orchard Lands, Limited* (1) in which it was held, on a somewhat similar agreement, that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for penalty, and should be relieved against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it believed to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture.

As to the relief from forfeiture, their Lordships think that the Supreme Court were right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court were wrong in reversing Mr. Justice Newlands' judgment. Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.

In the case referred to this appears to have been what happened, for *Kilmer* v. *British Columbia Orchard Lands, Limited* (1) was an appeal in which the fact that the company

(1) [1913] A. C. 319=108 L. T. 306=82 L. J. P. C. 77=29 T. L. R. 319=556 S. J. 938.

had sold land for a price to be paid in instalments at specified dates, with a clause of forfeiture, in default of punctual payments, both of all rights under the agreement and of all payments already made. Time was, as in the present case, declared to be of the essence of the agreement. Default in punctual payment having occurred, the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counterclaimed for specific performance. This Board held that, as regards the company's claim, the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms.

So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board, it appears that their Lordships proceeded on the view that this was so. The date of the payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned Counsel who argued the case for the purchaser contended that, when the company had submitted to postpone the date of payment, they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counterclaimed.

In the present case there has been no such agreement to extend time, nor anything that amount to waiver of the right to treat time as of the essence. While, therefore, the Court below was, in the present case, right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their Lordships are of opinion that there was no justification for decreeing specific performance. They think that the respondents should, even at this late stage, be relieved from forfeiture of the sums paid by them under the agreement as proposed by the learned Judge who tried the case. For this purpose the respondents should have liberty to apply to the Court of first instance. For the rest, the judgment of the Court of Appeal should be reversed, and the claim for specific performance dismissed, the appellant to have his costs here and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

D. D. *Appeal allowed in part.*

Solicitors for Appellant—Blake & Redden.

Solicitors for Respondents—Stanley Evans & Co.

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*A.I.R. 1915 Privy Council.

(FROM ALLAHABAD)

13th July 1915.

VISCOUNT HALDANE, LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Mt. Bilas Kunwar—Plaintiff—Appellant.

v.

Desraj Ranjit Singh and *others*—Defendants—Respondents.

Privy Council Appeal No. 32 of 1912.

* (*a*) *Benami—Purchase by husband in wife's name—Purchase is presumed to be benami—English law compared.*

Where a purchase is made in the name of wife, the natural inference is that the purchase is a benami transaction; a dealing common to Hindus and Muhammadans alike. It has a curious resemblance to the doctrine of English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of Common Law, that where a feoffment is made without consideration the use results to the feoffer. The exception in English law by way of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is benami or not. The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid. 3 M.I.A. 229 and 6 M.I.A. 53 Ref.

A person purchased a bungalow in the name of his mistress but allowed his wife to stay therein. The mistress never lived in the bungalow which was all along in the wife's possession.

Held, that the purchase was benami and the mistress had no title thereto.

* (*b*) *Evidence Act, S. 114, Ill. (g)—Party considering certain document irrelevant and not producing it—No adverse inference can be drawn against him.*

It is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that

appear to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. [P. 98, C. 1.]

*(c) *Estoppel—Evidence Act, S. 116—Tenan cannot challenge his landlord's title till he openly restores possession to landlord.*

A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. [P. 98, C. 2.]

E. Richards and *G. E. A. Ross*—for Appellant.

De Gruyther and *B. Dube*—for Respondents.

Sir George Farwell.—This is an appeal from a judgment and decree, dated the 10th of May, 1910, of the High Court at Allahabad, which reversed a judgment and decree, dated the 26th of August, 1908, of the Judge of the Small Cause Court of Allahabad exercising the powers of a Subordinate Judge.

Rai Bisheshar Baksh Singh was a taluqdar of Oudh; he was a man of some wealth, a Rajput of good position; he had two Rajput wives but no son; he had, however, one daughter by one of the wives. He had also a Muhammadan mistress named Jagmag Bibi, by whom he had two sons, and for whom he had made provision on a fairly liberal scale, and had given full possession thereof in 1876 and in 1888. On the 9th of June, 1887, the taluqdar purchased for Rs. 9,000 the bungalow in dispute in this action; he raised the purchase money by a mortgage on his own property and paid for it, and had the sole use and enjoyment of it for himself and his wives during his own life, but the deed of sale was made out and registered in Jagmag's name. The *taluqdar* spent money on the house, built a well and walls and kept a gardener in occupation, he and his wives lived there, and the mother of one of his wives lived and died there. His wives used the bungalow by his permission for "*Kalabbas*," *i.e.*, to live at the bank of the Ganges for religious purposes for a month at a time; the purchase seems to have been made for the purposes of the *Kalabbas*. Jagmag Bibi was never in the bungalow during this period; she would of course, as a Muhammadan mistress, have no part or lot in the Hindu religious observances of Rajput wives, and it is inconceivable that she could have associated in any way in the bungalow with them.

The bungalow was useless to her for any personal use, and it was wholly inappropriate as a provision for her if the *taluqdar* ever had any intention or idea of making a further provision for her; the net income was very small in some years the out-goings exceeded the income. There is no evidence of any intention to give the bungalow to Jagmag as a provision for her or otherwise beyond the bare fact of the registration in her name; it is not clear how or when she got possession of the title-deed; it may be that it was in the *taluqdar's* possession at his death, and at some subsequent period. As the deed was made out in her name there is no importance in this. Down to the *taluqdar's* death the natural inference is that the purchase was a *benami* transaction; a dealing common to Hindus and Muhammadans alike, and much in use in India; it is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our Common Law, that where a feoffment is made without consideration the use results to the feoffor. The exception in our law by way of advancement in favour of wife or child does not apply in India (*Gopeekrist Gosain* v. *Gungapersaud Gosain* (1), but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey* v. *Mt. Shama Soonadri Dibiah* (2). "The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid."

On the 31st of August, 1890, the *taluqdar* died, and by an agreement of the 21st of March, 1894, between his two widows the possession and management on behalf of both was given to one of them, *viz.*, Thakurain Balraj Kunwar, and she has throughout managed the property in question. Whether any acts or omissions by any of the parties after the death of the taluqdar could affect the nature of the *benami* transaction as it stood at his death it is unnecessary to consider, for their Lordships are of

(1) [1854] 6 M.I.A. 55=4 W.R. 46=1 Sar. 493 (P. C.).
(2) [1843] 3 M.I.A. 229=6 W.R. 43=1 Suther 147=1 Sar. 271 (P.C.)

opinion that nothing has been given in evidence which could have any effect at all on the transactions as *benami*. The evidence given by Jagmag is quite untrustworthy, and she has not even called her sons whom she purports to vouch as actors on her behalf: the Trial Judge does not place any confidence in Roshan Lal's evidence, and his conduct certainly is open to comment. On the facts as accepted by their Lordships as the result of the evidence, all rates, rents and taxes and repairs and the ground rent of the bungalow have been paid by the Thakurain. She has had possession of the premises by her servant Bhairon, and has let them to various tenants from 1891 down to the commencement of this action, the last tenant being Dr. Ranjit Singh, to whom the plaintiff let and gave possession in 1896, and to whom also she gave notice to quit on the 13th of October, 1905.

On these facts their Lordships are of opinion that the transaction was and remains throughout *benami*. They are unable to agree with the opinion expressed by the High Court; they find no ground on which to treat a purchase by the *taluqdar* of such a property as this bungalow in the name of his Muhammadan mistress in a manner differing from that on which a similar purchase by a Hindu in the name of a complete stranger would be treated, nor is there any ground for asserting that the probabilities of the case are in favour of an intention by the *taluqdar* to benefit his mistress; for the reasons stated above the exact contrary appears to their Lordships to be the case. The High Court Judges "attach great significance" to the non-production of the books showing the accounts of the general estate, and appear to draw an inference therefrom adverse to the plaintiff's claim; any such inference is, in their Lordships' opinion, unwarranted. These books do not necessarily form any part of the plaintiff's case; it is, of course, possible that some entries might have appeared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference such as is made in the High Court that the books, if produced, would have shown rent credited to Jagmag or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow therein is very remote, but even if it had been greater, the court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so no inference in his favour can be drawn as to the contents thereof.

The other point in the case is one of estoppel. The property was let by the plaintiff to defendant Ranjit Singh; he was let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The Subordinate Judge was clearly right on this point. The High Court appears to have been under some misapprehension, and counsel for the respondents have not attempted to support their judgment on this point. Their Lordships are of opinion, and will humbly advise His Majesty, that the decree of the High Court should be reversed and that of the Trial Judge should be restored, and that the respondents should pay all the costs here and below.

D. D. *Appeal allowed.*

Solicitors for the Appellant—T. L. Wilson & Co.

Solicitors for the Respondents—Ranken Ford, Ford & Chester.

**A.I.R. 1915 Privy Council.

(FROM ALLAHABAD)

8th June 1915.

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Rajwant Prasad Pande and *others*—Plaintiffs—Appellants.

v.

Ram Ratan Gir and *others*—Defendants—Respondents.

Privy Council Appeal No. 114 of 1913.

** (*a*) *Decree—Setting aside—Fraud—A decree once passed cannot be challenged by separate suit except on ground of fraud practised on Court.*

It is not open to suitors who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Such a suit is equivalent to a suit for the rescision and destruction of a former decree of a competent Court. That rescision and destruction could be obtained only on the ground of fraud practised on the Courts. [P. 101, C. 1.]

* (*b*) *Jurisdiction—Challenge as to method of exercise does not justify denial thereof.*

A challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction.

Lowndes—for Appellants,

De Gruyther and *Dube*—for Respondents

Lord Shaw.—This is an appeal from a decree of the 23rd of February, 1911, of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree, dated the 17th of August 1909, of the Court of the Additional Subordinate Judge, of Gorakhpur. The court of first instance allowed the plaintiffs' claim. On appeal the claim was dismissed.

The object of the present suit is, by its terms, declared to be three-fold. But upon examination the substantial and only object is for a declaration in favour of the plaintiffs against the defendants to the effect that the plaintiffs are not party to a certain order which was passed *ex facie* against them on the 22nd of September, 1902. Further declarations are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a court of competent jurisdiction on the 22nd of September, 1902, and bearing to apply to the present appellants, does not in fact apply to them.

The circumstances of the case are these. In 1884, Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor-in-title of the respondents. He had two sons, Rajwant Prasad and Bhagwant Prasad. In 1897, a suit for sale under the mortgage, and directed against, *inter alia*, these three persons, was instituted. It was heard *ex parte*, and on the 30th of April, 1897, a decree was made allowing the plaintiffs' claim. An order absolute was made on the 22nd of September 1900.

In 1901, however (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant challenges made in the course of these litigations), Bhagwant and his two sons obtained an order under section 108 of the Code of Civil Procedure, 1882, to have the decree of the 30th of April, 1897, set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all the joint family, but that one member thereof had been properly served with the suit and another had not. A certain embarrassment arose in consequence, and these proceedings, so protracted, ensued.

So far as Rajwant, the present appellant, was concerned, the original suit was found to have been properly initiated, and the summons properly served. The courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application, Rajwant had no right of compeering. Their Lordships are of opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

On the 22nd of September, 1902, the Subordinate Judge delivered judgment, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April, 1897, he granted a complete decree to

the respondents in this appeal, against all the members of the joint family. The situation that thus arose was that in September, 1902, a decree was comprehensively directed against all the joint family of which Rajwant, the appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April, 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on the 23rd of June, 1903, namely, after the second and comprehensive decree had been obtained, an application was actually made for execution of the decree, not the second and comprehensive one of 1902—but the original decree of 1897. Their Lordships think it right to record that in that application this statement was made:—

"In the beginning the name of Bhagwant Parshad also is entered as a defendant, but on his application this decree was set aside against him, and consequently his name was not entered in the column of judgment debtors. Another decree has been passed as against him. It will be executed separately."

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to make the decree of September, 1902, absolute as against all the members of the joint family, the appellants took steps to have the situation cleared up. Accordingly, on the 7th of July, 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate Judge on the 3rd of November, 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgments of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on the 3rd of November, 1906, the objectors, the present appellants, appealed to the High Court, and did so upon the same arguments as they now propose in support of the present appeal to this Board. The grounds of judgment of the High Court make it clear beyond all questions that the very points which are now urged were points then taken. The objections were disallowed.

It is contended before their Lordships, however, that this matter cannot be dealt with as *res judicata;* that it is open to suitors in India who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated *seriatim.* The objections that are now taken are, first, that the decree of 1897 has never been set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was *res judicata,* and, therefore, there are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money, larger than the sum of money contained in the former. The answer is that the interest accounts for the difference, and, secondly, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgment of the court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgment now given no affirmance is given of the doctrine or application in the High Court of merger, either in a general sense or in the sense of a *vox signata.* The decree of the 26th of February, 1908, sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the court; it had jurisdiction to entertain them.

It is said that the court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it

is very trite and very familiar that a challenge of the method of the exercise of the jurisidiction of a court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of this case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgment of Lord Hobhouse in *Malkarjun* v. *Narhari* (1) is not a very remote example. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still, upon a new application to Courts of Justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordships' judgment, is equivalent to a suit for the rescision and destruction of a former decree of a competent Court. That rescision and destruction could be obtained on the ground of fraud "practised on the courts below"; but fraud has been eliminated from this case. And accordingly these proceedings are in their Lordships' judgment, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitor for the Appellants—Douglas Grant.

Solicitors for the first Respondent—Barrow, Rogers and Nevill.

(1) [1901] 25 Bom. 337=27 I. A. 216=10 M. L. J. 368=2 Bom. L. R. 927=5 C.W.N. 10 (P. C.).

** A.I.R. 1915 Privy Council.

(FROM CALCUTTA.)

15th November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Bhupendra Krishna Ghose and *another*—Plaintiffs—Appellants.

v.

Amarendra Nath Dey and *another*—Defendants—Respondents.

Privy Council Appeal No. 86 of 1914.

* * (*a*) *Hindu Law—Will—Dayabhaga—Testator can postpone a son's right to inherit by interposing a life estate, or direct by his authority to adopt, that the widow's life estate shall not be disturbed.*

Under the Dayabhaga, the testator has not only the power of authorising his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life estate. [P. 102, C. 2.]

A Hindu made a will under which he made his wife his testatrix and authorised her to make successive adoptions. It was further provided: "If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue in such case my estate after the death of my said wife shall pass to the sons of my sister who may be living at the time of my death." After his death his widow adopted a son but he died unmarried and the widow too died shortly afterwards: [P. 102, C. 2.]

Held that the estate devolved upon the sons of testator's sister according to the will and not upon the heirs of the adopted son under Hindu Law. [P. 103, C. 1.]

* (*b*) *Succession Act (1865), S. 111—S. 111 should be strictly applied.*

The rule of construction mentioned in S. 111 should be applied only to cases strictly coming within its scope. [P. 103, C. 1.]

Robert Finlay, Upjohn, W. Garth and *Dunne*—for Appellants.

De Gruyther and *Dube*—for Respondents.

Mr. Ameer Ali.—This is an appeal from a judgment and decree of the High Court of Calcutta pronounced in a suit which relates to the will of one Herumbo Nath Ghose, a Hindu inhabitant of the town of Calcutta, subject to the Dayabhaga School, who died on the 10th of November 1907.

The material portion of the will, which bears date the 26th June 1898, is in the following terms:—

"This is the last will and testament of me Herumbo Nath Ghose of No. 45, Pathuriaghat Street, Calcutta, son of Girindra Chunder Ghose,

deceased *Zamindar*. I revoke all prior testamentary writings and appoint my wife Srimati Paritoshini Dasi to be the sole executrix of this my will. I hereby authorize my said wife to adopt *Dattaka putra*. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son, or if such adopted son predeceases her without leaving any male issue in such case my estate after the death of my said wife shall pass to the sons of my sister, Srimati Benodini Dasi who may be living at the time of my death."

On the testator's death his widow Paritoshini Dasi applied for and obtained probate of the will. The estate of Herumba accordingly vested in her as his legal representative and remained in her possession until her death three years later. It is alleged that in August 1909 she, in pursuance of the authority given to her by her deceased husband, adopted an infant of the name of Hem Chunder Dey. This child died on the 11th of March 1910 which was followed by the death of Paritoshini herself shortly after.

The present suit was instituted on the 30th of March 1910 by Kissory Moni Dasi, the adoptive mother of Herumbo, against the two sons of Benodini Dasi, his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. Kissory Moni died in September following whereupon one Trailokya Nath Ghose, who alleged himself to be the next reversioner of the infant Hem was substituted in her place. Trailokya has died since the trial; and the present appellants are his sons and widow who represent him as his executor and executrix respectively. The fact of the adoption by Paritoshini of the infant Hem was denied by the respondents, but the question has not been tried. Both the Courts in India have dealt with the case on the assumption that the adoption was duly made as alleged by the plaintiff; and, on the construction of the will, have held that as the adopted son died without leaving male issue, on the death of the widow, the bequest to the sons of Benodini took effect and they accordingly dismissed the suit.

The judgment of the High Court is challenged on two grounds: *firstly* it is urged that on the adoption of the infant, the estate vested in him as full owner by virtue of the Hindu Law of inheritance, that he took it in his capacity of son and not as devisee under the will, and on his death the property devolved on his heirs. Consequently, it is contended, the executary devise in favour of the respondents failed completely. *Secondly*, it is contended that it fails also under the provisions of section 111 of the Indian Succession Act (X of 1865) which has been made applicable to Hindus by the Hindu Wills Act (XXI of 1870).

It is to be observed that the will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death, and he does not create any estate unknown to Hindu law. Before proceeding to examine the will in order to discover the intention of the testator, their Lordship desire to make one further observation, *viz.*, that under the Dayabhaga, the testator has not only the power of authorising his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions, in order to ensure the performance of those religious rites on which depend his salvation in after life, but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life estate.

In the present case had the testator given to the widow a power to adopt without constituting her his executrix, she would have taken merely a widow's interest which would have become divested on her adopting a son. It is clear, however, from the language of the will that the testator was anxious that there being no natural-born son, a son should be adopted who and whose male issue should duly perform those religious rites which are considered essential in the Hindu system for the salvation of the deceased. With this object he empowered her to make five successive adoptions and constituted her as his executrix to give effect to his wishes. If the first son so adopted died in her lifetime without leaving male issue, she had the power to adopt a second; or a third, fourth, or fifth, in case the second, third, or fourth also died without leaving male issue. Thus the power to adopt confided to the widow could not be exhausted so long as she was alive and until the directions of the testator had been fully carried out. It is obvious that the

estate could pass only to the son who survived her, or, in case of his death in her lifetime, to his male issue, if he left any. Otherwise the whole object with which the power was given to the widow for making the adoptions would be defeated. The estate was in the widow during her life; the gift over is expressly declared to take effect after her decease in case of the failure of the adoptions without securing the object the testator had in view. Their Lordships conceive that mere statement of the purpose of the testator which is apparent on the face of the will and of the consequences resulting from the contention advanced on behalf of the appellants, is sufficient to show its fallacy.

The infant who was adopted by the widow died in her lifetime unmarried and without leaving any issue, and as she died a few days later she was unable to give further effect to the wishes of her deceased husband. On her death, therefore, the gift to the sons of Benodini, the testator's sister named in the will took effect, and the estate passed to them. But it has been strenuously contended that under the provisions of section 111 of the Indian Succession Act the bequest to them is void. That section runs as follows :—

"Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

Section 111 embodies the rule enunciated in *Edwards* v. *Edwards* (1). The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force. Even in India as regards Hindus, its application is confined to special tracts such as the territories subject to the Lieutenant-Governor of Bengal and the Presidency towns of Bombay and Madras. Their Lordships think that it should be applied only to cases strictly coming within its scope. In the present case the event on the occurrence of which the distribution was to take place is distinctly mentioned as being the death of the widow. That being so, the gift to the nephews is not affected by section 111 and must take effect.

(1) [1852] 15 Beav. 357=16 Jur. 259=21 L. J. Ch. 324=92 R. R. 464.

Their Lordships are of opinion that the judgments of the Courts in India are correct and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

D.D. *Appeal dismissed.*

Solicitor for the Appellants—G. C. Farr.

Solicitors for the Respondents—Watkins and Hunter.

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* A.I.R. 1915 Privy Council.

(FROM ALLAHABAD)

16th November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Nageshar Prasad Pande—Appellant.

v.

Raja Pateshri Partab Narain Singh and *another*—Respondents.

* (*a*) *Transfer of Property Act, S. 41, proviso—A's name entered in Revenue papers—B real owner—A's transferee must show that he enquired about transferor's title and acted in good faith.*

Where A's name had been entered in the revenue papers but the ownership of the property had vested in B by virtue of a prior *supratnama* by the last male holder and by virtue of a will of his wife to whom the property had been sold by her husband, A's transferee cannot claim to have a good title to the property unless he can show that after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith.

* (*b*) *Hindu Law—Reversioner mortgaging property and applying proceeds to pay off debts by widow—Mortgage is not binding on a person holding under* supratnama *by last male holder and the will of the widow.*

The fact that a Hindu reversioner mortgaged the property and applied the money to discharge debts due by the widow of the last male holder and defrayed the expenses of her Gaya Shradh does not make the mortgage binding on a person in whom the title to the property had become vested by virtue of a *supratnama* executed by the last male holder and a will by his wife to whom the same property had been sold by her husband.

Dube—for Appellant.

De Gruyther, K. C. and *W. Garth*—for Respondents.

(The following judgment of the Allahabad High Court gives the History of the case).

Judgment.—This appeal arises out of a suit brought by the plaintiff—respondent

for sale upon a mortgage executed by one Rudra Narain Singh on the 21st of January 1895. The property which the plaintiffs seek to sell for realisation of the amount of the mortgage is a share in the village Saondih. The plaintiffs' allegation is that this village belonged to Babu Chet Singh and was sold by him to his wife Dulhin Rup Kunwari in the year 1847; that Dulhin Rup Kunwari was the owner of the property and continued to be so till her death in 1887, and that upon her death it was inherited by Rudra Narain Singh as the next heir to her husband, he being the nephew of Chet Singh. One Bishun Shukul obtained a money decree against Dulhin Rup Kunwari and in execution of it caused the property in question to be attached and advertised for sale. Before the sale could take place, however, Dulhin Rup Kunwari died, and after her death Rudra Narain Singh first executed a usufructuary mortgage on the 14th of March, 1893, and subsequently, in lieu of the amount secured by that mortgage, the mortgage of the 21st of January, 1895, on which the present suit is based. It is said that with the money raised by Rudra Narain Singh he discharged Rup Kunwari's debt to Bishun Shukul, repaid other debts and defrayed the expenses of her Gaya Shradh. The defendant, Raja Pateshri Partab Narain Singh, is the Raja of Basti. He brought a suit against Rudra Narain Singh for possession of several villages, one of which was the village Saondih. The defendants to that suit were Rudra Narain Singh, and various transferees of the property including the present plaintiff. He claimed a declaration that he was entitled to the property and he prayed for possession of it. His claim was dismissed by the court of first instance but this Court decreed it and the decree of this Court has been affirmed by their Lordships of the Privy Council. In that suit it was held that by virtue of a *saprudnama*, dated the 21st of March, 1848, executed by Chet Singh and a will of Musammat Rup Kunwari made by her in 1858, the Raja of Basti became entitled to the property held by Rup Kunwari, and that Rudra Narain Singh had no right to it. In the present suit the plaintiff seeks to go behind the decision in that suit. As has been stated above, he was placed in the array of defendants. In the 29th paragraph of his written statement he contended that the then plaintiff, that is, the present appellant, the Raja of Basti, had no right whatever to question the validity of the transfers made in his favour. He referred in specific terms to the transfers made by Dulhin Rup Kunwari and the hypothecation of the disputed villages by the defendant first party, namely Rudra Narain Singh. An issue was framed to the effect whether the court-fee was insufficient, the suit being for possession by avoidance of the transfers made by Rup Kunwari and Rudra Narain Singh. This issue proceeded on the assumption that the suit was also a suit to avoid the transfers made in favour of the present plaintiff. The issue was decided by the Court of first instance against the defendants to that suit and no exception was taken to that decision in the Appellate Court. The result of the final decision in that suit was, that the present appellant, the plaintiff to that suit, was declared entitled to the property claimed by him, and it was further declared that he had a right to recover possession of it from Rudra Narain Singh who was then in possession. The question of the title of the plaintiff to that suit was one of the material questions in the case and it was determined in favour of the plaintiff against the present plaintiff who was a party to the suit. It is true that no specific mention of the mortgage now in question was made in the judgment in that suit, but we think the present plaintiff, as defendant, did raise the question of the validity of the mortgage in his favour and was entitled to do so with a view to resist the plaintiff's claim for establishment of his title. He could assert, as he does now, that by reason of the operation of the rule of estoppel, the then plaintiff, the Raja of Basti, was precluded from setting up his right to the property mortgaged to him; but he did not do so. We think that it is too late for him now to assert that the decision in the former suit to which he was a party and which has become conclusive as between all persons who were parties to it, should be ignored in the present suit and the question of title of the appellant, Raja Pateshri Partab Narain Singh, should be considered and determined independently of that judgment. It having been held between the parties to the present suit that Raja Pateshri Partab Narain Singh and not Rudra Narain Singh is entitled to the property in question, it was not, in our opinion, open to the Court in this case to hold otherwise.

On the merits, also we are of opinion that the plaintiffs have no case against the appellant, Raja Pateshri Partab Narain Singh. As we have said above, and as was found in the previous suit, the Raja of Basti acquired an absolute interest in the property held by Dulhin Rup Kunwari by virtue of the *supratnama* of 1848, and the will of Rup Kunwari of 1858. It may be that the *supratnama* is not binding on Rup Kunwari as she was not a party to it and as a sale deed had been executed in her favour before the date of the *supratnama*; but the will was made by her, and by virtue of it Raja Sitla Bakhsh Singh, the father of the appellant, Raja Pateshri Partab Narain Singh, became the owner of the property upon her death. She died in 1887, and therefore on the date on which the mortgage now in question was executed, the owner of the property was Raja Sitla Bakhsh Singh or the appellant, Raja Pateshri. Partab Narain Singh and not Rudra Narain Singh, who made the mortgage.

The Court below was of opinion that the mortgage is binding on the appellant inasmuch as Rudra Narain Singh's name was entered in the Revenue papers after the death of Rup Kunwari, and he was the ostensible owner of the property. The learned Subordinate Judge apparently relies on the provisions of Section 41 of the Transfer of Property Act, but he overlooks the proviso to that section, which is to the effect that a transferee from an ostensible owner can defeat the real owner only if after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith. There is nothing in this case to show that the plaintiff made any inquiry whatever to ascertain the title of his mortgagor, Rudra Narain Singh. It is true, the name of Rudra Narain Singh was entered in the Revenue papers, but if inquiry had been made, it would have appeared that at the time when mutation of names was applied for objections were preferred on behalf of the Raja of Basti and that the name of Rudra Narain Singh was entered simply because he was in possession. Further inquiry as to Rudra Narain's title would have led to the discovery of the fact that there was a will, by virtue of which the Raja of Basti was the owner of the property after the death of Rup Kunwari. It cannot be said that the name of Rudra Narain Singh was entered as ostensible owner with the consent of the real owner, the Raja of Basti. On the contrary, his name was entered in spite of opposition put forward by the Raja. The present plaintiff is a person who has been lending money to the family for a long time. He resides in the same locality and was apparently acquainted with all the circumstances of the family concerned. He cannot therefore claim to be a *bonafide* transferee without notice so as to be in a position to defeat the title of the real owner.

The only other ground on which the learned Subordinate Judge has decreed the plaintiff's claim is that the money which the plaintiff advanced to Rudra Narain Singh was applied to the discharge of debts due by Rup Kunwari. That circumstance, however, would not make a mortgage made by Rudra Narain Singh binding on the appellant.

For the above reasons we are of opinion that the plaintiffs are not entitled to a decree against the appellants for sale of the village Saondih. We accordingly allow the appeal and so far vary the decree of the Court below that we dismiss the suit for sale of the village Saondih as against the appellants. The appellants will have their costs in both Courts.

(The plaintiffs appealed to the Privy Council who affirmed the above decision with the following judgment.)

Viscount Haldane:—Their Lordships think that they may depart from the practice of making a more elaborate report, and they desire only to say that the judgment of the High Court seems to them so satisfactory and sufficient that they do not wish to hear anything further about the case.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant.—Barrow, Rogers and Nevill.

Solicitor for Respondent.—Mr. Douglas Grant.

*** A.I.R 1915 Privy Council.**

(FROM LAHORE)

24th June 1915.

VISCOUNT HALDANE, LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE, AND MR. AMEER ALI.

Bagga and *others*—Appellants.

v.

Saleh and *others*—Respondents.

**Co-sharer—Shamilat land—Payment of grazing dues by a non-proprietor does not make him co-sharer in shamilat.*

The payment of Tirni (grazing dues) by a person who is not a proprietor paying land revenue does not confer upon him any right to share in the shamilat of a village. [P. 106, C. 2.]

Arthur Grey—for Appellants.

Respondents.—ex parte.

Sir John Edge.—This is an appeal by the plaintiffs in the suit from a decree of the Chief Court of the Punjab, which had dismissed their appeal from a decree of the Trial Judge by which their suit had been dismissed. The respondents to this appeal have not appeared.

In their plaint, dated the 3rd May 1905, the plaintiffs alleged that they, "like the land-owners, are the proprietors" of houses and vacant sites in *Patti Lak* and had paid *tirni* (grazing dues) in respect of village *shamilat land* (common land) of Lak, and they claimed a declaration that they

"Like proprietors, may be declared co-sharers in 30,838 bighas 1¼ kanals of the village *shamilat* land of *Patti Lak* in proportion to Rs. 29-15-7, the tirni paid by the plaintiffs, and a share (may be) awarded to them in the said village *shamilat* of *Patti Lak* on the said *tirni* amount according to the *Khewat*."

It is to be observed that in their plaint the plaintiffs did not base their claim to share on the partition of the common lands of *Patti Lak* upon any right as proprietors of any lands assessed to the revenue in *Patti Lak*. The plaintiffs were not recorded in the *khewat* as persons paying land revenue in respect of land held by them in *Patti Lak*. They did not, in fact, hold any lands in *Patti Lak* which were assessed to the land revenue. What they claimed was that as they had paid grazing dues they should be treated in the partition of the common land of the village as if they were proprietors of the village, holding lands which had been assessed to the revenue. The trial Judge rightly held that the plaintiffs had not proved any right to participate in the partition of the common lands and dismissed their claim. On appeal the Chief Court held that the payment of *Tirni* by a person who was not a proprietor paying land revenue did not confer upon him any right to share in the *shamilat of Patti Lak*. The plaintiffs have failed to prove that they have any right to participate in the partition of the *shamilat* of *Patti Lak*.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

D. D. *Appeal dismissed.*

Solicitors for Appellants—T. L. Wilson & Co.

**** A.I.R. 1915 Privy Council.**

(FROM SUPREME COURT OF CANADA)

27th April 1915.

VISCOUNT HALDANE, LORDS ATKINSON AND PARMOOR, SIR GEORGE FARWELL AND SIR ARTHUR CHANNELL.

Eastern Trust Company—Appellants.

v.

MaKenzie Mann & Co., Ld.—Respondents.

** *(a) Specific Relief Act, S. 54—Injunction issued to a party preventing from receiving money from Government—Government knowing injunction but paying—Government has no right to ignore injunction—Crown.*

Where defendant by injunction was restrained from receiving money from Government who were to pay the same as subsidy, but the Government with full notice of this injunction paid it to defendant.

Held, that there is nothing on which to support a decision of Court which pronounces the Executive Government free to dispose of money, the right to which is *sub judice inter partes* and held in *medio* by the order of the Court. [P. 109 C. 2.]

* * *(b) Crown—Non-existence of provision like petition of right—Government cannot disregard law but must obey the same—Civil P.C., S. 80.*

The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. [P. 109, C. 2.]

It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt

to ascertain the law, in order to obey it, not to disregard it. *Dyson* v. *Attorney-General* (1911) 1 K. B. 410 and *Burghes* v. *Attorney-General* (1912) 1 Ch. 173 Ref. [P. 110, C. 1.]

*(c) *Specific Relief Act, S. 54—Injunction restraining party to take money from Government—Government paying and party receiving—Party is guilty of contempt.*

Where a party to suit was restrained by injunction from receiving money from Government but the Government in disregard of the injunction paid and the party received it,

Held, that the party was guilty of contempt of Court.

R. B. Finlay, T. S. Rogers and ***Geoffrey Lawrence***—for Appellants.

P. O. Lawrence, H. Mellish and *T. T. Paine*—for Respondents.

Sir George Farwell.—This is an appeal from a judgment of the Supreme Court of Canada (Duff, J., dissenting), which reversed the unanimous judgment of the Supreme Court of Nova Scotia, dated the 5th July 1913, varying the report dated 15th January 1912, of the referee appointed by the Court in this action. The action is a partnership action between James Irvine, since deceased, as plaintiff, and Robert G. Hervey and others as defendants, and a decree was made therein by Graham, J., on March 13th, 1905, whereby the partnership was dissolved and certain accounts and inquiries were directed to be taken by a referee appointed by the Court. The respondents, Mackenzie and Mann & Company, Limited, were made parties to the action under the following circumstances. In June 1902 the Harvey Trust and Guarantee Company, as agents for the partners Irvine and R. G. Hervey, controlled all the capital, stock, and bonds of the Nova Scotia Southern Railway Company, which had been formed by the partners, who were unable to complete its construction, and arrangements had been made whereby the railway was to be completed by the Halifax and South-Western Railway Company, and Government subsidies were to be paid to that company in respect of the Nova Scotia line, which would form part of the said Halifax and South-Western Railway when completed; and on the 13th June 1902 an agreement was entered into between the trust company, as agents for the two partners of the one part, and the respondents Mackenzie and Mann and Company, Limited (therein and hereinafter called the contractors), of the other part, whereby the partners agreed to sell and the contractors agreed to buy all the stock and bonds of the said Nova Scotia Railway Company for 275,000 dollars, of which 75,000 dollars were to be paid in fully paid capital stock of the said Halifax Company at par on an event which has happened and the balance 200,000 dollars as follows:—5,000 dollars on execution and the balance, 195,000 dollars, from time to time to the extent of 50 per cent. of the amounts paid by Government on account of loans or subsidies in respect of the said Nova Scotia line as and when such amounts were paid until the whole 195,000 dollars were paid.

"Provided that if the 50 per cent. be not sufficient to pay the 195,000 dollars in full, the balance shall be paid when the said loans and subsidies have been all received by the said company."

There is a further proviso which will be dealt with more conveniently later.

The sum payable by the contractors would form part of the assets of the partnership of which the Court had undertaken the administration, and would be applicable primarily in discharging the debts of the firm, including their indebtedness to the Nova Scotia Company, and inasmuch as the contractors owned all the stock and shares of that company, the discharge of the company's debts would enure for their benefit by increasing the value of the company's assets, and consequently of its stock, shares and securities. The substantial question in the case is the amount payable under the contract by the contractors.

On 29th January 1904 a Receiver was appointed of such assets, and an injunction was granted restraining the defendants Hervey and the Hervey Trust Company from receiving from the contractors or the provincial treasurer of the Province all or any part of the 195,000 dollars.

When this appeal was opened before their Lordships it was treated as common ground that by September 27th, 1907, the total subsidy then paid by Government was 397,080,90 dollars:—

"One half of this 19,854,045 dollars is a sum sufficient to pay more than the amount called for under the contract of June 13th, 1902."

This subsidy was paid on mileage. The inquiry with regard to this matter is given in the order of 24th November 1908:

"What balance remains due and owing in respect of the consideration moneys payable under the said contract dated June 13th, 1902, to the parties entitled under the said agreement, or the person, if any, who succeeded to their rights thereunder."

The case has throughout proceeded on the footing of ascertaining the exact amount due, but towards the end of his argument before their Lordships, counsel for the respondents took the point that nothing was due, because, according to his argument, the 195,000 dollars fell short by about 30,000 dollars, and that the inquiry should be answered accordingly. It may be questioned whether such an argument is now open to the respondents, but whether it is so or not, their Lordships are of opinion that it is untenable; the 5,000 dollars was undoubtedly payable and paid on the execution of the contract, and the balance from time to time to the extent of 50 per cent. of the amounts was payable and paid by Government on account of loans or subsidies. There is nothing to lend colour to the suggestion that the contractors are not bound to pay until the whole accounts have been settled up, and show no balance, even of a dollar, owing. The proviso points to the payment of the balance out of subsidies paid in respect of the residue over and above the 50 per cent., not to the payment of the entirety of the 50 per cent. of the subsidies, as a condition precedent to a demand for payment of so much as has been paid, and an account of the amount of such payments.

Another objection was also taken by the respondent's counsel, which may possibly have been taken in the Supreme Court of Canada, although the only reference to anything of the sort occurs in Duff, J.'s dissenting judgment, where he says:—

> "If it had been shewn that the plaintiff in the action or the Receiver was aware that such payments were being made to Hervey, then it is conceivable that a case of estoppel might have been made out. But there is no suggestion of anything of the kind."

The argument offered to their Lordships is that Hervey, in contempt of Court, got payment of some of the subsidy money to himself, and that a motion to commit him was made, which failed by reason of his disappearance from the colony. It appears to their Lordships that it is sufficient to state the point to shew its want of substance.

The real point, however, argued and dealt with in the Courts below is as follows. The contract of 13th June 1902 contained the following proviso referred to above:—

> "It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Company, Ltd., and its contractors in the province of Nova Scotia for labour and supplies furnished in connection with the construction of the said Nova Scotia Southern Railway Company's road, heretofore constructed, have been paid or satisfied, and the amounts of such claims may be paid out of the consideration moneys hereinbefore mentioned, and all sums paid in liquidation of such claims shall be considered payments on account of the said sum of 195,000 dollars."

The object of this proviso is to enable the Government of Nova Scotia, in whose jurisdiction labour had been done by working men, and materials supplied and used on that portion of the railway which had been made in the province, to compel payment therefor by the Nova Scotia Railway and its contractors: the persons to be paid are the labourers for their labour and the tradesmen for their goods: the persons who were bound to pay, whose default was to be cured by Government intervention, were the railway company and the contractors. There is no such provision with regard to any other work or material.

The contract is framed in accordance with the subsidy contracts between the Nova Scotia Government and the Halifax and S.-W. R. Co., in whom the undertaking of the Nova Scotia Company was vested (Act I, 3 of 1903, Acts of Nova Scotia), confirmed by C. 1 of the Acts of Nova Scotia, 1902, which makes special provision for payment of all labour in the construction of the work or materials therefor, and in case of default in paying the men or in paying for materials on or before the 20th day of the month for all works performed or materials delivered before the first of that month, the Governor in Council has power to retain all money due to the company and to apply it in paying the men their wages, or in paying for materials, and charge it as if paid to the company on account of the subsidy. The Government undertook no personal liability for such payment, but took power to ascertain the sums due and the persons to whom they were due.

In June 1903 the Government, under the statutory power given under C. 26 of the Acts of 1903 Nova Scotia, appointed a Commissioner—

"to inquire into and report to the Governor in Council what claims for wages of the workmen employed in and for materials supplied for the construction or unfinished construction of the Nova Scotia Southern Railway are due and unpaid by any person, firm, or corporation, and the particulars and amounts of such claims respectively, and also all other claims against the company, construction Company, or contractors engaged in the building of the said railway, the nature and particulars of the said claims, and the respective amounts thereof."

The Commissioner duly made his report, and the Government acted thereon, and made large payments to persons reported as entitled to payments out of the subsidy. The greater part of these payments reached the person entitled thereto, and no objection is now raised in respect thereof. But before all payments on account of the subsidy had been made, *viz.*, on 13th July 1903, this action was commenced, and a Receiver was appointed by the Court of the assets of the Plaintiff's business, and an injunction was granted until the final determination of the action restraining the Defendants, R. G. Hervey, and the Hervey Trust from receiving from the Canadian Bank, or the contractors, or the Provincial Treasurer of Nova Scotia or otherwise, and the said Bank and the contractors were restrained from paying to the said Defendants or to any persons other than the Receiver (*inter alia*), all or any part of the said 195,000 dollars. The Provincial Treasurer was dismissed from the action on the ground that the Court had no jurisdiction over him, and the Government, with full notice of the order, proceeded to distribute the subsidy without any regard to it. With regard to payments actually made by the Government under the statutory powers above referred to, the action of the Executive may be justifiable; but even so, the question whether any particular sums mentioned in the contract were or were not properly described for labour and supplies is a question of construction, and therefore of law for the Courts. Their Lordships are unable to agree with the view of the Supreme Court as to the powers of the Government and to the presumption which ought to be drawn as to the nature of the payments made.

It was further held, on the admission of the parties, that no injunction could be granted against the Crown, and further that no other party to the action was bound by the injunction or the appointment of a Receiver.

This decision raises a question of great importance. Duff, J., in his dissenting judgment, puts the first point very clearly:

"The parties were declaring that certain payments made by the Government were to be deducted from the consideration moneys. These were such payments as the Government should be satisfied were due and owing in respect of claims for 'labour and supplies. The deduction could only be made if two conditions were satisfied: (1) that the claim was for labour and supplies; and (2) that the Government was satisfied that it was due and owing.'"

In the present case the Government have not only made payments which by no latitude of construction can come within the words "labour and supplies," but have also paid a large sum to R. G. Hervey, who was directly restrained by the Court from receiving it. If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of the Crown there is no ground, for Idington, J.'s proposition that the Government may fairly say that they were given such power by the Legislature over the subject-matter and that the Courts have no ground for interfering, at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounces the Executive Government free to dispose of money the right to which is *subjudice inter partes* and held in *medio* by the order of the Court.

The second point taken by Idington, J., is equally untenable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson* v. *Attorney-General* (1) and in *Burghes* v. *Attorney-General* (2). It is the

(1) [1911] 1 K. B. 410=103 L. T. 707=80 L. J. K. B. 531=27 T. L. R. 143 55 S. J. 168.
(2) [1912] 1 Ch. 173=28 T. L. R. 72=105 L. T. 758=81 L. J. Ch. 105.

duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the Receiver and to obtain from the Court an order on the Receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

The duty of the Crown in such a case is well stated by Lord Abinger Chief Barren in *Deare* v. *Attorney-General* (3). After pointing out that the Crown always appears (in England) by the Attorney-General in a Court of Justice—especially in a Court of Equity—where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say:

"It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice where any real point of difficulty that requires judicial decision has occurred."

Further, their Lordships are unable to agree with the Supreme Court of Canada in their opinion of the injunction. Apart from the Crown, the Court had clear jurisdiction over all the parties to the action to restrain them from doing any of the acts complained of; its order and injunction operates in *personam*, and compels the party forbidden to do any act, whether the receipt of money or the like, to refrain from doing it, whoever the other party may be, and whatever his rights may ultimately prove to be. The existence of such a jurisdiction has been part of the equitable jurisdiction of our Courts for centuries, and is necessary in a case like the present for the safe preservation of the subject-matter of the action until the rights of the parties can be finally determined. It is a misconception to speak of the order and injunction of the Court in such a case as this as only permissive; it was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged, and although it could not bind the Government not to pay or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by the Government. Their Lordships are unable to agree with the decision of the Supreme Court which gives the Executive power to override the judgment of the Court.

Their Lordships, with all respect, differ entirely from the statements in Idington, J.'s Judgment, that an injunction under which the hand giving may be innocent, and the hand receiving guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such injunction is, on the contrary, in accordance with ordinary practice and well-settled principles, and their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts; it is clear that if a claimant to an inalienable Government pension succeeded in persuading the Court in this country that he had a *prima facie* claim to it, and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order.

Their Lordships agree with the decision of the Supreme Court of Nova Scotia, and will humbly advise His Majesty to allow this appeal, discharge the order of the Supreme Court of Canada, and restore that of the Supreme Court of Nova Scotia, of the 5th July 1913.

But in remitting the report as directed by the last-mentioned order there should be a direction to the referee that in taking the accounts all amounts paid by the Government of Nova Scotia to the creditors of the Nova Scotia Southern Railway Company ought to be set off against the amount payable by the Respondents.

The respondents must pay all the costs in the Courts below and of this appeal.

D.D. *Appeal allowed.*

Solicitors for Appellants—Paines, Blyth and Huxtable.

Solicitors for Respondents—Linklater, Addison and Brown.

(3) [1835] 1 y. & C. 197=41 R. R. 237.

*A.I.R. 1915 Privy Council.

(FROM LAHORE)

19th May 1915.

LORD ATKINSON, SIR GEORGE FARWELL, SIR JOHN EDGE, AND MR. AMEER ALI.

Padman and *others*—Appellants.

v.

Hanwanta and *others*—Respondents.

*(a) *Evidence—Objection to admissibility at late stage would not be allowed.*

Where an objection to the lower Court having admitted registered copy of a will was taken in appeal to Privy Council.

Held that the objection should have been taken in trial Court. [P. 112, C. 2.]

*(b) *Will—Revocation.*

The principle underlying the rule in 1 Moo. P. C. 299 that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it, must be applied with considerable caution to the wills of the people of India. [P. 112, C. 2.]

*(c) *Evidence Act, S. 115—Civil P.C., S. 11.*

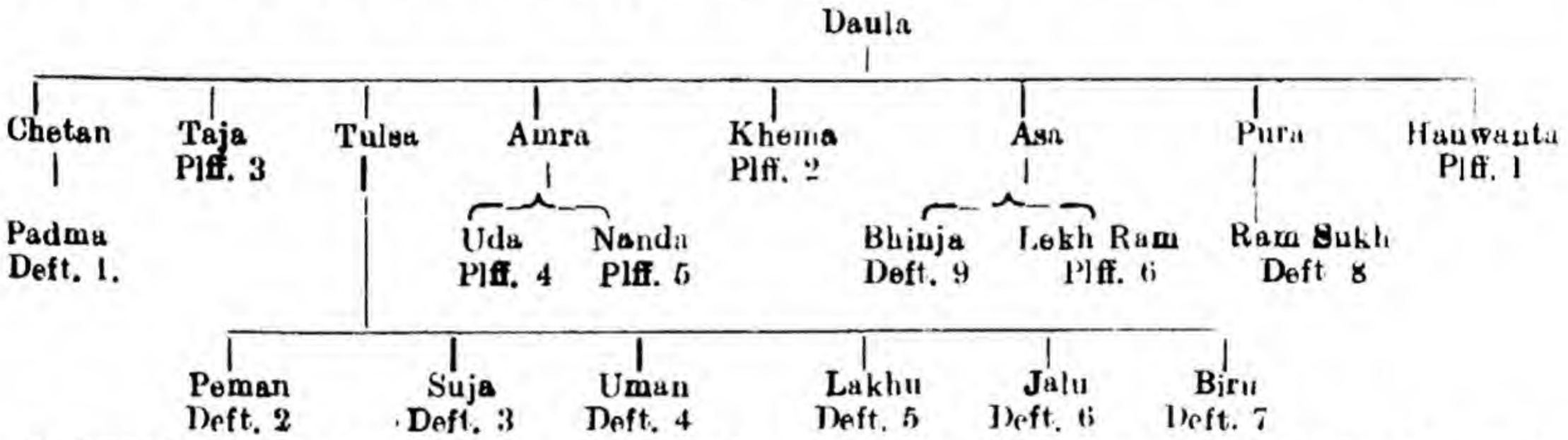
Withdrawal by party of his revision application against a decision which was however upset at others' instance does not estop him from enforcing his rights in another proceeding.

DeGruyther and *J. M. Parikh*—for Appellants.

Arthur Grey—for Respondents.

Mr. Ameer Ali.—This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 17th of July 1909, and the dispute relates to the property of one Daula, a Jat by origin who migrated from Bikanir many years ago and settled in the Ferozepore District. He died in April 1902, leaving a large family of sons and grandsons and considerable landed property.

The following pedigree will explain the relative position of the contesting parties in the present litigation:



In 1884 Daula had executed a will, which was duly registered at the time, under which his surviving sons and a grandson, Ram Sukh, whose father Pura had died, were to take his properties substantially in equal shares.

In January 1898 he revoked his former will and made another, which also was registered, by which, excluding Chetan and Tulsa, he left his property in six equal shares to his four other surviving sons and to Ram Sukh, the son of Pura, and to Bhinja and Lekh Ram, the two sons of Asa, who had died in the meantime.

On Daula's death there were the usual mutation proceedings for the registration of the names of his successors in the Collector's Register, in the course of which the devisees under the second will claimed to have their names recorded to the exclusion of Chetan's and Tulsa's representatives. In view, however, of the provisions of the will of 1884, the Collector ordered the names to be entered in eight shares and referred the contending parties to settle their respective claims in the Civil Court. This happened in September 1902, and in December following, the present suit was brought by the persons taking under the second will against the representatives of Chetan and Tulsa, defendants 1 to 7, to establish the plaintiffs' claim under the will of 1898 and to recover possession of the one-fourth share of Daulat's lands in respect of which Chetan and Tulsa had been recorded as owners. This one-fourth includes the shares of Ram Sukh and Bhinja, who, on their refusal to join in the action, had been made defendants (8 and 9).

The defendants 1 to 7 raised various objections to the plaintiffs' suit, the nature of which is indicated by the issues framed by the Court of first instance. They are as follows :—

(1) Whether the property in dispute was acquired by Daula alone or jointly by him and his sons.

(2) Whether the will of 1898 was executed by Daula voluntarily and whether he was competent to make such a will.

(3) If so, whether the will has been cancelled by any subsequent act on his or on the part of the plaintiffs.

Before trial, however, the parties agreed to refer the dispute to arbitration. The arbitrators made an award, and on the 25th November 1903 the District Judge, in accordance therewith, dismissed the plaintiffs' claim. On revision under S. 622 of the Civil Procedure Code of 1882, the Chief Court reversed the order of dismissal and remanded the case to be disposed of according to law. On remand the first Court went into evidence and in the result dismissed the plaintiffs' claim, principally on the ground that the lands in dispute were not the self-acquired properties of Daula over which he had a right of disposition *dehors* the ordinary law under which ancestral property is inheritable by sons and grandsons *per stirpes* in equal shares. The District Judge does not say this in so many words, but this is clearly the effect of his judgment. On the other issues he does not appear to have come to definite findings.

On appeal by the plaintiffs the Divisional Judge was of opinion that the properties to which the suit related were the self-acquired properties of Daula within the Hindu Law, and that the will of 1898 was not open to the objection of having been executed under undue influence or without due comprehension; but he considered that the subsequent acts of Daula showed that he had revoked or cancelled it. He was further of opinion that no sufficient foundation was laid for the admission in the first Court of secondary evidence of the will of 1898. He accordingly dismissed the plaintiffs' appeal.

From his judgment the plaintiffs appealed to the Chief Court, which agreed with the Divisional Judge in his finding that the properties in dispute were the acquisitions of Daula who had a right of disposition over them. The learned Judges were also of opinion in agreement with the second Court on the question of the competency of Daula to make the will of 1898, but they differed from the Divisional Judge on the point on which he had dismissed the plaintiffs' suit. They held in substance that there was no sufficient evidence of revocation. They accordingly set aside the Divisional Judge's judgment and gave the plaintiffs a decree for the entire one-fourth share claimed by them.

An application for review of judgment was made to the Chief Court under the provisions of S. 622 of the Civil Procedure Code, for the exclusion of the shares of Ram Sukh and Bhinja from the decree in favour of the plaintiffs. It was also attempted to be argued on this application, on certain grounds to which their Lordships will refer presently, that the share of Shera, one of the sons of Khema who had died after the institution of the suit, should be excluded. These applications were rejected by the Chief Court.

The defendants have now appealed to His Majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first Court against the copy obtained from the Registrar's office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention.

As regards the question of revocation, the Chief Court, after reviewing all the circumstances, said as follows :—"We think that the more reasonable presumption in this case is that the will was mislaid and lost, or else was stolen by one of the defendants after the death of Daula;" and they held that in their opinion it was not revoked. Their Lordships think that it was perfectly within the competency of the learned Judges to come to that finding. Much stress has been laid on the view expressed by Baron Parke, in *Welch* v. *Phillips* (1) that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so called, must be applied with considerable caution. In the present case the deceased was a very old man and, towards the end

(1) [1836] 1 Moo. P. C. 299=43 R. R. 83.

of his life, almost imbecile. There is nothing definite to show that he had any motive to destroy the will or was mentally competent to do so. On the other hand, the circumstances favour the view the Chief Court has taken that the will was either mislaid or stolen.

As regards the contention that the shares of Shera, Ram Sukh, and Bhinja should be excluded from the decree in favour of the plaintiffs, their Lordships will first deal with Shera's share. It is urged that inasmuch as Shera had put in a petition in the Chief Court to withdraw his application for revision in the arbitration matter which was formally granted on the 3rd April 1906, he must be taken as estopped from questioning the defendants' right so far as his particular share is concerned. In other words, that he must lose his share, if he is otherwise entitled to it, by the simple fact of having withdrawn or tried to withdraw his application for revision. Their Lordships think, this contention is clearly not well founded. On the same day on which the order was made on Shera's petition, *viz.*, the 3rd of April, the Chief Court set aside *in toto* "the reference to arbitration and subsequent proceedings as altogether bad." The parties were thus relegated to their original rights; Shera is now plaintiff, and entitled, like the others, to his share.

The effect of the order in the mutation proceedings was to place the representatives of Chetan and Tulsa in possession of two-eighths or one-fourth share of the property, and the suit is to recover from them this share; but Ram Sukh and Bhinja, who are entitled, under the will of 1898, to one-sixth and one-twelfth respectively under the second will disclaim all benefit thereunder. They are apparently in possession under the Revenue Court's order of one-eighth and one-sixteenth respectively. The one-fourth share claimed by the plaintiffs, for which the Chief Court has made a decree in their favour, includes the excess share of Ram Sukh and Bhinja, which amounts to one-twenty-fourth and one-forty-eighth respectively, in the aggregate one-sixteenth. The plaintiffs are clealry not entitled to a decree for their shares. The decree of the Chief Court must, therefore, be modified to that extent. In other words, the decree will be for three-sixteenths instead of one-fourth. And their Lordships will humbly advise His Majesty accordingly.

Having regard to the general result of the appeal, their Lordships think the ends of justice will be met by ordering each party to bear their own costs.

D.D. *Decree modified.*

Solicitors for Appellants—Edward Dalgado.

Solicitors for Respondents—T. L. Wilson & Co.

****A.I.R. 1915 Privy Council.**

(FROM NEW ZEALAND)

8th July 1915.

VISCOUNT HALDANE, LORDS PARKER AND SUMNER.

Rutherford—Defendant—Appellant.

v.

Acton-Adams—Plaintiff—Respondent.

*** Contract Act, S. 18—Misrepresentation about subject-matter of contract made not in the contract but collaterally—Remedy is claim for damages for breach of the collateral contract if any —Specific Relief Act, S. 35.*

In exercising its jurisdiction over specific performance, a court of equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. In a suit by purchaser the court holds him to have an even larger right. Subject to considerations of hardships, he may elect to take all that he can get and to have a proportionate abatement from the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract and not to a claim to make good a representation about that subject-matter made not in the contract, but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for a breach of a collateral contract if there has been such a contract. [P. 114, C. 1 & 2.]

Cave and P. F. Wheeler—for Appellant.

G. Wallace, and J. M. Paterson—for Respondent.

Viscount Haldane.—The real question in this case is whether the appellant, the purchaser of a large tract of land, can, after entering into possession and taking a conveyance, claim compensation for misrepresentation as to the mileage of fencing on the land. The contract was silent as to the fencing, but it is contended that on this subject the respondents agent made a

material misrepresentation as to the mileage which induced the appellant to enter into the contract. Their Lordships will proceed on the assumption that this was so. As, shortly after the payment of the deposit, the purchaser entered into possession and has taken profits, recission is now impossible. It is equally true that, as there is no charge made of fraudulent misrepresentation, no claim can be made for damages for deceit. The only possible remedy open to the appellant as purchaser is to claim compensation against the vendor for the deficiency in the mileage of fencing by invoking the well-known jurisdiction of a Court of Equity in cases of specific performance to order compensation for discrepancy between what was agreed to be conveyed and what can be conveyed.

But their Lordships are in agreement with the majority of the Learned Judges of the Court of Appeal of New Zealand in thinking that the case is one to which this remedy has no application. Under the agreement the balance of the purchase money was to be paid on 30th June, 1912, and upon payment the vendor was to convey. The purchase money had all been paid excepting two sums of £3,400 and £170 (being interest) which had been retained by the purchaser to meet his claim for compensation for the deficiency. The purchaser's solicitors had written a letter dated 1st July, 1912, in which they proposed that, on payment of the rest of the purchase money remaining unpaid, the vendor should convey without prejudice to his right of action for the two sums referred to, and they tendered the conveyance for execution without prejudice to their client's claim for shortage of fencing. The proposal was carried out. The result was, in their Lordships' opinion, that the vendor had under the contract a valid claim at law for payment of the £3,400, and the £170. They are further of opinion that the purchaser cannot counterclaim for compensation. They have examined the cases on the point decided both in this country and in the Courts of New Zealand. The result of this examination is to satisfy them that the principle which applies ought to be laid down as follows. In exercising its jurisdiction over specific performance, a Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues, and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. In a suit by purchaser another possible case arises where a vendor claims specific performance and the Court refuses it, unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to considerations of hardships, he may elect to take all that he can get and to have a proportionate abatement from the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract, but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for a breach of a collateral contract if there has been such a contract.

Their Lordships have arrived at the conclusion that, as recission cannot now be asked for, and as there is no such collateral contract as has been referred to, the claim of the purchaser the appellant, fails. They cannot find in the letter which they have mentioned anything which gives him a new or different right. They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant—Stevenson and Couldwell, Agents for Lane and Neave. Christchurch, New Zealand.

Solicitors for Respondents—Hawes, Wood and Ware, Agents for George Harper, Son and Pascoe. Christchurch, New Zealand.

**A.I.R. 1915 Privy Council.

(FROM CALCUTTA)

22nd November 1915.

VISCOUNT HALDANE, LORDS PARMOOR AND WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Musahar Sahu and *another*—Appellants.

v.

Hakim Lal and *another*—Respondents.

Privy Council Appeal No. 10 of 1912.

** *Transfer of Property Act, S. 53—Paying one creditor in full is permissible though rest of the assets are not enough to pay remaining creditors—Property should not be removed from creditors to debtors benefit—Preferring one creditor even in anticipation of execution of another is not fraudulent.*

In a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

[P. 115, C. 2 & 116, C. 1.]

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid. So soon as it is found that the transfer is made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to another creditor. *In Re. Moroney (1887) 21 Ir 27 and Middleton v. Pollock (1876) 2 Ch. D.104 Ref.* [P. 116, C. 1.]

Where the debtor has preferred one creditor to the detriment of another, this is not in itself a ground for impeaching the transfer under the section even if the debtor was intending to defeat an anticipated execution by the impeaching creditor. [P. 116, C.2.]

Dube—for Appellants.

Dunne—for Respondents.

Lord Wrenbury.—On the 2nd September 1901 Kishun Benode executed two *kobalas* or conveyances, the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.

The plaintiff Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 14th December 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901 Kishun Benode had made an affidavit that he did not intend to transfer any of his properties and accordingly on the 11th February 1901, the petition was dismissed.

In this state of facts the two *kobalas* were executed by the debtor on the 2nd September 1901.

On the 5th December 1901 the plaintiff obtained judgment in his action for Rs. 12,695-10-0 and costs. The defendant did not appear at the trial. On the 21st December 1901, Kishun Benode applied for a rehearing, but on the 2nd August 1902 that application was dismissed by default. In the interval, *viz.*, on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the properties transferred.

Under these circumstances two suits were brought to set aside the *kobalas* on the ground that within section 53 of the Transfer of Property Act, IV of 1832, the transfers were made with intent to defeat or delay the creditors of Kishun Benode.

The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the plaintiff has brought this appeal.

The appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September 1901 form really one transaction, and that the second *kobala* must fall with the first.

As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies

there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C. B., in *Moroney, In re* (1), where he says :—

"The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that securtiy given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid : *Middleton* v. *Pollock* (2). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy.

The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction : that (i) Kamta Prashad, the nephew, the minor and ward, and (ii) Hakim Lal, the uncle of Kamta and brother of Ram Aotar Lal, minor's guardian, are for this purpose not distinguishable as independent transferees, that from the 11th February 1901 until after the 11th June 1902 Kishun Benode was praying for time, and that this fact and the fact that the former *kobala* was fictitious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent finding that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it under the section even if the debtor was intending to defeat an anticipated execution by the plaintiff.

Their Lordships will humbly advise His Majesty that the appeal should stand dismissed with costs.

D. D. *Appeal dismissed.*

Solicitors for the Appellants—T. L. Wilson & Co.

Solicitors for the Respondents—Watkins & Hunter.

(1) [1887] 21 Ir. 27.
(2) [1876] 2 Ch. D. 104—45 L. J. Ch. 29.

***A.I.R. 1915 Privy Council.**

(FROM CALCUTTA)

19th January 1915.

LORDS DUNEDIN AND SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

Ahmed Musaji Saleji and *others*—Apppellants.

v.

Hashim Ebrahim Saleji and *others*—Respondents.

Privy Council Appeal No. 87 of 1914.

**(a) Civil P.C., Secs. 2 and 97—Suit for accounts of partnership—Order directing accounts to be taken is preliminary decree—Civil P. C., O. 20, R. 15.*

In a suit to have partnership accounts taken, and for that purpose to have various matters decided by the Court, the court "declared" that the partnership in question was dissolved as from 1st July 1907 and then "ordered and decreed" that—"It is referred to the Assistant Referee of this Court to take the following account and to make the following enquiries, that is to say :—

(i) to enquire who were the partners who were the entitled to share in the assets and good will of the said partnership business ;
(ii) "To take an account of the dealings of the parties with the assets of the said partnership business ;"

Held that the adjudication was preliminary decree within s. 2 and s. 97.

**(b) Civil P. C., S. 2(2)—Order cannot be separated into elements some of which are orders and others decrees.*

The Code makes no provision for something which is neither a decree nor an order nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. [P. 117 C. L. & 118 C. I.]

**(c) Civil P.C., S. 2 (2)—Matters which must have been decided had they not been common ground are 'matters in controversy.'*

The expression "Matters in controversy" in sec. 2 (2), (the definition of "decree") cannot be pressed so as to exclude matters which, though they are common ground, must have been actually decided, if any question had arisen and are the foundation of the whole determination.
[P. 118, C. 1.]

(d) *Contract Act, S. 263—Partnership—Dissolution—One partner retaining assets and continuing business is accountable for such assets.

It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, apart from fraud or misconduct in the nature of fraud.
[P. 118, C. 1.]

Robert Finlay and *Dunne*—for Appellants.

Upjohn, Cozens Hardy and *Lowndes*—for Respondents.

Lord Sumner.—This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Court. Three questions only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows. The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on 30th June 1908, and on 30th August 1909 the trial Judge, Fletcher, J., by his formal adjudication (to use a neutral term) "declared" that the partnership in question was dissolved as from 1st July 1907, and then "ordered and decreed" that—

"It is referred to the Assistant Reforee of this Court to take the following account and to make the following enquiries that is to say:—

"(1) To enquire who were the partners who were entitled to share in the assets and goodwill of the said partnership business;

"(ii) To take an account of the dealings of the parties with the assets of the said partnership business;"

and, further, certain other matters not now material.

This adjudication was immediately appealable but was not appealed. The Assistant Referee duly held the enquiries directed, and all matters were gone into at a great expenditure of time and money. His report on enquiry No. 1 was adverse to the appellants, and being accepted to by them was confirmed by Fletcher, J.

The appellants then, by memorandum of appeal dated 23rd May 1912, raised the question whether enquiry No. 1 was rightly included in the adjudication dated 30th August 1909, or whether it was not one which should have been made by the learned Judge himself. This at once and for the first time raised the question, which is the first and chief issue in the present appeal, whether the abovementioned determination of Fletcher, J. was a "decree" or an "order" within the meaning of those terms in the Civil Procedure Code, Act V of 1908. If it was a decree it was a preliminary decree within section 97, and any appeal was incompetent and barred thereby: if it was an order it was appealable still. Their Lordships would unfeignedly deplore a state of procedure which enable the appellants to take their chance of success before the Assistant Referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone before him at all; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the enquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher, J., which included this direction, was itself a decree and therefore being a preliminary decree could not under section 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned Judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus *in limine* settled rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*. The declaration when so made was what the Court's adjudication, and indeed the appellants' own case, call it, a decree. The Code makes no provision for something which is

neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. This was in substance a decree: it did not cease to be such, because a subordinate part of it, if correctly made, might have been made separately as an order. It conclusively determined the rights of the parties in regard to certain, and those essential matters, involved in the suit, and the expression "Matters in controversy" in section 2 (2), the definition of "decree" cannot, in their Lordships' opinion, be pressed so as to exclude matters which though as it happened they were common ground, must have been actually decided, if any question had arisen and were the foundation of the whole determination. The Code, has got rid of such doubts as were debated in *Khadem Hossein* v. *Emdad Hossein* (1) Accordingly sec. 97 of the Code applies: the appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The appellants were ordered to bring certain money into Court to pay interest as from a certain date. The contention on the former point, namely that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud. The report of the Assistant Referee disclosed conduct of this sort on the appellants' part falling within the decided cases, even if it did not amount to fraud, as probably the Referee meant to find that it did. Both Courts below adopted this report and therefore there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

D. D. *Appeal dismissed.*

Solicitors for Appellants—Burton, Yeates & Hart.

Solicitors for Respondents—Watkins & Hunter.

(1) (1902) 29 Cal 758=5 C. W. N. 617.

*** A.I.R. 1915 Privy Council.**

(FROM BOMBAY)

29th June 1915.

VISCOUNT HALDANE, LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Merwanji Muncherji Cama and *another*—Plaintiffs—Appellants.

v.

Secretary of State for India—Defendant—Respondent.

Privy Council Appeal No. 101 of 1914.

* *Bombay City Land Revenue Act (2 of 1876)—Scope—Act provides machinery for recovering rent—It does not purport to maintain registration of title—Person misled by entries in records under the Act cannot claim estoppel against Government from setting up their real title to any land.*

The Act is one which makes provision for the administration and collection of the land revenue of the Government in the city of Bombay. It is for this purpose only that it sets up machinery. The object is to ascertain who is liable to pay. The Collector is a revenue official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the statute nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue. A purchaser cannot therefore claim estoppel against Government from setting up their real title to a land, on the ground that he was misled by entries made in registers maintained under this Act. [P. 120, C. 2.]

P. O. Lawrence, *Raikes* and *Lowndes*—for Appellants.

E. Richards and *Dunne*—for Respondent.

Viscount Haldane.—The facts in this case are really not in controversy. The appellants have advanced on mortgage of land in the City of Bombay Rs. 80,000. They claim against the respondent, the Secretary of State, that they advanced this sum to Abdul Hussein Ibrahimji, the mortgagor, relying on statements in certified extracts from the Rent Roll of quit and ground rent land, kept in the office of the Collector of Bombay, to the effect that the land was of quit and ground rent, and not of *Sanadi* tenure. The question to be decided is whether the appellants, who were plaintiffs in the Courts below, are entitled to a declaration that the respondent is estopped from treating the land as of Sanadi tenure. In Bombay both of these tenures exist. The land in question is in fact held under a Sanad which purports to enable the Government to resume possession for public purposes on giving six months' notice and providing compensation for buildings and other improvements. For the purposes of the question to be decided their Lordships assume, although the point is not conceded, that if the land were held on the other tenure it would be contrary to the practice of the Government, if not to the law, to resume possession, and that the land would be in consequence more valuable as a security. It is not, however, clear that such a view has always prevailed or that the difference between the two tenures was regarded as important at the time of the mortgage.

The *Sanad* was granted by the Government of Bombay in 1824, a rent of 11 *reas* per square yard being reserved. Such a rent would have been the usual rent had the land been of the other tenure.

In January 1892 the mortgagor had granted a security over the land for an advance from the Chartered Mercantile Bank. A Mr. Gostling, partner in the firm of Gostling and Morris, land surveyors in Bombay, had been employed to report on the security and the title. He inspected certain entries in the Collector's Rent Rolls and in what was called Laughton's Revenue Survey Register, both of which were kept in the office of the Collector. In the entries which he inspected there were express references to the Sanad with which the title originated. He applied to the Collector for "certified extracts" from the rolls and register. These extracts were, in accordance with the rules which obtained, made by his own clerk, and were formally certified by an assistant of the Collector as correct. The extracts were, however, inaccurate in certain points. In one of them the title given was "Rent Roll of Quit and Ground rent," instead of, as it should have been in accordance with the book from which it was taken, "Rent Roll of Land situate in New Town or Kamatipura." In another of the extracts, the entry in the Rent Roll from which it was taken contained a reference to the *Sanad* of 1824, and this was omitted in the extracts. Mr. Gostling, in addition, obtained from the mortgagor a notice in which the Collector required payment of a small sum as rent for "the quit and ground rent land situate at New Town." He also inspected the title deeds. These did not go back as far as the *Sanad* of 1824, but on one of them, dated in 1843, there was an indorsement to the effect that the registration of deeds of transfer did not imply any relinquishment of the right of ownership in, or the power to resume, the land at the pleasure of the Government, but that the sole object of the register was to enable the Collector to apply to the proper person for the payment of the rent.

Mr. Gostling does not appear to have been deterred by this indorsement, or by the references to a *Sanad*, from recommending the title. Their Lordships think that in 1892, when he made the investigation, importance was not attached in the same degree as later on to the difference between the two tenures. It appears to have been thought that in neither case was there substantial likelihood of the Government resuming the land.

On the 25th October, 1892, some ten months after the first advance, the mortgagor obtained advances on second mortgage from the appellants. The latter employed a solicitor named Shroff to investigate the title and advise as to the security. His evidence shows that he inspected the title deeds at the bank and also got hold of the certified copies of the extracts from the Collector's Rent Rolls and the Collector's notice to which reference has been made. He appears to have applied to the Collector for access to certain of the records and to have obtained it. At all events he searched

the records, which not only did not indicate that the tenure was quit and ground rent, but which contained a reference to the Sanad of 1824. It is probable that he was not paying more attention to the difference between quit rent and *Sanadi* tenure than had Gostling or the Collector's clerk who checked the extracts made by Gostling's clerk. In the end he advised the appellants to proceed with the mortgage.

The case made for the appellants, who were plaintiffs at the trial, was that by reason of the references and omissions in the copies of the extracts, as well as in the Collector's notice and in certain bills sent in by the Collector for the rent due, the action of the Collector has estopped the respondent, the Secretary of State, from denying that the land is of quit rent as distinguished from *Sanadi* tenure, and that the appellants are entitled to a declaration of title on that footing. In order to determine whether this is so, it is necessary to ascertain what was the duty of the Collector and his position in relation to the Government and the public. The Collector, prior to 1876, kept in his office what were called Rent Rolls of land, on whatever tenure held. After 1876 this practice continued, but was regulated by the Bombay Act II of that year, known as the Bombay City Land Revenue Act, 1876.

Under this Act, which extends only to the City of Bombay, the controlling authority in all matters connected with the land revenue is vested in the Collector of Bombay, subject to the Governor in Council. The duty imposed on him is to fix and levy the assessment for land revenue. The liability is to be settled with the superior holder of the lands, subject to an appeal to the Revenue Judge, who is to be the Senior Magistrate of Police. There is a further appeal to the High Court on its appellate side. The existing survey and the demarcation of lands already made, and all the records of this survey are to be *prima facie* evidence. Corrections of such demarcation or of entries in the records of the survey may be made by the Collector, or by order of a competent Court.

Part VIII of the Act relates to transfer of lands. Section 30 provides that whenever the title to immoveable property subject to the payment of land revenue to the Government is transferred, the transferor and the transferee are to give notice to the Collector. Any transferor who fails to give notice is, in addition to being liable for a penalty, to continue liable for the payment of land revenue until notice is given or transfer is effected in the Collector's record. In case of dispute as to the making or completion of any entry or transfer, the Collector may summon the parties and take evidence and decide summarily what entry should be made. Section 35 provides that the registration or transfer of any title in the Collector's records shall not be deemed to operate so as in any way to affect any right, title, or interest of the Government in the property in respect of which such transfer is made or registered. In the final part of the Act, which is headed "Miscellaneous" it is provided that it shall be the duty of the Collector to prepare and keep, in such form as the Government shall from time to time sanction, a separate register and Rent Roll of every description of land, according to the nature and terms of the tenure on which such land is held. All maps, registers, and other records are to be kept in the office, and to be open to the inspection of the public, who are to be entitled to obtain extracts or certified copies.

Their Lordships are of opinion that the Act must be treated as defining the extent of the rights of any one who consults the maps, register, and records at the office, and that in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. When it is so read their Lordships think that this purpose and the nature of the rights conferred are not doubtful. The Act is one which makes provision for the administration and collection of the land revenue of the Government in the city of Bombay. It is for this purpose only that it sets up machinery. The object is to ascertain who is liable to pay. The Collector is a revenue official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No

doubt the register is of considerable use even for conveyancing purposes. But neither the language of the statute nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

From this conclusion as to the scope of the Act it follows that what has taken place in the present case has not given the appellants any right to claim that the Government is prejudiced in any right it has to treat the land in question as of Sanadi as distinguished from quit rent tenure. Nor are their Lordships satisfied that at the time of the investigation of the title in 1892 the parties themselves really attached much importance to the statements as to tenure in the extracts and other documents produced. They appear to have inspected the deeds in the usual fashion, and to have concerned themselves with the question of who was the owner of the land rather than with the question of the rights of the Government. In the view which has been taken, it is not necessary to deal separately with the question raised under section 35 of the Act as to whether any right, title, or interest of the Government could be affected by the registered entry.

Their Lordships will humbly advise His Majesty that the appeal fails and ought to be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellants—E. F. Turner & Sons.

Solicitors for Respondent—The Solicitor, India Office.

****A.I.R. 1915 Privy Council.**

(FROM LOWER BURMA)

16th December 1915.

VISCOUNT HALDANE, LORD WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

Bank of Bengal—Plaintiffs—Appellants.

v.

Ramanathan Chetty and *others*—Defendants-Respondents.

Privy Council Appeal No. 42 of 1915.

** (*a*) *Contract Act, S. 188—Money lending business—Agent expressly authorised to borrow and lend money to clients—Such authority implies authority to pledge principal's credit for borrowing—Power of attorney.*

Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. *Byrant Powis and Byrant, Ltd., v. La Banque du Peuple (1893) A. C. 170 Applied.* Where under a power of attorney the agent had express authority to borrow on behalf of the principal for purposes of lending money to others.

Held that the authority to borrow implied an authority to pledge the credit of the principal for the purpose of obtaining or securing advances from others to constituents. [P. 123 C. 2.]

Where therefore for the sake of convenience, instead of receiving the borrowed money directly himself and lending it to the borrower, the agent authorised the lender on the pledge of the principal's credit to advance the money to the borrower.

Held that the principal was liable for the act of the agent, the borrowing by the agent being an essential incident of the business.

If authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. [P. 124 C. 1.]

* (*b*) *Nattukottai Chetties—Agent can pledge principal's credit—Principal and Agent.*

Among Chetty money-lending firms it is the practice for the agent to pledge the credit of the principal for borrowing money for the sake of lending it to their constituents. [P. 123, C. 2. and 124, C. 1.]

E. Richards and *Coltman*—for Appellants.

Newbolt and *Sanders*—for Respondents.

Mr. Ameer Ali.—This is an appeal from the Chief Court of Lower Burma, and the sole question for determination is whether the agent in Rangoon of the original defendant to the action, Latchmanan Chetty, since deceased, now represented by the respondents had authority to enter into the transaction with the plaintiff bank on the basis of which it seeks to enforce the present claim against the principal.

Lutchmanan Chetty was a native of Madras and ordinarily resided there. He belonged to the well-known Chetty money-lending caste, and had a large and apparently lucrative money-lending business in Rangoon, which he carried on by agents, under name and style of "Ana Roona Laina," or shortly "A.R.L. Chetty." Previous to 1901 he had two partners, but after the death of one and the retirement of the other in that year, he was the sole owner of the business.

By a power of attorney dated the 24th of October 1904, he appointed one Ramaswamy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm of Ana Roona Laina or A. R. L. Ramaswamy Chetty." On the 15th of May 1905 Ramaswamy, by the power reserved to him in his appointment, substituted in his place one Chockalingam Chetty "as the attorney and agent" of the defendant. And since his appointment Chockalingam admittedly has managed the entire money-lending business of the defendant's firm in Rangoon.

The transaction which forms the basis of the present claim was entered into in May 1908. It appears that about this time one Hassum (or Hashim) Ebrahim, with whom Chockalingam had previous dealings and who was evidently a constituent of the firm, applied to him for financial assistance. He acceded to the request, and the arrangement that was come to between them was in substance this, that Chockalingam should pledge the firm's credit with the plaintiff Bank to enable Ebrahim to have a cash credit account opened in his name and obtain from the bank advances not exceeding in the aggregate Rs. 50,000, and that to secure the due repayment of this amount with interest thereon he should execute a promissory note in favour of the defendant's firm which Chockalingam on his side should endorse over to the bank.

It is to be observed in this connection that under the provisions of The Presidency Banks Act (XI of 1876, S. 37, cl. (e), the bank is precluded from opening cash credits on the security of any negotiable instrument of :—

> "any individual or partnership firm . . . which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership."

It was in view of this provision of the law and the practice of the Bank in conformity therewith, that the promissory note for Rs. 50,000, bearing the usual Bank rate of interest, was executed on the 23rd May 1908, by Ebrahim in favour of "A. R. L. Chockalingam Chetty," the name under which the defendant's firm admittedly carried on business in Rangoon. This note was endorsed over by Chockalingam to the Bank. Thus both Ebrahim and the Chetty firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to Ebrahim on his cash credit account.

At the same time and on the same date Chockalingam gave to the plaintiff Bank a letter of guarantee on behalf of his firm. It stated the nature of the transaction and the character of the obligation undertaken by the Chetty firm in these terms :—

> "In consideration of the Bank of Bengal having agreed at our request to grant to Hassum Ebrahim (who is hereinafter referred to as the Borrower) accommodation by way of Cash Credit to such an amount from time to time as the Bank in its discretion shall think proper upon condition that such Cash Credit shall to the extent of Rs. 50,000 and interest be secured by the Promissory Note hereinafter mentioned we the undersigned A. R. L. Chockalingam Chetty (Guarantor) have delivered to the Bank of Bengal a Promissory Note dated 23rd May 1908 for Rs. 50,000 and interest payable on demand made by the said Borrower in favour of us and endorsed by us to the said Bank or order (the said Promissory note being intended as a guarantee to the extent of Rs. 50,000 and interest of the balance from time to time due to the said Bank from the said Borrower on account of the said Cash Credit) on the understanding that the Bank shall be at liberty to take steps to enforce payment of the said Promissory Note at any time after notice in writing demanding payment thereof posted to us at our usual or last known address and default being made in payment for three days after the posting of such notice."

Ebrahim appears to have drawn considerable sums of money on the cash credit account thus opened. He was adjudicated an insolvent shortly after, and his assets vested in the Official Assignee. He himself is said to have absconded.

The plaintiff bank thereupon called upon the defendant to pay the amount due from Ebrahim, and on his failure to do so, brought the present action in the Chief Court of Lower Burma in its original civil jurisdiction. The defence to the action in the main is the denial of authority on the part of Chockalingam to enter into the transaction so as to bind the defendant's firm.

The case was at first heard *ex parte*, owing to the default of the defendant to enter appearance, but the *ex parte* decree was set aside, and the suit came on for trial as a contentious cause on the 17th January 1912, before Ormond J., who framed the issues and took part of the evidence. It was heard subsequently by Robinson, J. The defendant besides putting in the power-of-attorney and the instrument substituting Chockalingam in place of Ramaswamy, adduced no evidence; and Robinson, J. held in substance that although there was

no express authority to the agent to enter into a transaction of this nature the defendant subsequently ratified and confirmed the act, and was therefore clearly liable. He accordingly decreed the plaintiff's claim. The appellate Court did not agree with this view. The learned Judges further considered that if guaranteeing the loans of others was to be regarded as "a necessary incident of the business, it would not be so much a money-lending business as an insurance business."

They accordingly dismissed the suit.

In their Lordships' opinion this judgment cannot be supported. The learned Judges seem to have missed the real point at issue. They do not appear to have correctly apprehended the character and extent of the powers entrusted to the agent or the nature of the business which he conducted and managed on behalf of the defendant in Rangoon.

Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and money-lenders in Rangoon" in copartnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" under the style of A. R. L. Chetty, and that he was desirous of appointing Ramaswamy Chetty as his attorney for the general management of his said business, the defendant (Lutchmanan Chetty) proceeds to state the duties with which he charges the agent and the powers he entrusts him with:—

"To transact, conduct, and manage all and every or any of the affairs, concerns, matters, and things in which I, the said A. R. L. Latchmanan Chetty, now am or hereafter may be in any wise interested and concerned, and for that purpose to use or sign my name to all and every or any documents or document writings or writing whatsoever. To borrow money from any bank or Banks, firm or firms, person or persons, either with or without pledge of securities for moneys advanced to various persons."

The authority to borrow is given in explicit and the broadest terms, "either with or without pledge of the securities" lodged with the agent by constituents for moneys advanced to them.

The power then goes on to declare:—

"To make draw, sign, accept, endorse, negotiate, and transfer all and every or any Bills of Exchange, Promissory Notes, Hundies, Cheques, Drafts, Bills of Lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may in his absolute discretion think fit, to make, draw, sign, accept, endorse, negotiate and transfer in my name and on my behalf."

It is to be borne in mind that the defendant's business was a general money-lending business, in the course of which he financed both Chetties and non-Chetties. The agent had express authority to borrow. For what purpose? To lend to others. It was an essential incident of the business; and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. It was a matter of convenience that, instead of receiving the money directly himself and lending it to the borrower, he authorized the lender, in this case the bank, on the pledge of the firm's credit, to advance the money to the borrower.

Applying to the power in the present case the canon of construction laid down in *Bryant, Powis and Bryant, Ld.* v. *La Banque du Peuple* (1) *viz.*—

"that where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. For between May 1905 and May 1908 Chockalingam entered into twenty-three identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority. Besides, there is evidence that among these Chetty money-lending firms

(1) (1893) A.C. 170—1 R. 330=2 L.J.P.C. 68—41 W.R. 600—68 L.T. 546.

it is the practice for the agent to pledge the credit of the principal in this manner.

It was urged on behalf of the defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. But it is to be observed that the case of the plaintiff Bank was that the defendant's books of accounts would show receipt of commission on the transaction. It called upon the defendant to produce those books, which he failed to do; nor was Chockalingam called to support his allegation in respect of the non-receipt of commission.

Their Lordships are of opinion that the decree of the Chief Court should be set aside, and that of Robinson J. should be restored. The respondents must pay the costs of this appeal and of the appeal in the Chief Court.

And their Lordships will humbly advise His Majesty accordingly.

D. D. *Appeal allowed.*

Solicitors for the Appellant.—Arnould & Son.

Solicitors for the Respondents.—Bramall and White.

****A.I.R. 1915 Privy Council.**

(FROM MADRAS)

15th March 1915.

LORDS DUNEDIN AND SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

V. Venkatanarayana Pillai—Plaintiff—Appellant.

v.

Subbammal and *another*—Defendants—Respondents.

** (*a*) *Civil P. C., O. 22, R. 3—Hindu Law—Suit by presumptive reversioner to challenge adoption by widow—Plaintiff dying—Next presumptive reversioner can continue the suit—Hindu Law—Adoption—Suit by reversioner.*

If, in a suit to obtain a declaration that the adoption of a certain person by a Hindu widow is invalid and does not affect the reversionary interest of the plaintiff reversioner, the plaintiff who is the next presumptive reversioner dies, the next presumptive reversioner can apply to continue the suit as legal representative of the deceased plaintiff. [P. 125, C. 2, P. 126; C. 1.]

There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question whether "the next presumable heir" is "the legal representative" of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights, and therefore on the death of plaintiff presumptive reversioner, the next presumptive reversioner has a right to continue the suit. [P. 126, C. 2.]

Under O. 1, R. 1, the contingent reversioners may be joined as plaintiff in the presumptive reversioner's suit. The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, *viz.*, the validity or invalidity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. [P. 127, C. 1.]

** (*b*) *Limitation Act, Arts. 118 and 125—Suits within both Articles contemplate danger to inheritance common to reversioners though they are different from each other in other respects—Limitation Act, Art. 125.*

Under the Hindu Law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis*. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian Law, however, permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two articles of the Indian Limitation Act (9 of 1908) which deal with these two classes of suits differ widely in their language, Art. 118, Sch. 1, contains no restriction as to the person entitled to sue; whilst in Art. 125 the suit is contemplated to be by the person "who, if the female died at the date of instituting the suit, would be entitled to possession," but it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character; one relates to status and involves the adjudication of a right *in rem*; the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

[P. 125, C. 2.]

Robert Finlay and *Dube*—for Appellant.

De Gruyther and *Brown*—for Respondents.

Mr. Ameer Ali.—The question for their Lordships' decision arises upon a petition for substitution of the petitioner in place of the deceased appellant Venkatanarayana, who has died since the filing of his appeal to His Majesty in Council.

Venkatanarayana brought a suit, on the 29th of July 1907, in the High Court of Madras in its ordinary civil jurisdiction to obtain a declaration that the adoption of the second defendant by Subbammal, the first defendant, was invalid, and did not affect his (Venkatanarayana's) reversionary interest in the ancestral estate of one Venkatakrishna, deceased. Subbammal, in her answer, alleged that the adoption which the plaintiff sought to set aside was made by her under the authority of her husband, given under a will. The plaintiff, on the other hand, contended that the authority so given was revoked by a subsequent will. The Courts in India have held on the construction of this document that it did not amount to a revocation. Venkatanarayana, after the decision of the High Court in its appellate jurisdiction dismissing his suit, applied for the usual certificate to appeal to His Majesty in Council, which was duly granted, and an appeal was filed and was pending when he died on the 19th of November 1913.

The petitioner Kuppusami Pillay applies to be substituted in the place of the deceased appellant and for an order for revivor of the appeal and for leave to prosecute it "in the usual way." He alleges that Venkatanarayana in his lifetime was a member of a joint undivided Hindu family consisting of himself, two sons, and two grandsons, one of whom was the petitioner; and that he was now the sole surviving member thereof, and entitled to the reversionary interest in Venkatakrishna's ancestral properties.

The application is opposed on the ground that, as the petitioner is not the legal representative of Venkatnarayana in respect of the reversionary right claimed by him to the estate of Venkatakrishna, he cannot be substituted in place of the deceased appellant. It is contended on the authority of certain decisions of the High Court of Madras that where a transaction by a Hindu female taking a limited estate in the inheritance of the last male owner is impugned by the next or presumptive reversioner as invalid and beyond her competency, any adjudication against him does not operate as *res judicata* against the contingent reversioners, and consequently on the death of the presumptive reversioner the others have each, in order of succession, a separate right of suit, and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him.

Their Lordships think this argument proceeds on an obvious fallacy. Under the Hindu Law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis*. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian Law, however, permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two articles of the Indian Limitation Act (9 of 1908) which deal with these two classes of suits differ widely in their language, article 118, Schedule 1, contains no restriction as to the person entitled to sue; whilst in article 125 the suit is contemplated to be by the person "who, if the female died at the date of instituting the suit, would be entitled to possession." But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character; one relates to status and involves the adjudication of a right *in rem*; the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

In the present case Venkatanarayana sued for a declaration that the adoption of the second defendant was invalid. Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment

just as the relief sought is for their common benefit. On the death, therefore, of the presumptive reversioner the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff, unless there is anything in the Procedure Law of India to preclude him from so doing.

The Madras High Court has drawn a distinction between a suit brought to challenge an adoption and one to declare an alienation by a qualified owner as not binding beyond the lifetime of the alienor. In the first class of cases it has been recognised that the presumptive reversioner's suit is in a representative character; in the other, however, chiefly on the ground that the adjudication relating to an alienation in the suit of the presumptive reversioner does not operate as *res judicata* against the contingent reversioners, it has been held that they have no right to continue an action brought by him. Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits, the position of the plaintiffs in both instances when closely examined will be found, so far as the point for decision is concerned, to be the same. The test of *res judicata* applied by the Madras High Court seems, therefore, to be irrelevant to the inquiry whether the petitioner is entitled to continue the action commenced by his grandfather.

What has to be considered is whether "the right to sue," in the words of the statute, "survives" and if it does, who can continue the action to obtain the relief that is sought?

For the purposes of this application it must be assumed that the facts stated in the petition, which their Lordships note are not controverted, are true, and that Venkatanarayana was the nearest reversioner when he brought his suit, and that the present petitioner was at the time only a contingent reversioner. In *Rani Anand Kunwar* v. *The Court of Wards* (1) this Board gave expression to the principles applicable to suit by reversioners to impugn the validity of transactions by Hindu females. They said that:—

"As a general rule, such suits must be brought by the presumptive reversioner, that is to say, by the person who would succeed if the widow were to die at that moment."

But in laying down this broad rule their Lordships pointed out in clear terms that under certain circumstances the "next presumable reversioner would be entitled to sue."

There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question "whether the next presumable heir" is "the legal representative" of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights.

Rule 1, Order 22, in the new Civil Procedure Code of India (Act V of 1908), which corresponds with section 361 of Act 14 of 1882, declares that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Rule 3, clause 1, provdes that—

"Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

The words "legal representative" have for the first time been defined in sub-section 11, section 2, of Act V of 1908, which runs thus:—

"Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Sub-section 11 was embodied in Act V of 1908 with the object of putting in the statutory language the results of the decisions of the Indian tribunals on the meaning of the words "legal representative"; but it is not clearly worded and has already been the subject of criticism by at least one

(1) (1881) 6 Cal. 764=8 I. A. 14=5 C.L.R. 381=4 Sar. 195 (P.C.)

of the High Courts in India. The phraseology of sub-section 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner. They think, however, that his right to be substituted in place of the deceased appellant rests on a broader ground.

Rule 1, Order 1, of Act V of 1908, which brings the Indian practice into line with the English rule, provides as follows :—

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of, or arising out of the same act or transaction, or series of acts or transactions, is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise."

It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, *viz.*, the validity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for. The costs of this application will be costs in the appeal.

D.D. *Application granted.*

Solicitor for Petitioner.—John Josselyn.

Solicitor for Respondent.—Douglas Grant.

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*A.I.R. 1915 Privy Council.

(FROM THE SUPREME COURT OF CEYLON.)

22nd July 1915.

LORD SUMNER, LORD WRENBURY AND SIR EDMUND BARTON.

Arthur John Pate—Appellant.

v.

W. C. Pate and *others*—Respondents.

(On Appeal from the Supreme Court of Ceylon.)

(*a*) *Partnership—Ceylon—Law relating to partnership—A partnership agreement cannot be proved by parol testimony owing to the provisions in S. 21, of Ordinance VII of 1840 in an action for accounts after dissolution and the same are not effected by Ordinance XXII of 1866 which enacted that English law of partnership applied to Ceylon.*

From 1888, the appellant, and Charles Henry Pate whose legal personal representatives are the respondents with two others not parties to the proceedings traded together in a coaching business with a capital exceeding £100. The business, which was a *de facto* partnership, came to an end in 1903. There were no articles of partnership or agreement in writing. Charles Henry Pate sued for partnership accounts as on a dissolution.

By Ceylon Ordinance VII of 1840, S. 21, "No promise, contract, bargain or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorised by him or her, shall be of force or avail in law for any of the following purposes:..... (4) for *establishing* a partnership where the capital exceeds £100; provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to *prove* a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners."

Held :—(1) that the suit was not maintainable in the absence of a contract in writing, and the Ordinance XXII of 1866 which enacted that English law was the law of partnership in Ceylon left the prior Ordinance VII of 1840 wholly unaffected.

(2) The term "establishing a partnership," does not mean merely the establishing of a disputed right to be a partner but includes proof of the allegation of an agreement as the basis of the suit. Partnership being essentially a relation resting in agreement, the requirement is a binding rule of evidence unless the transaction could be brought under the proviso requires of its reducing the same to writing. A statute requiring that the truth shall be proved by one form of testimony only and not all available forms should not be misconstrued merely because some hardship may otherwise result in some instances.

*(*b*) *Practice—Precedents—Long series of decisions should be set aside if they are misconstruing rule of evidence in an enactment to the effect that agreements are to be proved only when in writing, since this would not be one of the cases where inveterate error if left undisturbed because titles and transactions have been founded on it.*

Notwithstanding the fact that the current of authority of considerable standing placed a wrong interpretation, inveterate error should be rectified where titles and transactions are not likely to have been founded in cases of parol agreements and no hardship is involved in leaving parties to take the consequences of disregarding so simple and ordinary a formality which D. C. Kandy, No. 52, 568 (1871) Vanderstraten, 195, overruled.

Erle Richards (*for Norman Craig, serving with His Majesty's Forces*), and *Van Breda*—for the Appellant.

P. O. Lawrence, Dornhorst. H. A. Hind (for J. N. Buchanan, serving with His Majesty's Forces). and *Sproule*—for the Respondents.

Lord Sumner.—From the beginning of 1898 Arthur John Pate, now appellant, Charles Henry Pate, whose legal personal representatives are now respondents to this appeal, and George William White and Charles McClay, both now dead and strangers to these proceedings, traded together in a coaching business between Matale and Jaffna and between Damboola and Trincomalee. They had no articles of partnership. There was no agreement in writing or written memorandum of the bargain subsisting between them. Their capital exceeded £100. Disputes presently arose, and there has been much controversy about them. In one way or another their partnership—for such *de facto* it was—had come to an end before December 1903, when Charles Henry Pate began the present suit, making Arthur John Pate the principal defendant.

The plaint alleged that there was an agreement of partnership, carried out by contributions of capital and by joint trading, and alleged also its ultimate dissolution. It stated that no account had been taken or settled, and prayed a decree for partnership accounts, with payment of such sums as might be found due and other suitable relief.

The answer took the objection *in limine* that the partnership agreement was not proved by any writing in accordance with Ordinance VII of 1840, S. 21. The action went to trial. It was held to be maintainable, and the ruling was sustained on appeal. This was in July 1907. Inquiries were directed, and further proceedings and appeals took place till, in December, 1911, the Supreme Court disposed of the last of them, and judgment went against the now appellant for some Rs. 40,000.

The respondents' Counsel drew their Lordships' attention to the fact that the Supreme Court of Ceylon disposed of the objection based on Ordinance VII of 1840 as long ago as 1907, while leave to appeal to their Lordships' Board was only granted in 1912. It was suggested that after such an interval of time their Lordships might well decline to entertain what was called a mere technical objection. The point had been argued when the Supreme Court granted leave to appeal, and the Court, following prior decisions in Ceylon, held that the decree, which declared the existence of a partnership, was not appealable till the taking of accounts had shown whether or not an amount of Rs. 5,000 or more was involved, as provided in R. 1 (*a*) of the Rules scheduled to Ordinance XXXI of 1909. The appellant's case did not raise this point; and, as their Lordships are of opinion that it is not an objection of which their Lordships would take notice *motu proprio*, no further observation need be made upon it.

Ordinance XXII of 1866 enacted that English law is the law of partnership in Ceylon, but this in no way enlarged or diminished the prior Ordinance VII of 1840. When that Ordinance has been construed, no Court can proceed to modify its effect or restrict its application.

It is described as an Ordinance to provide more effectually for the prevention of fraud and perjuries. Its object is effected by requiring certain kinds of transactions to be proved by writing, not by limiting the competency of persons, or by prohibiting or penalising their acts, or by avoiding certain classes of transactions. After a code of formalities for the execution and attestation of wills and sundry deeds and other instruments in twenty sections, it proceeds in s. 21 to what is plainly and evidentially provision with regard to certain legal proceedings. It enacts that "no . . . . agreement, unless it be in writing and signed by the party making the same, ... shall be of force or avail in law for any of the following purposes." The first three purposes are: *first* charging any one with another's debt or default, *secondly* pledging moveable property without delivery, and *thirdly* sale of moveables without either delivery or some payment. The fourth is "for establishing a partnership where the capital exceeds one hundred pounds."

To this there is a proviso:

"Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners."

But for the use of the word "establishing" as to the purpose, and of the word "prove" in the proviso, it could hardly be doubted

that "establishing" means "establishing by proof" *coram judice*. The significance of a change of term as importing change of substance, though material, may easily be exaggerated. If at the end of the trial the Judge had said to the plaintiff, "you cannot succeed unless you establish a partnership, and on the evidence you have established none," the mere expression would have been perfectly correct. In their Lordships' opinion the words "for establishing a partnership" clearly apply to the present case, which was founded on the allegation of an agreement, not expressed in any writing, of which parol evidence was adduced for the purpose of establishing a partnership as the basis of the suit. This agreement, in their opinion, was of no force, and did not avail in law unless it could be brought within the proviso. They are unable to accept the somewhat unpractical contention that "establishing" here specially refers to cases (if such there be) where the plaintiff seeks to establish his disputed right to be a partner, and not to cases where the parties have acted as if they were partners in fact and some dispute has arisen as to their partnership rights or property *inter se*. It is true that the Ordinance says "no . . . . agreement shall be of force," and not "no evidence of an agreement shall be of force," but this appears to be a mere verbal distinction. In what sense could an agreement be of force for establishing a partnership, which would effectually distinguish the agreement from the record or evidence of that agreement? It is said that a partnership which exists in fact, and *a fortiori* a partnership which has existed in fact and has been determined, needs no "establishing," a term only appropriate to that which exists exclusively in promise and not in performance. Again, this is only a play upon words. Partnership is essentially a relation resting in agreement. That agreement may be proved or established (if there be no evidentiary law to the contrary) by proof of an express agreement, written or unwritten, or by proof of such acting as raises the inference of an implied agreement; but a partnership, whether in course of performance or wholly spent, is still a matter of agreement, though of agreement coupled with something more. If agreement once be negatived, there is no partnership at all. However the matter may stand where an existing or past partnership is admitted, it is equally necessary to "establish" the agreement upon issue joined in that regard, whether the partnership alleged to be agreed is, or was, or is to be. The requirement is evidently a binding rule of evidence in Courts of law. As all parties to the suit had been *de facto* partners, or were the legal personal representatives of such persons sued as such, only the last line of the proviso need be considered. The question is whether the present is a case of "parol testimony concerning transactions by" partners, or concerning "the settlement of any account between partners."

Their Lordships think that the answer must be in the negative. Where the transaction of which proof is tendered would be irrelevant if it were not that it is a transaction by a partner, proof of it is testimony for establishing a partnership, and if that be not established the proof of the transaction is immaterial. If parol testimony can always be given concerning transactions by partners, it is not easy to see what the cases are in which a writing signed by the party is requisite. Again, if the settlement of any account between partners means simply a claim upon an account stated, it does not matter whether the parties to it have been partners or have not. If there is to be any relevancy in the words "between partners," it must be because claims for a partnership account, where the partnership is neither admitted nor established, are not within the proviso. Thus, just as a third party seeking to make A and B liable to him as partners may give circumstantial proof of their partnership, so, as soon as a partnership agreement has been duly established by writing, parol testimony of the partners' transactions and settlements of account may be given without further documentary evidence.

It may be that such an interpretation will restrict the application of the proviso to cases which are limited in extent and of infrequent occurrence. Still, on the whole, if the law requires certain classes of agreement to be recorded in or evidenced by writing in order to prevent fraud and perjury, the smaller the area of an exceptive proviso, the more emphatic is the safeguard against the commission of these offences. It is plain that the words 'for establishing a partnership," refer to proof of a partnership generally, for otherwise the

first branch of the proviso would not be an exceptive proviso at all, but a mere unnecessary warning. The first branch of the proviso refers to the case of strangers to a partnership who desire to prove its existence: the second deals with certain matters arising in proceedings between established partners.

It was urged upon their Lordships that, in accordance with a current of authority in Ceylon, now of considerable standing, a different interpretation should be placed on the words of this section. In 1871, it was decided in an anonymous case (D. C. Kandy, No. 52, 568 (1)) that when a partnership had been terminated, and on balance of account one partner claimed a sum to be due to him from another, he might prove his claim by parol evidence under this proviso, as "well with regard to the fact that a partnership had existed as with regard to the balance due." The reason for this decision is not clear. The Court distinguishes such a case from one in which a partnership has to be "established," by describing the latter as a case "where a man seeks to compel another to act as his partner"—a description which is very obscure. This case has been followed in Ceylon ever since, often with expressed reluctance, and latterly always on the grounds that the decision is binding. Thus in *Sawenna Chetty* v. *Kawenna Chetty* (2) Chief Justice Burnside expressed his doubts of it, and in *Bawa* v. *Mohamado Cassim* (3) Dias, J. supports the case on a supposed distinction between executory contracts of partnership and contracts which have been partly executed. Later decisions treat the point as ruled by the case in Vanderstraaten, namely *Mendis* v. *Peiris* (4), though Burnside, C.J. dissented; *Silva* v. *Nelson* (5) and *Annamalai Chetty* v. *Shand* (6); *Silva* v. *Silva* (7); *Kanappa Chetty* v. *Walathappa Chetty* (8); *Singho Appu* v. *Amarasuriya* (9); and two later decisions, unreported, of which certified shorthand notes of the judgments were produced to their Lordships.

With all respect to the learned Judges who so read the Ordinance in 1871, their Lordships not only think that their decision was erroneous, but also that even after the interval of forty-four years it ought to be overruled. The present is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb. There can be few partnerships in Ceylon, still in operation or unliquidated, in which writing has been dispensed with on the faith of these decisions. If parties choose to disregard so ordinary and so simple a formality as the Ordinance requires, there is no hardship in leaving them to take the consequences, nor is it in any case sound to misconstrue a statute for fear that in particular instances some hardship may result. That is a matter for the Legislature, not for the Courts. Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good, and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription the policy of which was the prevention of fraud. This the Legislature must be taken to have weighed before enacting the Ordinance. All that remains for judicial determination is its true meaning.

This decision has made it unnecessary to pursue the issues of fact which were investigated by the Courts below. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment should be entered for the defendants in the action.

T.A.R. *Appeal allowed.*

Solicitors for Appellant—O. A. Calyey.

Solicitors for Respondent—Clarke, Rawlins & Co.

(1) [1871] Vanderstraaten, 195.
(2) [1884] 6 Sup. ct. circular, 119.
(3) 1 Ceylon L. R. 53.
(4) 1 Ceylon L. R. 98.
(5) 1 Browne, 75.
(6) 1 Browne, 37.
(7) 6 New L.R. 92=3 Browne, 136.
(8) 7 New L.R. 339.
(9) 1 Weerekoon, 78.

****A.I.R. 1915 Privy Council.**

(FROM SOUTHERN NIGERIA.)

9th February 1915.

LORD SHAW OF DUNFERMLINE,

LORD PARKER OF WADDINGTON, AND

LORD SUMNER.

Attorney-General of Southern Nigeria—Appellant.

v.

John Holt and Company (Liverpool), Limited and *others*—Respondents.

(AND CROSS APPEAL)

Attorney-General of Southern Nigeria—Appellant.

v.

W. B. MacIver and Company and *others*—Respondents.

On Appeal from the Supreme Court of Southern Nigeria.

** (a) *Riparian Rights and Southern Nigeria—Law of accretion in favour of riparain owners is applicable even against the Crown as owner of the foreshore. But it does not apply to artificial reclamation as the law contemplates only imperceptible alluvion accretions—Alluvion.*

The respondents were in occupation of lands on the shore of the island of Lagos as riparian owners, and carried on business as African merchants. The lands had originally been granted by native Kings to the predecessors-in-title of the respondents who in and after 1861 obtained crown grants, which described the lands as being bounded by the sea, but neither expressly nor impliedly included the foreshore within their scope. About 1860 a wharf and two piers had been built on the foreshore and subsequent to the crown grants the respondents had carried out various works on the foreshore to prevent the serious inroad and ravages of tidal erosion. Owing to these measures, a strip of land which had been high water mark had been reclaimed on which the respondents had built stores and sheds and these together with the lands granted and the piers and wharf had been used for a period ranging from thirty to fifty years for the purposes of their business and been in their exclusive possession. The Government of the island of Lagos had knowledge of the reclamation and building upon and use of the land so reclaimed :—

Held :—(1) Though the grant contained specific measurements, as the *de facto* boundary was the sea, the ordinary doctrine of accretion or dereliction would apply being founded upon the general security of landholders and general advantage.

City of London Tax Commissioners v. *Central London Railway*—Referred to. [P. 135, C. 1.]

(2) The one condition for the operation of the rule is that the accretion should be natural and so slow and gradual as to be in a practical sense imperceptible in its course and progress and not imperceptible after a long lapse of time.

Attorney-General v. *Chambers*—Referred to. [P. 135, C. 2.]

(3) The principle of the law of accretion which is settled as between subject and subject is equally applicable to the relations between the subject and the crown.

In re Hull and Selby Railway—approved. [P. 135, C. 2.]

(4) The extension of lands in this case being caused artificially by the execution of reclamatory work and not by natural silting-up the ownership thereof vested in the crown as owner of the foreshore. [P. 136, C. 2.]

(b) *Limitation—Prescription as against Government cannot be pleaded on the strength of long-continued occupation for less than the requisite period of 60 years.*

Subjects cannot plead the benefit of prescription where their occupation is, though unquestionably long, not for the requisite period of sixty years.

Attorney-General of Ireland v. *Vandeleur* Distinguished. [P. 137, C. 2.]

(c) *License—A license is presumed as against Government when there is a duty cast on it to protect land from the intrusion of the sea and the same is performed by acts of the subjects with the knowledge of the crown for a long period of time.*

In view of the Ordinance of 28th March 1894 which cast the duty of protecting land from the incursions of the sea on the crown and the knowledge of the crown of the reclamation and the subsequent building, an irrevocable license was to be presumed in favour of the respondents to erect buildings and store goods on the reclaimed land and use it generally for the purposes of their business.

Attorney-General v. *Tomlin*—approved. [P. 139, C. 1.]

(d) *Riparian rights—Riparian rights of frontage owners are not affected by the land ceasing to be subject to flow and reflow of the tide whether due to reclamation by the crown, at third party or otherwise.*

The foreshore rights of frontage owners are not affected by reclamation of the foreshore by the crown or a third party and the reclamation in this case cannot operate as an abandonment of these rights over the land reclaimed.

Lyon v. *Fishmongers Co.*

Marshall v. *Ulleswater Steam Navigation Co.*—Referred to [P. 139, C. 1.]

* (e) *Easement—Extent*

Right of easement includes right to storage. [P. 137, C. 2.]

* (f) *Alluvion and dilution—Rights of crown.*

Crown as owner of the sea and foreshore is entitled to land turned into foreshore by erosion of sea. [P. 134, C. 2.]

P. O. Lawrence, A. R. Pennington and *Whinney*—for Appellant, the Attorney-General.

Cave, Tomlin and *A. T. Miller*—for Respondents (Appellants upon the cross-appeals).

Lord Shaw of Dunfermline.—These are two appeals and two cross-appeals, all consolidated, against two judgments pronounced by the Full Court of the Supreme Court of Southern Nigeria on 22nd April 1911, varying the judgment of Osborne, C.J., pronounced on 14th March 1910. For the sake of convenience the Attorney-

General for Southern Nigeria is hereinafter referred to as "the Crown" and the opposite parties as "the respondents."

The proceedings relate to certain lands in the district of Olowogbowo, in the island of Lagos, which became a part of the Colony of Southern Nigeria. The lands consist of five plots, all of which are situated on the shore of the lagoon. As commerce has developed, these lands, and especially the frontage thereof to the sea, have become of considerable value. They adjoin each other; and in the view which is to be taken of these appeals the facts as to the different plots may be sufficiently stated as follows: The respondent firm of Holt and Company were in occupation claiming as freeholders of (1) William's land and (2) Dunkley's land, and as tenants of the executors of the Reverend James White, who were the freeholders of (3) White's land. The respondents MacIver and Company were in the occupation of (4) George's land and (5) Johannsen's land as tenants of the freeholders of these respective plots. The whole premises were occupied for the purpose of the respondents' respective businesses as African merchants.

In regard to the possession and occupancy of the properties, the admitted facts are these: A wharf was built from George's land in or before the year 1859, a pier was built from Johannsen's land prior to the year 1861, and a pier was also built from Dunkley's land soon after that year. The respondents, it is further admitted, built stores, sheds, and other works at different dates upon the land adjoining the waterside, and in particular upon not inconsiderable portions of the *solum* of the land in question in the case, namely, that which had been foreshore, *i.e.*, land between high and low water marks at ordinary spring tides. The respondents and their predecessors used the foreshore and land for storage and for the purposes of their business; and the wharf and piers already mentioned were also used by them in connection with their trade.

While upon the one hand there seems little doubt that for about half a century continuous use and possession were had—of the kind and nature just described—and that, as trade developed, additional buildings and erections were put upon the ground, yet upon the other hand, it is admitted that this use and possession cannot be established for a period of sixty years.

To complete the general statement of the facts, it may be mentioned that a retaining wall was built to protect Dunkley's land prior to 1879, and that this retaining wall was continued in front of William's land in the years 1886-88. Further, as was stated on the appeal to the Full Court, there was no public right of way over the foreshore. In the years 1907.—1908 the Government of the island began the construction of a public road along the waterside of the lagoon. The road was continued over the lands in dispute in the present case. By this means the five plots belonging to the respondents have been cut off from the waters of the lagoon, and from their wharves and piers. By the construction of the road so made some of the stores, buildings, and sheds erected by the respondents or their predecessors have been destroyed, and the use and possession of the respondents' lands have been in an important degree subverted. It became accordingly, necessary to determine the nature of the rights of parties so as to settle the basis upon which compensation shall be made.

The form of proceedin s is by way of information. It is only necessary to look at the prayer of these to observe the startling consequences which would result to all the respondents' properties, should that prayer be granted as it stands, for it is prayed that a declaration be made of the absolute right of the Crown in the land in dispute, and for an injunction and peaceable possession. The result of this would be the complete extrusion of the respondents from land, foreshore, wharves, and piers. The properties themselves, instead of being properties abutting on the sea, would be separated therefrom by the road to be constructed, and be converted into hinterland.

Their Lordships are not surprised that the advisers of Crown shrank from the consequences of this sweeping demand. The only substantial concession made, however, was that, as to Dunkley's land and Johannsen's land, no appeal was presented against that portion of the judgment of the Court below, which declared that the respondents have acquired an easement for a jetty and a right of way thereto from these respective

lands. Subject to this. the demand of the Crown is maintained in all its breadth. This is the first time that process by way of information has been used in Southern Nigeria, and it is remarked by Osborne, C.J. that

"It has proved exceedingly difficult to adapt to the Supreme Court Ordinance and the procedure rules thereunder, which are framed to meet the requirements of a community wherein illiterate suitors not uncommonly conduct their own litigation."

Strict English procedure was accordingly departed from, and the Courts went further in considering themselves not limited by the actual wording of the information and pleadings. This occurred with the consent of both parties.

"What," said the learned Chief Justice, "we are really asked to do is to ascertain and declare what have been the rights of the respective parties from the time of first occupation of their lands by their predecessors-in-title, not only with regard to foreshore, but with regard also to a strip of land which lies between the limits specified in the various grants relating to the defendants' lands, and the low water mark of the lagoon."

While it is true that this state of the record may import certain difficulties into the case, their Lordships pass no adverse comment upon the course taken by the parties and the Courts below, and they desire to express their sense of the thoroughness and care with which the perplexing problems which emerge in the case, both upon the law and in fact, have been treated by all of the learned judges.

It appears from the historical narrative in the judgment of Osborne, C.J., that about 1850, Lagos, then under powerful chiefs, was one of the principal centres of the slave trade. It was bombarded in 1851 by a British force, and on 1st January, 1852, the slave trade was finally abolished. A British Consulate was established, and there was an influx of many liberated slaves from Sierra Leone and elsewhere. There seems no reason to doubt the opinion of the learned Chief Justice that the land had originally belonged to tribal communities, but that

"during the decade between 1852 and 1862 the practice of alienation sprung into vogue, and another new feature, totally foreign to native law, which knew not writing, was introduced in the shape of written grants by the King of Lagos. The land in Lagos was originally attached to the stools of the white cap chiefs, who were in no way subordinate to the early Kings."

In course of time, however, the royal power increased and the tribal and chieftain power diminished. This was the state of matters when King Docemo and his chiefs, on 6th March 1861, entered into a treaty of cession of the port and the island of Lagos to Her Majesty the Queen of Great Britain. The treaty is printed at length; the only question which has been mooted upon it is as to whether by its terms it granted sovereignty and jurisdiction alone to the exclusion of property. The words are complete and absolute, they

"grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full and absolute dominion and sovereignty of the said port, island, and premises, with all the royalties thereof freely, fully, entirely and absolutely."

Their Lordships do not refer to the treaty further than to say that in their opinion property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors were to be respected. It may be that these required confirmation by subsequent procedure, prescribed by way of ordinance or otherwise, but no question on that head arises in the present case.

On 13th March 1862, the ceded territories, under the title of Settlement of Lagos, were erected into a separate government. On 19th February, 1866, Lagos became part of the West African Settlements. On 24th July, 1874, the Gold Coast Colony, including Lagos, was formed. On 13th January, 1886, Lagos again became a separate colony, and finally, on 1st May, 1906, it became part of the Colony of Southern Nigeria. This is briefly the political history of the island; but none of these changes, recorded in the judgments of the Court below, effected any alteration in the *status* of the occupants of land, or in the nature of the tenure thereof. With regard to the plots of land in question in the present case, the one point which has a really important bearing upon the questions to be determined in the appeals is as to the boundary seaward of those plots. On 21st January, 1864, a Crown grant was executed in favour of William, who had been in possession for twelve years before, and the boundary on the south-west side of the property was stated to be the river Lagos.

In 1861 there had been a grant of the next plot by King Docemo to a native called Captain Harry Johnson; Johnson sold to Dunkley, and in 1869, Dunkley obtained a Crown grant. There is a peculiarity as to the southern boundary, which is stated to be the "Marina," but it appears to be a fact that there was no "Marina" or public thoroughfare in that island, and, as the Chief Justice states, there is evidence that Dunkley himself had previously reclaimed some land and built a sea wall thereon as early as 1868, and that at the time when he acquired the Crown grant he had a jetty or pier opposite his land.

As to the third plot, the original grant was to the Reverend James White, in 1861, and in his Crown grant the western boundary is stated to be the lagoon. The fourth plot, namely, George's land, was the subject of a grant from King Docemo, and the boundary is described as "facing the lagoon." The fifth plot, namely, Johannsen's land, is described as having a water frontage, and in an earlier agreement the property is said to include the ground on the beach.

Their Lordships do not investigate these titles in further detail. For in their opinion they are substantially at one in this—that the properties were each and all treated in description as being bounded in fact by the sea. The expression may be in one case the river Lagos, in another the lagoon, and so on, but a sea frontage was that which was meant, and in their Lordships' opinion was sufficiently expressed. They were riparian properties. In the next place, in their Lordships' view, there was no express grant of the foreshore made in any one of these titles, nor can any grant of foreshore be implied, looking to the language of description which is employed. Their Lordships are not moved by the fact that in some cases measurements are given; these would have to yield to the description. But the description itself is a water lagoon or sea boundary, and, as stated this, in the opinion of the Board, does not embrace foreshore within the scope of the grant.

Before adverting to the state of possession of these properties, their Lordships think it right to allude to one fact with regard to the sea frontage. A swift current sweeps along the shore. The effect in the past has been to erode the coast, and it has been the practice in time past memory to erect upon the shore stakes or "cabbage-sticks" to prevent the serious inroad and ravages of this tidal erosion. The practice was not only known to the British Government, but so early as 1864 it was recognized, and indeed enforced, by an ordinance confirmed upon 28th March of that year. A road had been made along a part of the riverside, and the owners of land abutting on the road were ordained, among other things, to drive in stakes in the bank of the river in such a manner as should be required by the Government surveyor—the narrative of the ordinance being that the road was liable to be put out of repair and the soil carried away by *inter alia* "the action of the tide at the base thereof." The reason of the ordinance is stated to be the convenience and comfort of Her Majesty's subjects. There can, in the opinion of the Board, be little doubt that the erosive action of the sea was such along the coast of Lagos that a protection against it was considered not only to be for private but for public advantage.

Before stating the nature of the operations conducted by the respondents, their Lordships, in view of the argument presented to them, think it necessary to consider the rights in the properties, the descriptions whereof have been already referred to, in reference to the doctrine of the accretion from the sea. In the first place, their Lordships are of opinion that when *de facto* the boundary was the sea under the different names already alluded to, there is nothing in the law or the nature of the case to prevent the application of the ordinary doctrine of accretion or dereliction to such a condition of things. On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had *de facto* been transferred to the Crown as owners of the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained.

The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were *de facto* fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a stretch of land (it might be yards, feet or inches) between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into hinterland, would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage.

The whole of this question, as applicable to lands *de facto* fronting a river but described by measurements which excluded its bed was anxiously discussed in the case of *City of London Land Tax Commissioners* v. *Central London Railway* (1). The law with reference to river and street boundaries of property was there gathered together, and it need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil *ad medium filum* is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring does not in fact include any part of the bed of the river or of the street. Similarly, in their Lordships' opinion, properties scheduled or specifically measured but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea. In the present case, accordingly, the conveyances of the properties, which are in question in this appeal were in the opinion of the Board *habile* to cover the land formed by slow, gradual, and natural accretion. Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt, its general applicability to lands like those of the respondants abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs.

There has been much written and decided law upon this subject, and, notwithstanding the very full argument, it need not be entered upon at large. But in spite of the wealth of authority, including the *dicta* in Hale *De Jure Maris* and of many eminent judges, it is not clear that the general proposition has been advanced beyond that laid down by Justinian in his Institutes, *bk. ii., tit. i.*, s. 20: "*Praeterea quod per alluvionem agro tuo flumen adjecit jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod its paulatim adjicitur, ut intellegere non possis quantum quoquo momento temporis adjiciatur.*" Blackstone says (Vol. II., Chap. XVI, p. 26).

"As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by derelict, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining."

Blackstone then introduces by way of explanation a reference to a doubtful brocard *de minimis non curat lex*, which Lord Chelmsford in *Attorney-General* v. *Chambers* (2) properly disclaims. The true reason for the principle of law in regard to foreshores is the same reason as the principle in regard to river banks, *i.e.*, that it is found upon security and general convenience.

In *In re Hull and Selby Railway* (3) Lord Abinger, C. B., referring to *Rex* v. *Lord Yarborough* (4), said:

"The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

The case of *In re Hull and Selby Railway* (3) is important not only for the opinions of Lord Abinger and Baron Alderson but for the fact of its acceptance of this principle of the law (settled as between subject and subject) to the relations between the subject and the Crown. "In all cases," said Lord

(1) [1913] A. C. 364=[1913] 82 L.J. Ch. 274.

(2) 4. De G. & J. 55.

(3) [1839] 5 M. & W. 327=(1839) 1 ... E.R. 1160.

(4) 2. B. & Al. (N.S.) 147=2 L. ... K.B. 147=3 B. & C. 91.

Abinger, "of gradual accretion, which cannot be ascertained from day to-day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and *vice versa*." and he repeats in different words his main proposition "No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property.

Alderson, B., dwelt specially upon the double-sided operation of the rule.

"I think," he says "the question is precisely the same, whether the claim is made against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore—that is, the space between high and low watermark-grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."

In the case of *Attorney-General* v. *Chambers* (2) Lord Chelmsford refers to the double-sided operation of the rule in this way:

"It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore."

As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress.

"Considering," said Abbott, C. J. "the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress not imperceptible after a long lapse of time."

This statement of the principle, namely, that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress, goes no further than the words of Justinian already quoted.

It was strongly contended before the Board that the facts of this case showed it to be substantially one of natural accretion. The argument was this. In accordance with the policy generally approved, stakes were set out between high and low water mark, and the silting up took place within those stakes and between them and the actual shore; and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes, and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the Court below. More than one reference is made to "the question of the reclaimed or silted-up land," and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it remains as before, *i.e.*, in cases like the present with the Crown. The history of the foreshore adjoining these lands, and of the operations thereof, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the Courts below upon this question of fact. Upon the appeals Chief Justice, Griffith, after referring to the finding of the trial judge, said:

"I have no reasonable doubt that the great bulk of the land between the Crown grant land and the lagoon is the result of artificial reclamation on the part of the defendants and their predecessors."

Osborne, C. J. who had been the trial Judge, puts his judgment upon this point thus:

"The evidence seems clearly to show that actual reclamation contributed more than alluvion to the extension of the lands in the occupation of the defendants and their predecessors in title, and as to actual gain by alluvion, uninfluenced by the defendants' and their predecessors' reclaiming operations, there is no direct evidence."

The finding is thus not very specific, although Mr. Justice Winkfield goes the length of saying "It is not established that any part of the land neutral tint on the plan" (*i.e.*, the land in question) "was the result of natural accretion or alluvion." In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding. Nor do they say that they would have come to a different conclusion. The case accordingly must be dealt with as substantially one of an addition to adjoining lands being caused

artificially by the execution of reclamatory work.

The natural situation of the land was that, consequent upon the erosion mentioned, a relatively steep and inconvenient shore had been created. The reclamation mentioned undertaken by the respondents and their predecessors was not of the simple character of the erection of stakes, as alluded to, but was the building of a solid wall; and the evidence appears to point to the foundations of that wall having been sunk to the extent of at least a few feet in the soil between ordinary high and low water mark, *i.e.*, in the foreshore itself. Nothing more natural could have been expected, and probably nothing more in the interest of all parties, including the Crown. The fact, however, being accepted as stated, the legal consequence follows—namely, that the doctrine of natural accretion cannot be held to apply.

The wall having been founded as stated, was built up; the land within it and the old high line of foreshore was levelled; and the respondents and their predecessors have possessed the same ever since,—that is, during a very long course of time—and they built thereupon from time to time the warehouses and sheds which appear upon the plans. The ground upon which these are erected protrudes largely over the disputed territory. Upon the new wall frontage itself wharfage accommodation was constructed; and the whole—namely, piers, wharf, disputed land and property within the old boundaries, have been possessed together and used, roughly speaking, in this way for a period of between thirty and fifty years.

The judgment of the Full Court has affirmed various easements over reclaimed land (1) in the case of William's land for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and (2) and (3) in the case of Johannsen's and Dunkley's lands easements for jetties. Against these last the Crown has not insisted at their Lordships' Board; but with regard to the first point it is maintained that such an easement is unknown to the law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors-in-title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof.

Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce* v. *Hay* (5) by Lord St. Leonards L.C., who observed: "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind." But in their Lordships' opinion the second contention of the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly, beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained. There remains for consideration the judgment of Osborne. C.J. which was *inter alia* defended in argument by the respondents, and to which, it was part of their case, that this Board should revert. The respondents are not in a position to plead the benefit of prescription, as, although, their buildings and erections have been used and occupied for a time unquestionably long, it has, as already mentioned, not reached the requisite period of sixty years.

Their Lordships have been referred, on the other hand, to cases like *Attorney-General for*

(5) [1852] 1 Macq. 305.

Ireland v. *Vandeleur* (6). But the facts of the present case cannot be brought under the category of lost grant. Although their Lordships are accordingly impressed with the long-continued possession. they are unable to discover in the law of England any acknowledged ground for holding that the property of the solum of the artificially reclaimed land has thereby become vested in the respondents.

A reference also was made to the case of *Phillips* v. *Halliday* (7). But the circumstances of that case were remote from the present. What was decided was that a pew may be annexed to a dwelling house within a parish, "either by a faculty or by prescription," which supposes a faculty. and that a faculty might be presumed upon evidence of exclusive possession and repair for a long period.

A passage in the judgment from the opinion of Herschell, L. C. is much relied upon ; it is to the following effect :—

"In the case of *Rogers* v. *Brooks* (8), Willes, J. a very learned Judge, said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the plaintiff. No doubt that is a strong expression, and possibly there may be presumptions that ought not to be made even under such circumstances as those, but I think it points out how emphatically the view has been entertained by learned judges that where there has been long-continued possession which is consistent with a legal title, every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right."

In the opinion of the Board this passage does not support the proposition that a transfer of the dominium of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership. The effect of this upon the present case will be immediately seen.

As to the facts, the dates of reclamation have already been given and the nature of the erections. operations and occupation stated. To all intents and purposes the reclaimed ground was used along with and as part and portion of the respondents' properties as a whole: and the piers, wharves and whole land have been, for the protracted period alluded to, used for the purposes of the shipping and mercantile business. Their Lordships are further of opinion that the circumstances in which the reclamation itself was made negative all ideas of intentional trespass or of surreptitious acquisition of land. As stated. the respondents' and their predecessors' acts of reclamation were good for all concerned, and were for a public benefit. Their Lordships find themselves in agreement with Chief Justice Osborne, who tried the cause, and has submitted both facts and law to a thorough consideration, that:

"It is quite impossible to believe that all reclamation and subsequent building can have gone on without the knowledge and against the wish of the Government.....as the Government must have been aware of the reclamation and subsequent building, it is more probable that those acts were done with permission from the Governor for the time being than that they were acts of trespass done in defiance of the Government."

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation and to obtain an injunction which would exclude the respondents from the reclaimed land.

One result of no inconsiderable consequence would. of course. follow. The plots of land. all of which were bounded by the foreshore and the sea. would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation made as above described. not objected to, and followed by occupation ever since. would be the loss of all kinds of navigation, groundage, and other foreshore rights. and the destruction of probably the most serious elements of value in the whole of the respondents' properties.

Their Lordships are of opinion that this result is not in accordance with law. It may be that, in building the foundation of the wall, a stricter care should have been taken to keep on the land-ward side of the foreshore : but the foreshore, it should not be forgotten, was exceptionally troublesome; the erosion was going on, and the current was so dangerous that in native opinion there was a devil in the water. In truth and substance what was done was to protect the land, to guard against the invasion of the sea, as a destructive force and to

(6) [1907] A. C. 369=76 L.J.P.C. 89.
(7) [1891] A. C. 228=61 L.J.Q.B 210.
(8) [1784] 1 T. R. 431 n.

conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it should not be forgotten that it is recognized by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, the licenses had been granted and duly recorded to the respondents to reclaim as was done, that license would have been in entire accord, not only with the right of the subject, but with this duty of the Crown. This principle is in accord with the law laid down in *Attorney-General* v. *Tomline* (9) and principally with the opinions of Fry. J., at the trial and Cotton. L.J.

With regard to the use and enjoyment of the made up land by the respondents as merchants their Lordships are, as already indicated, of opinion that the same cannot, in the circumstances, be subverted. As to what may be called foreshore rights, as such, the point of the case seems to be what is the effect of a frontage owner reclaiming part of the foreshore which is vested in another. It appears from the case of *Lyon* v. *Fishmongers Co.* (10) that the frontage owner has foreshore rights annexed to his land beyond such rights as he possesses as one of the public. And the real question, therefore, is whether the reclamation made in the circumstances before described operates as an abandonment of these rights over the land reclaimed. The abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case intended to convert their holdings into what has been described as "hinter-land." Further, it appears from the case of *Marshall* v. *Ulleswater Steam Navigation Co.* (11) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow and re-flow of the tide.

The case has been brought in order to determine the principles upon which compensation shall be awarded to the respondents in consequence of the construction by the Crown of a road over the disputed land. Their Lordships desire to make it clear that it follows from their decision that the foreshore rights originally attaching to the respondents' lands before reclamation have accordingly not been destroyed thereby. The lands further will fall, upon the case of compensation, to be treated upon the principle laid down in *Duke of Buccleuch* v. *Metropolitan Board of Works* (12) as possessing not only rights of navigation and otherwise in and enjoyable by the public at large, but those special rights which are attached and add value to specific riparian lands.

Their Lordships will humbly advise His Majesty that the judgment of the Full Court should be set aside, and the judgment of the Chief Justice in the Court of first instance on 14th March 1910, restored, except upon the point of costs. The Crown will pay to the respondents the costs of the appeals and of the cases in the Courts below.

T.A.R. *Appeals allowed.*

Solicitors for Appellant—(the Attorney-General)—Sutton, Ommanney and Rendall.

Solicitors for Respondent Companies—Field, Emery, Roscoe and Medley, Agents for Alsop, Stevens, Crooks & Co., Liverpool.

(9) 14 Ch. D. 58=49 L.J. Ch. 377.
(10) 1 Ap Cas. 662=46 L. J. Ch. 68.
(11) 2 L.R. 7 Q B 166=41 L.J. Q B 81.
(12) (1872) L.R. 5 H.L. 418=41 L.J. Ex 157.

A.I.R. 1915 Privy Council.

(FROM THE PRIZE COURT)

16th November 1915.

LORDS MERSEY, PARKER, SUMNER, AND PARMOOR AND SIR E. BARTON.

The Roumanian

(On the Appeal from the High Court of Justice).

(a) Jurisdiction of Prize Court over enemy goods in British ships on the high seas—Such goods continue liable to seizure in ports as the liability is not dependent on the local situation of the goods—Test of "ashore or afloat" disapproved—Subsequent ratification by Government sufficient to legalise seizure—Letter of detention of cargo even without specific mention effects seizure as prize immediately on delivery—The tanks into which the petroleum was discharged constitutes part of the Port for the purpose of application of the rule.

At the time of the outbreak of the war between England and Germany, *the Roumanian*, a British ship was on a voyage to Hamberg with a cargo of 6264 Tons of Petroleum belonging to a German Company. Under instructions by the admiralty to the Master of the ship it arrived at Dartmouth and later proceeded to London where the petroleum was to be warehoused in the tanks of the British Petroleum Co., Limited. Under the control of the Custom House authorities, a letter from the Custom House was served on the Master stating that the cargo was placed under

detention when only 570 tons remained undischarged. When the writ issued, the petroleum had been warehoused. The contentions raised ware (1) that the letter giving notice of detention of the cargo did not refer to it, as prize, (2) that the Prize Court had no jurisdiction as the petroleum was not afloat at the date of seizure. (3) that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum already warehoused in the tanks of the British Petroleum Co., Lim., and no longer on board and (4) that Enemy goods on British ships at the commencement of hostilities were not liable to seizure at all.

Held (1) The Custom House being the proper authority to seize any enemy property found in a British port for condemnation as prize, and the letter being intended and understood by all parties to operate as a seizure and no other possible intention being suggested, the cargo was effectively seized as price on delivery of the letter.

(2) The Prize Court has to determine the question "Prize or no prize" and it is the seizure as prize and not the local situation of the goods seized which confers jurisdiction, though it may be of importance in determining the question. The contention therefore failed.

Lindo v. *Rodney* 2 Dougl. 613n.—followed.

The Ooster Ems I .C. Rob. 284. [P. 144 C. 2.]

(3) No order for restitution could properly be made during the war in favour of German owners and no case was cited wherein the Public Trustee or other official kept the goods in safe custody till peace was restored.

(4) All enemy ships and cargoes found afloat on the high seas or territorial waters or in the ports or harbours after the outbreak of the war are liable to seizure as maritime prize. The petroleum having been on the high seas was liable to be seized which liability did not cease by removal to Dartmouth or London.

Infallible Test is not "ashore or afloat"; it fails as regards enemy goods seized on enemy territory because there is no ground for the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize unless they could be considered as locally situate within a port or harbour. The test of ashore or afloat is no infallible test as to whether goods can or cannot be lawfully seized as maritime prize. It is perfectly clear, enemy goods seized on enemy territory by the naval forces of the crown may lawfully be condemned as prize.

Lindo v. *Rodney* 2 Doug. 613 n.—followed.

In the Hoffnung (No. 3) (6 C. Rob. 383; 1 Eng. P. C. 583.)

The Charlotte (1 C. Rob. 386n; 1 Eng. P. C. 585 n.)

Brown v. *The United States* [8 Cranch. (Anst) 110]—distinguished.

The Ooster Eems (1C.Rob 284n; 1 Eng. P.C. 136n)—discussed and dissented from.

The Ooster Eems distinguished in:—

The Two Friends (1 C. Rob. 271; 1 Eng. P. C. 130). [The Progress (1810) (Edw. 210.)]

The Marie Anne—Rothery's Prize Droits p. 126.

The Berlin Johannes—Rothery's Prize Droits 125.—applied.

Goods seized by persons holding letters of Marque and even goods seized by persons having no authority whatever on behalf of the crown may lawfully be condemned as prize when the crown subsequently ratifies the seizure.

Brown v. *Franklyn* (1698) (Carth. 474.)

The tanks of the British Petroleum Co. Lim. constituted Part of the port of London for the purpose of applying the rule relating to liability to seizure of enemy's goods in the ports and harbours of the realm.—*Obiter.*

** (*b*) *Practice—Precedents.*

The plainer the proposition of law the more difficult, it sometimes is to find a decision actually in point. [P. 142, C. 1]

** (*c*) *International Law—Private property of enemy subjects.*

Private property of enemy subjects found within the realm at the commencement of war cannot be seized and appropriated by the crown

Maurice Hill Balloch, and *C. Robertson Dunlop*—for Appellants.

The Attorney-General (*Edward Carson*, *Erle Richards*, and *Theobald Mathew*—for the respondents, were not called upon.

Lord Parker.—This appeal relates to the cargo *ex* steamship *Roumanian*. The relevant facts are quite simple, and are not in dispute.

The *Roumanian* is a British ship, and on 4th August 1914, the day on which war broke out between this country and Germany, was on a voyage from Port Arthur (Texas) to Hamburg with a cargo of some 6,264 tons of petroleum belonging to the Europaische Petroleum Union, a German Company. On the same day the Admiralty, through the Secretary of Lloyd's, suggested to the owners that the ship should be diverted to some port in the United Kingdom, and the owners accordingly instructed the master to proceed to Dartmouth for orders. The ship arrived at Dartmouth on 14th August, 1914.

On 15th August the Board of Trade issued a notice containing recommendations with regard to the treatment of cargoes belonging to an enemy in ships diverted from their original ports of destination. These recommendations appear to their Lordships to be so conceived as in no way to prejudice the liability (if any) of such cargoes to be seized as prize. It was recommended that the cargo should be landed at a dock, legal quay,

or sufferance wharf, either in the port at which the steamer had arrived or in some other safe port, and warehoused subject to shipowners' and other charges until sale or disposal could be arranged for. If sold, the proceeds should be held for subsequent distribution to those entitled to the cargo, subject to shipowners' and other charges which might at law have priority over the claims of the persons entitled to the cargo or its proceeds. Obviously, if the cargo were liable to seizure as prize, seizure followed by condemnation in the Prize Court would entitle the Crown either to the cargo itself or the proceeds thereof, subject to such shipowners' or other charges as might by law take precedence of the Crown's interest.

On 20th August the *Roumanian* proceeded to London, arriving at Purfleet at noon on 21st August. Before her arrival arrangements had been made to warehouse the petroleum in the tanks of the British Petroleum Co., Lim., at Purfleet, and permission had been obtained from the Custom House authorities for its discharge into these tanks. When so discharged the petroleum would be in the custody of the Custom House authorities in the sense that it could not be removed therefrom without their sanction.

The work of discharge accordingly commenced at 12-15 p.m. on 21st August the petroleum being pumped into the tanks, which were situated some 100 to 150 yards from the wharf at which the vessel lay. Meanwhile the Custom House authorities took samples in order to test the specific gravity of the oil and ascertain whether or not it was dutiable.

About 7 p.m. on 22nd August a letter from the Custom House at Gravesend was delivered on board the *Roumanian*, addressed to the master, stating that the cargo of about 6,264 tons of petroleum was placed under detention. This letter was not received by the master till 11 p.m. Roughly speaking, about 1,140 tons of oil remained undischarged at 7 p.m. and 570 tons at 11 P.M. on 22nd August. Notwithstanding the letter above referred to, the work of discharging the oil continued. It was completed long before the writ in these proceedings, which did not issue until 19th September and was served by affixing the same to the tanks in which the petroleum was then warehoused. It will be observed that the letter giving notice of the detention of the cargo did not refer to its detention as prize, and it was accordingly argued on behalf of the appellants that there was no effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the Custom House is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter. The point, however, is of little importance in the view which their Lordships take of the points of law which will be dealt with presently, for if there was no seizure by delivery of the letter there was admittedly a good seizure when the writ was served. Under these circumstances three points were raised by counsel for the appellants. They contended, *first*, that, so far as the petroleum was not afloat at the date of seizure, the Prize Court had no jurisdiction; *secondly*, that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum so far as at the date of seizure it was warehoused in the tanks of the British Petroleum Co., Ltd., and no longer on board the *Roumanian*; and *thirdly*, that enemy goods on British ships at the commencement of hostilities either never were or at any rate have long ceased to be liable to seizure at all.

Obviously, if the last point is correct, it is unnecessary to decide the first two points. Their Lordships, therefore, think it desirable to deal with it at once.

The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in *The Miramichi* (1). Their Lordships have considered carefully the judgment of the President in the last-mentioned case, and entirely agree with it. The appellants' counsel based their contention on three arguments. *First*, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasising the fact that in the case of

(1) [1915] 84 L.J.P. 105.

The Juno (2) no authority could be found for the right of the master of a British ship on which enemy goods were seized as prize to compensation in lieu of freight, though, if such goods were properly the subject of prize, the question must constantly have arisen. *Secondly*, they laid stress on certain general statements contained in text-books on international law as to what enemy goods can now be seized as prize. *Thirdly*, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such Declaration.

With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor, as a general rule, do cases in which no point of law is raised and decided find their way into law reports. If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any authority which gives colour to this suggestion. There appears, indeed, to be no case in which, for this purpose, any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war. Their Lordships, therefore, are not impressed by the argument based on the dearth of actual decisions on the point. Moreover, the decisions, such as they are, certainly do not support, but, indeed, contradict the appellants' contention. It is clear, from the cases cited in *The Miramichi* (1) that enemy goods embarked on British ships during the hostilities are the subject of prize; see in particular *The Conqueror* (2a). In these cases the sole question decided has been the enemy character of the goods, and no stress has been laid on the time at which they were embarked, or on whether any person concerned had or had not been guilty of the common law offence of trading with the enemy. Further, there is the case of *The Venus*, referred to in Rothery's Prize Droits at page 129.

Their Lordships have thought it desirable to examine the papers preserved in the Record Office in connection with this case, the facts of which are as follows:—*The Venus* was a British ship which at the outbreak of hostilities was on a voyage to Hamburg. Its cargo had been shipped at Genoa, Ancona, and Mentone. The master, hearing of the outbreak of war and desiring to avoid the risk of his ship being captured by the enemy, put into Plymouth. The Receiver of Admiralty droits at Plymouth, suspecting upon information given by the master that part of the cargo belonged to enemy subjects, seized both ship and cargo. The ship-owners put in a claim for the release of the ship on the ground that it was British, and also for freight expenses and demurrage. The ship was ordered to be released. The claim for freight and expenses was allowed, there being a reference to the Proctor to ascertain the proper amount, which was declared a charge on the cargo. The claim for demurrage was disallowed. The amount to be allowed for freight and expenses was in due course certified by the Proctor, and apparently paid out of the proceeds of the cargo which had been appraised and sold under the direction of the Court. Parts of the cargo, or its proceeds, were subsequently claimed by, and released in favour of, neutrals. The residue of the cargo was condemned as the property of enemy subjects.

The case of *The Venus* appears, therefore, to be an authority against the appellants' contention. They say, truly, that the point does not seem to have been raised, but it is far more likely that the point was not raised because it was thought to be untenable than that the Court overlooked what, according to the appellants' contention, must have been a well-known principle of prize law. Further, *The Venus* is certainly an authority in support of the President's decision in *The Juno* (2). Curiously enough, the master of the *Venus*, though a British subject, is

(2) 84 L.J.P. 154 = 1 Prize Cas. 151.

(2a) 2 C. Rob. 303.

in the Proctor's report in the case, referred to as the " neutral master," a fact which is only consistent with the practice of the Court, in allowing freight, being the same whether the enemy goods were seized on neutral or on British ships. With regard to the general statements contained in text-books on international law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these statements in detail. They will take one example only, that cited from Westlake's *International Law*, Part II. p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows: " We may therefore conclude that enemy ships and enemy goods on board them are now by international law the only enemy property which as such is capturable at sea."

In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken, apart from the context, as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that, because the writer in the present case uses the expression " capturable at sea," he must have thought that enemy goods in neutral ships lying in British ports or harbours were, notwithstanding the Declaration of Paris, still subject to capture. Such statements are in any case more than counterbalanced by statements contained in other well-recognised authorities. Thus, in addition to the passages quoted in *The Miramichi* (1) from Dana's edition of *Wheaton's International Law*, it will be found that Halleck [International Law, vol. II (4th ed.), p. 98] states that whatever bears the character of enemy property (with a few exceptions not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods, and not the nationality of the ship on which they are embarked, or the date of embarkation, which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in *The Rebeckah* (3) of the manner in which the order of 1665 defining Admiralty droits has been construed by usage.

Passing to the appellants' third argument, that based on the Declaration of Paris or the principle supposed to underlie such Declaration, it may be stated more fully as follows: Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbours of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognises that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (International Law, Part II. p. 145), it assimilates neutral ships to neutral territory, recognising that on both the authority of the neutral state ought (except possibly in the case of contraband) to be exclusive. So far the argument proceeds logically, but its next step is, in their Lordship's opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of war. This part of the argument is, in their Lordship's opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilates neutral ships to neutral territory, but it is impossibe to base

(3) 1 C. Rob. 227=1 Eng. P. C. 118.

on this assimilation any argument for the immunity of enemy goods in British ships.

The cases are not in *pari materia*. If the Crown has ceased to exercise its ancient rights of seizing and appropriating the goods of enemy subjects on land, it is because the advantage to be thus gained has been small compared with the injury thereby entailed on private individuals, or in order to insure similar treatment of British goods on enemy territory.

But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right of seizing and appropriating enemy goods on the high seas or in territorial waters or the ports or harbours of the realm has never been allowed to fall into desuetude. In order to attain this advantage of sea power in the fullest degree, our Courts have always upheld the right of seizing such goods, even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war or because on some future occasion they themselves might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice, where no question of international comity can possibly arise. Their Lordships hold therefore, on this part of the case, that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, were always, and still are, liable to be seized as prize, either on the high seas or in the ports or harbours of the realm. It follows that the petroleum seized on board the *Roumanian* was properly condemned as prize.

The next point to be considered is the jurisdiction of the Prize Court so far as the petroleum in question was, when seized as prize, warehoused in the tanks of the British Petroleum Co., Ltd., and no longer on board the *Roumanian*. The appellants contended that it is the local situation of the goods seized as prize which determines the jurisdiction of the Prize Court. If such goods be, at the time of seizure, on land, and not afloat, it is not, they contended, the Prize Court, but some Court of common law which has jurisdiction to determine the rights of all parties interested. In their Lordships' opinion this contention also fails.

The chief function of a Court of Prize is to determine the question, "prize or no prize;" in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question the local situation of the goods at the time of seizure may be of importance; but it is the seizure as prize, and not the local situation of the goods seized, which confers jurisdiction. If authority be needed for this propositon, it may be found in Lord Mansfield's judgment in the case of *Lindo* v. *Rodney* (4). It must be remembered that the jurisdiction of the Prize Court is based in every case upon a Commission under the Great Seal. Lord Mansfield pointed out that, in the case before him, the Commission under which the Court derived jurisdiction conferred jurisdiction in all cases of prize, whether the goods sought to be condemned were taken on land or afloat. The same may be said of the Commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the Court of Admiralty as a Court of Prize and its jurisdiction apart from the Commission which constitutes it a Court of Prize. To give the Court of Admiralty, as such, jurisdiction, the matter complained of must have occurred on the high seas; but in all matters of prize it was not the Court of Admiralty as such, but the Court of Admiralty, by virtue of the Commission, which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat. The only authority which, at first sight, appears to be in conflict with Lord Mansfield's decision is the case of *The Ooster Ems* (5) to which, for the reasons hereinafter mentioned, no great weight can be given.

Their Lordships will now proceed to consider the appellants' contention that, even if the Prize Court had jurisdiction, it ought,

(4) 2 Dougl. 613n.
(5) 1 C. Rob. 284n = 1 Eng. P. C. 136n.

nevertheless, to have decided against the condemnation of the petroleum in question, so far as it was not actually afloat on board the *Roumanian* at the time of seizure. They admitted that during the war no order for restitution or release could properly be made in favour of the German owners, but they suggested that the proper course was to hand the petroleum over to the Public Trustee or some other official for safe custody until the restoration of peace. No case where any such course has been pursued was cited. The real question is whether the petroleum in question is, according to the law administered by Prize Courts in this country, properly the subject of maritime prize, although locally situated on shore. All enemy ships and cargoes which may, after the outbreak of the war, be found afloat on the high seas or in territorial waters or in the ports or harbours of the realm are liable to seizure as maritime prize. The petroleum in question was undoubtedly enemy property. It was undoubtedly on the high seas at and after the declaration of war. It became liable to seizure as prize as soon as war was declared. It did not cease to be so liable by being carried into Dartmouth, or thence to Purfleet. It clearly remained so liable while still afloat. Did it cease to be so liable when pumped into the tanks of the British Petroleum Co., Ltd. ? In the course of the argument counsel were asked to suggest some intelligible reason why it should cease to be so liable. No satisfactory reason was suggested, and their Lordships have been unable to discover one for themselves. The argument of counsel was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize, unless possibly they could be considered as locally situate within a port or harbour, and that the tanks of the British Petroleum Co., Ltd., could not be considered as part of the Port of London. There is, in their Lordships' opinion, no ground for this assumption. The test of ashore or afloat is no infallible test as to whether goods can or cannot be lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize. The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of *Brown* v. *Franklyn* (6), quoted in Lord Mansfield's judgment above referred to. Brown and Burton, the masters of a vessel belonging to the East India Co., seized enemy goods on land. They had no letters of marque. The King's Proctor instituted proceedings in the Prize Court, and, having obtained a condemnation of the property as prize, proceeded against Brown and Burton for an account. The latter instituted proceedings at common law for a prohibition on the ground that the goods taken were on land, but relief was refused. Moreover, Lord Mansfield, in *Lindo* v. *Rodney* (4) expressly approves an admission made by counsel in that case to the effect that it would be "spinning very nicely" to contend that, if the enemy left their ship and got on shore with money, and were followed on land and stripped off their money, this would not be a lawful maritime prize.

If this be, as it seems to their Lordships to be, good Law, the present is an *a fortiori* case. In the case put by counsel the landing of the goods was made by the enemy with the object of escaping capture afloat. In the present case the landing was by British subjects, who had the enemy goods in their possession and did not know what else to do with them, and were pursuing a course recommended by the Board of Trade, and in no way intended to prejudice the Crown's rights.

With regard to the authorities quoted in this connection, they have, in their Lordship's opinion, with one possible exception, no real bearing on the point. In *The Hoffnung* (7) the cargo seized on shore had been landed and sold prior to the declaration of war. These goods, therefore, even if enemy goods at all, were never liable to seizure as prize. They were not in fact seized, nor was any proceeding taken against them, but an attempt was made to recover, against the ship which had brought them, the value of the goods so sold, the ship itself belonging to a neutral. This claim was rejected by the Court. It was held that, unless it could be shewn that the hand of capture had been employed on these goods in the quality of cargo, the Court could not go back to affect them in any other character. The same principle was recognised in

(6) [1698] Carth, 474.
(7) (No. 3) 6 C. Rob. 383=1 Eng. P. C. 583.

The *Charlotte* (8) in which it was held that the proceeds of goods landed and sold prior to the seizure of the ship, and never themselves seized, were not amenable to the jurisdiction of the Court.

In *Brown* v. *The United States* (9) it was decided, on the facts, that the goods in question were in the position of enemy goods found on American soil at the commencement of the hostilities, and not, therefore, the subject of maritime prize. That case, therefore, is clearly distinguishable from the present.

The only case which raises any difficulty is that of *The Ooster Eems* (5). There is no satisfactory report of this case. It is mentioned in the note on page 284 of 1 C. Rob. and in the preface to *Hay and Marriott's Decisions*, p. xxvii. Their Lordships have, however, examined the papers relating to it preserved in the Record Office. The *Ooster Eems* was a Prussian, and, therefore, a neutral vessel. It was stranded on the Goodwin Sands on a voyage from Texel to the East Indies. Before it broke up part of its cargo was sent ashore, including some boxes of silver coin. The latter were deposited by the master with the Prussian Consul at Deal. One Jeremiah Hartley, an officer of the Court of the Cinque Ports, acting under an order of attachment issued by such Court sitting as an Admiralty Court, seized and obtained possession of the goods so landed, including the boxes of silver, on behalf of the Warden of the Cinque Ports. The seizure may have been intended to be a seizure of enemy goods as maritime prize, though their Lordships have been unable to ascertain that the Court of the Cinque Ports had any jurisdiction in prize. The Warden took no proceedings, either in his own or any other Court, with a view to having the goods lawfully condemned. The master therefore obtained from the High Court of Admiralty in England a monition requiring Jeremiah Hartley and the Warden, and all others whom it might concern, to appear and proceed to the legal adjudication in that Court whether the goods seized were lawful prize or not. The King's Proctor subsequently intervened. Certain depositions were filed which appeared to raise some suspicion that the goods were Dutch, and therefore enemy goods, but there was no real evidence to that effect. The master deposed that he did not know to whom the goods belonged, and, under these circumstances, one would have expected that the Court would have acted on the presumption arising from the fact that the ship was a neutral ship. The Court, however, made an interlocutory decree condemning the goods on the ground that the goods, which apparently were assumed to be enemy goods, were not at the time of seizure "in a privileged vehicle or on neutral territory." All questions between the Crown and the Warden were reserved. The master appealed to the Lords Commissioners of Appeal in Prize, and on such appeal the order for condemnation was discharged, not on the merits, but, in the words of the Privy Council Journals, on the ground that "the High Court of Admiralty in England, the Court appealed from, had not a jurisdiction over the goods seized and proceeded against in this cause."

The records of the Privy Council do not contain any note of the reasons which led to this decision. It would appear, however, from the case of *The two Friends* (10) that Lord Stowell had before him some note of these reasons, for he represents Lord Thurlow as saying that "the goods in question had never been taken on the high seas, but had only passed in the way of civil bailment into civil hands, and were afterwards arrested as prize." If this be correct, it may mean that, in the opinion of the Lords Commissioners, it is the local situation of the goods seized as prize, and not the seizure as prize, which determines the jurisdiction of the Prize Court, a decision diametrically opposed to the judgment of Lord Mansfield in *Lindo* v. *Rodney* (4), which had been pronounced only three years previously. On the other hand, it may mean that the goods in question were not liable to seizure as prize; because they were not on the high seas, but on land, in which case Lord Thurlow was deciding the very point which he held the Court of Admiralty had no jurisdiction to decide, and he ought to have ordered the restitution of the goods to the master instead of leaving that somewhat hardly used individual to his remedies at common law, in the assertion of which he would have in some way or other to get over Lord Mansfield's judgment to the effect that prize or no prize could only be determined in a Prize Court.

(8) 1 C. Rob. 386n. =1 Eng. P. C. 585n.
(9) 8 Cranch (Amer) 110.

(10) 1 C. Rob. 271 =1 Eng. P. C. 130.

Moreover, it is almost impossible to suppose, in the then state of the authorities, that Lord Thurlow thought that, to constitute lawful prize, the seizure must have been on the high seas. It was already well settled that enemy ships and goods in the ports or harbours of the realm were the subject of maritime prize. It was equally well settled that enemy goods on enemy territory seized by the maritime forces of the Crown, or persons having letters of marque, could properly be condemned as prize. It, therefore, he used the expressions attributed to him by Lord Stowell, some other explanation must be found.

In their Lordships' opinion a reasonable explanation of the case and of Lord Thurlow's words may be found in the following consideration. It appears that the Court of the Cinque Ports, in its capacity as an Admiralty Court, had taken possession of the goods at the instance of the Lord Warden. There was, therefore, a matter pending in the Cinque Ports which, so far as their Lordships can discover, was not a Court of Prize. The effect of the monition was to remove this matter to the High Court of Admiralty for trial there. In so trying it, the High Court would be exercising an Admiralty, and not a prize jurisdiction. As appears by Lord Mansfield's judgment in *Lindo* v. *Rodney* (4), in order to found an Admiralty jurisdiction, the complaint must be made of something done on the high seas. This explanation would fully account for the words used by Lord Thurlow, though it must be admitted that Lord Stowell took a different view as to what he meant. In any event their Lordships do not consider that *The Ooster Eems* (5) has any value as an authority. It has never been followed, and apparently has been cited twice only, and in each case distinguished. It is so cited and distinguished in *The Two Friends* (10) above referred to, and also in *The Progress* (11). In the last mentioned case certain British ships with their cargoes had been captured by the French. It is not clear whether they were captured at sea and taken into Oporto after the French occupation, or whether the French found them in the harbour of Oporto when they took possession of it. The French appear to have landed part of the cargoes, which was warehoused on shore at the time when the military forces of the Crown took Oporto. It was, however, held, upon the facts, that there had been a capture by the French, and a recapture by the military forces of the Crown of both ships and cargoes.

Lord Stowell allowed a claim for salvage on the part of the military authorities in respect of that portion of the cargoes which had been landed, as well as of the ships, and that portion of the cargoes remaining on board. He distinguished *The Ooster Eems* (5) on the ground, as their Lordships understand the decision, that the master of the *Ooster Eems*, in landing the goods, was acting within his authority derived from the owners of the goods, whereas the landing in the case which he was considering had been effected by persons acting without authority from, and contrary to, the interests of the owners. The same ground of distinction would appear to be applicable to the case their Lordships are considering. The petroleum was not warehoused pursuant to any authority given by the owners, but in breach of the contract for its carriage to Hamburg, and, so far as the owners were concerned, this was as much a hostile act as the landing of the goods by the enemy captors in the case of *The Progress*. In neither case, to use Lord Stowell's expression, was the continuity of the character of the goods landed as cargo in any way interrupted.

There are only two other cases which need to be referred to in this connection. The first is that of *The Marie Anne*, cited. In this case, at the outbreak of the war with France on 16th May 1803, *The Marie Anne*, a French ship, was under repair at Ramsgate, and certain parts of her cargo had been landed and were warehoused. Both the ship and the goods so landed were seized as prize, and in due course condemned as such.

There is no record of the reasons which influenced the Court. It may be that the warehouses in which the goods were deposited were considered as part of a harbour or port of the realm, so as to bring the case within the ordinary definition of goods liable to seizure as prize. It may be that the goods, having been temporarily landed while the vessel was repaired, were still considered as part of the cargo, though not actually on board. The case, however, is clearly inconsistent with the proposition that goods seized on land cannot be lawful prize. The

(11) [1810] Edw. 210.

same may be said of the case of *The Berlin Johannes* (12) if, as would appear to be the case, the goods already landed were seized and condemned as prize.

If these decisions turned on the question whether the goods, though landed, were still in port, they are authorities against the appellants, for no valid distinction can be suggested between a warehouse for the receipt of goods brought into harbour by sea and the tanks in which, in the present case, the petroleum was stored.

Their Lordships, therefore, have come to the conclusion that the petroleum on board the *Roumanian*, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Co., Ltd., for safe custody, and that therefore its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm, but it is unnecessary to decide this point.

For the reasons hereinbefore appearing their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

T.A.R. *Appeal dismissed.*

Solicitors for Appellants—Ince, Colt, Ince & Roscoe.

Solicitors for Respondents—Treasury Solicitor.

(12) Rothey's Prize Dr ats 125.

A.I.R. 1915 Privy Council.

(FROM JAMAICA)

8th July 1915.

LORDS DUNEDIN, SHAW OF DUNFERMLINE, SUMNER AND SIR EDMUND BARTON.

Ward and *Others*—Appellants.

v.

Brown and *Others*—Respondents.

On Appeal from the Supreme Court of Jamaica.

Will—Construction of—Ambiguity in certain portions—Remedy is to read whole will together—Vesting of executory gift is a morte testatoris—Defeasance clause is referable to the prescribed period of distribution—Intention of the testator.

A testator directed by clause 7 of his will, that the trustees named therein should stand possessed of his residuary estate in trust to pay out of the income, certain annuities to his wife and children, and that immediately after the decease of his wife, they shoud stand possessed of the residuary trust-funds for all his children in certain proportions and shares. Clause 8 provided as follows:—"If any child shall die in my life-time or *after my decease* leaving a child or children who shall survive *me*, then and in every such case such last mentioned child or children shall take and if more than one, equally between them, the share which his or her or their parent would have taken, of and in the residuary trust funds if such parent had survived me."

Held (1) that the provided shares of the residuary estate vested in the children of the testator from his death. [P. 150, C. 1.]

(2) That the construction of clause 8 that grand children could not take unless their parent died in the testator's lifetime conflicted with the phrase "*after my decease*" and on the other hand vesting *a morte*, and no later, is indicated by two expressions referring to children and grand-children as surviving "me," and hence the whole will must be read together according to the ordinary principle set forth in *Chunilal Parvatishankar* v. *Bai Samarth*. 38 Bomb. 399. [P. 149, C. 2 and P. 150, C. 1.]

(3) That clause 7 disclosed the mind of the testator on the important subject of the realisation and distribution of the estate which was to take place at the death of his widow and therefore in the event of the death of any child before that event, the vesting of that child's share was subject to defeasance in favour of his or her child or children. [P. 150, C. 1.]

O'Mahoney v. *Burdett*– approved.

Chunilal Parvatishanker v. *Bai Samarth*, 38 B. 399, followed.

R. Finlay, H. Terrell and *Beaumont*—for Appellants.

A. Grant and *Lavington*—for the infant Respondents.

Cave and *Israel Davis*—for the Respondent trustees.

Lord Shaw of Dunfermline.—This is an appeal from an order of the Supreme Court of Jamaica, dated 14th July 1914, which affirmed a decision of the Chief Justice of Jamaica, dated the 28th April 1914.

The question raised is as to the construction of certain portions of the will of Lieutenant-Colonel the Hon. Charles James Ward. The will is dated 24th September 1913. Col. Ward the testator died on 7th December 1913.

The clauses raising the point of construction are these:

"7. I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust that my trustees

shall sell, call in, and convert into money the same or such part thereof as shall not consist of money and shall with, and out of the moneys produced by such sale, calling in, and conversion, and with, and out of any ready money, pay my funeral and testamentary expenses and the legacies and bequests bequeathed by this, my will, or any codicil hereto and shall invest the residue of the said moneys by placing same on deposit in the Colonial Bank and the Bank of Nova Scotia or either of the said banks at their discretion and shall stand possessed of the said residuary trust moneys and investments for the time being representing the same and the income arising therefrom (hereinafter called the residuary trust funds) in trust to pay out of the said income thereof during the life of my said wife the following annual payments (payable in equal monthly instalments):—to my said wife, six hundred pounds; to my son Charles Ward, four hundred pounds; to my son Arthur Claud Ward, six hundred pounds; to my son Harry Ward, five hundred pounds; to my son Frank Ward, five hundred pounds; to my daughter Mrs. McGrath, four hundred pounds; to my daughter Mrs. Haggart, four hundred pounds; and to my daughter Sybil Ward, three hundred pounds. And from and immediately after the decease of my said wife my trustees shall stand possessed of the residuary trust funds in trust for all my said children in the following proportions and shares:—to each of my said sons a sum equivalent to four twenty-fifths of the said residuary trust funds and to each of my said daughters a sum equivalent to three twenty-fifths of my said residuary trust funds.

"8. If any child shall die in my life-time or after my decease leaving a child or children who shall survive me then and in every such case such last-mentioned child or children shall take and if more than one equally between them the share which his or her or their parent would have taken, of and in the residuary trust funds if such parent had survived me."

On 22nd December 1913, the will was duly proved by the executors named therein.

The testator was survived by his widow and by all of the seven children above named. They are all still alive with the exception of Captain Arthur Claud Ward, who died in action in France since the suit was instituted, on 26th August 1914. His widow and two infant children have been made parties to this appeal. Some of the other six children of the testator have children; some have not. The details are unnecessary. The true contest in the case has reference to the vesting of the shares of estate dealt with, in the clauses above quoted. By the originating summons, a question, the only one brought before the Board, was put to the Court as follows:—

"Whether each of the plaintiffs (the testator's children) take a vested interest in respect of his or her proportion and share in the residuary trust funds bequeathed to him or her under the will of the said testator."

It is somewhat unfortunate, in the opinion of their Lordships, that the answer, as worded by the Courts below, is indirect and negative in form. But the Board does not differ in substance and result from the judgment as that is explained by the learned judges of the Supreme Court.

Both parties admitted in argument that under the clauses quoted there was vesting *a morte testatoris* in the testator's children, they having survived him. The appellants maintained that this vesting was absolute. The infant respondents, on the other hand, maintained that in the case of the death of any child before the period of distribution, namely, the death of the testator's widow, and of such child leaving children—the vesting of the particular share was subject to defeasance in favour of such grandchildren.

Clause 8 of the will does undoubtedly raise difficulty. The appellants' contention was that grand-children could not take unless their parent had died in the testator's lifetime. The will says, however, "if any child shall die in my lifetime *or after my decease*" and so the appellants boldly contend that the words "or after my decease" should be struckout The respondents, on the other hand, are met by the fact that vesting *a morte*, and no later, is indicated by two expressions in the same clause referring both to children and grandchildren as surviving "me"; and they boldly contend that the word "me" should be struck out.

Fortunately clause 7 does not a little to help towards a solution. That clause makes clear what was the mind of the testator on the important subject of the realization and distribution of his estate. These were to take place at the death of his widow. She and each of his seven children were provided with fixed annuities to be paid during the period of his widow's survivance. All were provided with a minimum income until the widow's death, and thereupon and once for all the estate was to be divided.

Their Lordships think this consideration is paramount, and that language used by the testator bearing on the death of any of his children leaving children is *prima facie* referable to a child's death occurring prior to the distribution of the estate. To select for preference grandchildren born of a child who had predeceased himself, and to exclude from the succession grand-children born of a

child who had survived him but predeceased his wife—this preference and exclusion to take place in regard to grand-children all of whom had been born and all of whose parents had died prior to the appointed distribution of the estate—this does not appear to accord with the intention of the testator.

While it would not be sound to hold that any defeasance could take place subsequent to the prescribed period of distribution, their Lordships are of opinion that at and up to that period defeasance in favour of grand-children can, and was intended to occur. The language of Lord Hatherley in *O'Mahony* v. *Burdett* shows the importance of the consideration as to the date of division and its bearing on the question of defeasance—

"In those cases where the Court has found upon the face of the will a positive direction to pay over the personality to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, 'we hold this defeasance to be before that period of distribution arrives, holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who having it in their hands, will of course spend it without any further trust, and on the other hand that a subsequent event, namely a certain person, dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise."

The assistance derived from clause 7 thus enables the ambiguity caused by clause 8 to be cleared up. The whole will must of course be read together, according to the ordinary principle set forth in many authorities and recently by this Board in *Chunilal Parvatishankar* v. *Bai Samrath* (1).

Their Lordships will humbly advise His Majesty that the appeal be dismissed, but that the judgment of the Supreme Court be varied in its declaration, and that it be declared that the plaintiffs under the provisions of the will acquired on the death of the testator a vested interest liable to defeasance in the event of any of them dying in the lifetime of the testator's widow leaving a child or children.

(1) [1914] I.L.R. 38 Bomb. 399.

The costs of all the parties, taxed as between solicitor and client, will come out of the estate.

T.A.R. *Appeal dismissed.*

Solicitor for Appellant and infant Respondents—Tippetts.

Solicitor for trustee Respondents—F. W. Atkinson.

A.I.R. 1915 Privy Council.

(FROM AUSTRALIA)

25th January 1915.

VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, LORD SUMNER, AND SIR JOSHUA WILLIAMS.

Attorney-General for the State of New South Wales (*At the Relation of A. A. Cocks* and *others*)—Appellant.

v.

J. L. Williams—Respondent.

On Appeal from the High Court of Australia.

Charitable trust— New South Wales Authority of, State Executive for dedication to public use of Governor's residence on Crown lands, whether same were "Waste lands" or not under New South Wales Constitution Act, 1855 (18 *and* 19 *Vict., C.* 54), *S.* 2.—*Temporary permission for public use does not constitute charitable trust—Proceedings incompetent without a party representing Crown in right of United Kingdom—Capacity of Attorney-General of the State.*

Government House, Sydney, was built upon Crown land about 1845 and used as the official residence of the Governor of New South Wales until 1900. From 1900 to 1912, by an arrangement between the Governments of the Commonwealth of Australia and New South Wales, the premises were occupied by the Governor-General, the Governor of the State being provided with another house. This arrangement came to an end in 1912, and the State Government threw open to the public the grounds attached to Government House and decided upon extensive alterations in the stables for converting the same into a school of Music. The Attorney-General of New South Wales, on the relation of sundry private persons, filed an information praying for declarations that the said house and ground were vested in His Majesty, dedicated to the public purpose of a residence for the sovereign's representative in New South Wales and that neither the Governor of New South Wales nor the Governor-in-Council has power to interfere with or alter that purpose and for an injunction against the respondent as

representing the State Government and ministers from using the house and grounds otherwise :—

Held, that the suit was not maintainable, since no trust in favour of the public had been declared or charity established and what was granted was a bare temporary permission or revocable license and that the action complained of was that of the Executive of the State and within its powers, whether the house and ground were "waste lands" within 18 and 19 Vict. C. 54, S. 2 or not. [P. 152, C. 1 and 2, P. 152, C 1.]

Held, further that the action was defectively constituted, as it was contended that the property and the right of administration of the premises was in the Crown in right of the United Kingdom, but the Crown in that right was not represented before the Courts, and the defect, though formal, was grave and made the proceedings as constituted incompetant. [P. 152, cols. 1 and 2.]

P. O. Lawrence, and *Alfred Adams*—for Appellant.

R. Finlay, *Austen-Cartmell*, and *F. L. V. Coffey*—for Respondents.

Lord Sumner.——Government House, Sydney, stands in extensive grounds on Sydney Harbour, between Sydney Cove and Farm Cove. It was built about seventy years ago, and down to the end of the last century was always used as the official residence of the Governor of New South Wales. It replaced an earlier Governor's residence, the stabling of which alone survives, "consisting of a mass of modern Gothic buildings" the Gothic of 1817—"built by Governor Macquarie on a handsome scale." It was built at the instance of the Governor for the time being for the use of himself and his successors. In this sense, and in this only, has it been "appropriated" to the use of the Governor of New South Wales. At no time had members of the public any right to use it. They visited it as His Excellency's guests, or resorted to it on business connected with his office, but it was always his personal residence, and was as private as is possible in the case of a person holding so eminent an office. It was a public building on a public domain only in the sense that the property was in the Crown, and the Crown granted the use of it to a public official.

In 1900, after the passing of the Commonwealth Act, by an arrangement made between the Government of the Commonwealth of Australia and the Government of New South Wales, the house and grounds were occupied by His Excellency the Governor-General of the Commonwealth as his Sydney residence, another house at Sydney being provided by the Government of New South Wales as the residence of the Governor of the State. This arrangement was terminated in 1912, and Government House became untenanted. At the end of the year, after some trifling alterations such as the removal of sentry boxes and fences and the provision of notice boards and paths, the grounds were thrown open to the public, the Premier of New South Wales attending and making a public announcement to this effect. No change was made in the house, but the public was admitted to see the ground floor twice a week. For all that appears what was done was temporary and, if the present house of the Governor of the State were disposed of, he might resume residence in the dwelling of so many of his predecessors. In the stables, however, more extensive alterations were decided upon ; the buildings were to become a conservatorium or school of music.

It was in these circumstances that the appellant, the Attorney-General of New South Wales, on the relation of sundry private persons, filed the present information praying declarations that "the said house and grounds are vested in His Majesty the King, dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales," and that "neither the Governor of New South Wales nor the Governor in Council has power to interfere with or alter the said purpose to which the said house and grounds are dedicated," and asking for an injunction against the defendant (who had been duly nominated under the Claims against the Government and Crown Suits Act, 1912), as representing the Government of New South Wales, the ministers, officers, and servants of the Crown, from using the house and grounds otherwise than in accordance with such declarations.

The evidence that the Government of New South Wales threatened and intended to act in substantial contravention of such declaration was inconsiderable, but their Lordships do not stay to observe upon this. It satisfied the Supreme Court of New South Wales, which unanimously granted the declarations and the injunction. The High Court of the Commonwealth discharged them unanimously. The question to be decided is a question of right ; the respondent does not contest that, failing any right, those whom he represents have, in some and a sufficient degree, formed and acted upon an

intention not consistent with the terms of the declarations.

The appellant's case originally was that the property in question had been affected by something in the nature of a declaration of trust. They were said to have been "dedicated to public use," and when it became apparent that the case was not one of dedication in the proper sense of the term, and that no highways across the premises had been dedicated at all, it was said that the grounds of Government House had been "appropriated to the use of the public".

This vague term, more consistent with a bare temporary permission or a revocable licence than with anything which could be the foundation of a definite permanent right, became eventually the symbol of something supposed to be in the nature of a charitable trust, and thus it was that the commencement of proceedings in the name of the Attorney-General on behalf of the Crown was justified.

Their Lordships are in entire accord with the High Court of the Commonwealth in thinking that no such case was made out and that no trust was declared and no charity established. It would be superfluous to add to the reasons with which this conclusion was supported in the cogent judgments delivered in the Court below.

It is admitted that the property in the premises in question is vested in the Crown, and thus Courts of law have been asked to pass judgment upon the use which ministers, of the Crown are making of Crown property. No private person, natural or Corporate, has any civil right therein, and the complaint is no more private than that which any member of the public may make, on what he deems to be public and patriotic grounds, against the conduct of an administration in relation to what is popularly called "public property". It is evident that the appellant is at once faced with many difficulties, not all of which need to be discussed now.

Their Lordships feel, as the High Court of the Commonwealth felt, that the action is defectively constituted. The Attorney- General of New South Wales proceeds against a subordinate of his own, the representative defendant abovementioned; but if, as is contended, not only the property but the right of administration of the premises is in the Crown in right of the United Kingdom, no one appears before the Courts to watch its rights or to state whether or no what has been done is or is not authroised or ratified by His Majesty on the advice of his ministers. This defect, though formal, is grave, for their Lordships cannot in such a matter supply the deficiency by inference, or by information of less than the highest authority. They agree with the High Court that the proceedings as constituted are incompetent, but they agree also that it is better not to dispose of a case which has attracted some public concern, merely on this formal ground.

When first the grounds of Government House were marked out and the house was built, it was by the Governor of New South Wales that they were administered, in correspondence with and under responsibility to the Secretary of State. Accordingly the area of the grounds was diminished from time to time. The house itself was always occupied by the Governor as one of his residence, but under directions from the Secretary of State, it might doubtless have been used for other purposes. In due time an Executive Council was established, upon whose advice the Governor performed various executive acts. After the Constitution Act of 1855 came into force, the Executive was the Governor acting upon the advice of ministers.

It has been much questioned whether Government House and its grounds were "waste lands" within 18 and 19 Vict., c. 54, S. 2, so that the management and control of them passed to New South Wales thereby, but in their Lordship's opinion it is not necessary to decide the point. If the premises are "waste lands", there is nothing to show that what has been done has been done otherwise than in the strictest accordance with constitutional usage. Whatever jurisdiction there may be in certain events to consider judicially the effect of ministerial acts, when a Governor is not in accord with ministers, or of a Governor's acts if ministers have not advised them, no question of invoking such jurisdiction arises here.

Equally, if Government House remains outside of the operation of 18 and 19 Vict., c. 54, the Governor is entitled to have ministerial assistance both in the way of consultation and of executive action. Their Lordships agree with Mr. Justice Isaacs that "the absence of what has

been called 'executive authority' for the determination of ministers to apply the land to the new purposes" is not material in the present proceedings. It cannot be said, saving always the rights of the Crown of the United Kingdom, that anything illegal or even irregular has been done *qua* the people of New South Wales if the Governor has exercised his authority, as the officer of the Crown, in respect of property held by the Crown in right of the United Kingdom, upon the advice and by the ministration of the Ministry of New South Wales. There is nothing which requires him to act in such a matter by a solitary determination or by his own single effort. Though the personal intervention of the Governor is not shown in the present case, and even if it be assumed that it was absent, the action taken is that of the Executive and is within its competence on either hypothesis as to the construction of the Constitution Act. No question arises of any obligation on the part of the Governor to take or to abide by the advice of the Ministry of New South Wales, assuming the premises not to have been "waste lands" within 18 and 19 Vict., c. 54. It therefore appears to their Lordships that the appellant fails *in limine*, for nothing that has been done is shown to have been *ultra vires* or irregular.

It was indeed contended that this property could not be disposed of without some legislative act, and that none such is shown or suggested to have taken place. Their Lordships think that this point, which does not appear to have been raised in the Courts below, has been taken under a misapprehension. The argument refers to permanent dispositions, alienations or the like. Here, on the evidence, nothing irrevocable has been done. The railings and sentry boxes can be restored, and the public can be excluded from the grounds. The professors can be dispersed from the conservatoire, and the horses brought back to their stables. There may be some disappointment and even discontent, and some expense more or less considerable, but if, when the lease of the Governor's present residence expires, it should be decided that he should once more occupy the house of his predecessors, it does not appear that there has been any disposition or irrevocable change to prevent it.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs.

T.A.R. *Appeal dismissed.*

Solicitors for *Appellant*—Crawford, Chester and Slade.

Solicitors for *Respondent*—Light and Fulton.

****A.I.R. 1915 Privy Council.**

(FROM QUEBEC.)

25th June 1915.

VISCOUNT HALDANE, L.C., LORD DUNEDIN AND LORD ATKINSON.

Canadian Pacific Railway Company—Appellants.

v.

Frechette—Respondent.

On Appeal from the Court of King's Bench for the Province of Quebec (Appeal Side).

(a) Tort-Negligence—Quebec—The Law of Quebec on contributory negligence differs from the Law in England as it awards damages proportionate to the culpability of the parties. This is inapplicable when the plaintiff's negligence is the sole effective cause.—The term "Contributory negligence" defined.

The respondent was serving as a brakesman shunting a freight wagon on the line of the appellant company at Quebec. The line and the electrical apparatus for lighting belonged to and were controlled by the Commissioners of Quebec harbour. In obedience to S. 264 of the Canadian Railway Act, 1906, the appellant company had provided the Tower Coupler, a reasonably effective machine for coupling and decoupling. To work the lever, under the orders of the foreman, he went in between the waggons, while the train was in motion. He was knocked down and severely injured. In an action for damages for personal injuries,

Held:—(1) The Law of Quebec differed from the Law of England on the question of contributory negligence as laid down in *Tuff* v. *Warman*, *Radley* v. *Lond, and North Western Railway Co.*—Referred to. [P. 156, C 1.]

In Quebec, notwithstanding proof of contributory negligence by plaintiff, a kind of penalty proportioned to his culpability would be inflicted on him and the sum deducted from what would otherwise have been awarded to him. [P. 156, C 2.]

Nichols Chemical Co. of Canada *v.* Lefebere.—Referred to

(2) Where the sole effective cause of an accident is the plaintiff's own negligence, he is not entitled to damages and the law awarding damages proportionate to the degree of negligence of the respective parties will not apply. [P. 156, C 2.]

George Mathews Co. *v.* Bouchard—approved.

The true sense of the term "Contributory negligence," is brought out only when both parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it, and if the negligence of either party falls short of this, it is irrelavent. [P. 156, c. 2.]

Thomas v. *Quartermain; Metripolitan Railway Co.*, v. *Jackson, Dublin Wicklow and Wexford Ry. Co.* v. *Slattery*—Referred to.

An act of negligence not coming within the definition set out would be an *injuria* but not an *injuria dans locum injuriae.* [P. 156 c. 2.]

Davey v. *London and South Western Railway Co.*, *Macleod* v. *Edinburgh and District Tramways Co.*, *Grand Trunk Railway* v. *McAlpine*—followed.

(*b*) *Tort—Damage—Volenti Non Fit Injuria*

The doctrine of *Volenti Non Fit Injuria* is applicable only when (1) the plaintiff fully knew the risk he ran by his act and (2) voluntarily incurred such risk. [P. 157 c. 2.]

Smith v. *Baker*—Referred to. *Sword* v. *Cameron, Bovitonshill Coal Co.* v. *Reid*—Distinguished.

Robert Finlay and *G. G. Stuart* (*Geoffrey Lawrence with them*)—for Appellants.

Leslie Scott and *J. N. Francoeur*—for Respondents.

Lord Atkinson.—This is an appeal from a judgment of the Court of King's Bench of Quebec (Appeal Side), dated 9th March 1914, confirming the judgment of the Superior Court, sitting in review, dated 28th November 1913, whereby damages amounting to the sum of $ 12,000 were, in accordance with the verdict of the jury which tried the case, awarded to the respondent in respect of personal injuries sustained by him through the negligence of the appellants, while he was engaged in working as a brakesman shunting a freight car or waggon on the line at Princess Louise Basin at Quebec. This line and the electrical apparatus for lighting it belong to and are controlled by the Commissioners of Quebec Harbour.

By S. 264 of the Canadian Railway Act, 1906, it is provided that

"Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means—.....(c) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars."

In obedience to this enactment the appellants have equipped most of their freight cars at each end with a certain coupling and decoupling machine called the Tower coupler. It is unnecessary to describe in detail the mechanism of these machines further than to say that the portion of each called the knuckle, designed for coupling the cars by impact, is kept close and in position by an iron pin or peg which fits into a sheath or socket in the knuckle, and that when this pin is withdrawn from its sheath the knuckle opens and the cars, there to fore coupled together, become detached from each other. These pins are each attached to one end of a lever fixed to the car. The other end or handle of the lever projects beyond the side of the car to such an extent that it can be worked so as to raise the pin by a person standing on the permanent-way, but clear of the car. The fore and aft levers of each car project beyond opposite sides of the car. If that, on one end of the car projects beyond its left side, that on the other end projects beyond its right side. It was not disputed that when there is a strain on the coupling mechanism, which may happen in many ways, the pin may be nipped so tightly by the knuckle that it cannot be withdrawn by the action of the lever, and that it is only at a moment when there is what is called a "slack" between the cars that the pin does not stick, and can be readily withdrawn by the action of the lever. But it was clearly proved, and was not, their Lordships think, seriously disputed, that thissticking of the pin does notshowthat the coupling machine is a defective machine. Strain will admittedly cause the pin to stick however perfect the machine may be.

The respondent was twenty-seven years of age at the time of the accident, was educated and intelligent. He had been about three months in the employment of the appellant company as a "spare" brackesman,—that is, one who may be discharged in the slack season if no berth be found for him at some other place on the line. On 13th October, 1912, he had work through the night. The electric lights on the jetty were extinguished about 1-30 a.m., but the men who were at work on the railway were furnished with lamps such as brakesman use, good of their kind. About 5 o'clock in the morning of this day an engine, with fourteen or fifteen waggons, bound for three different destinations, attached, was standing on one of the sets of rails on the main line. It became necessary to divide up this train and shunt those of the cars destined for Winnipeg into one siding, those destined

for Vancover into another, and those destined for Montreal into a third. The car furthest from the engine was to be shunted into the Winnipeg siding. The respondent was aware of all this and was helping in the work under the superintendance of a foreman named Ernest Tremblay. The respondent threw over the switch lever which was situated on the north side of the line of rails upon which the engine and cars were standing in order to let this foremost car pass into the Winnipeg siding, and, having done so, he recrossed the line to its south side. The engine was then pushing the car for Winnipeg up towards the points thus set, at a speed of about three miles an hour.

Tremblay signalled to the engine driver to stop the train, and then (at what interval of time is not clear) ordered the respondent to uncouple this truck. This the respondent proceeded to do. He tried to do it several times with the aid of the lever, but found that the pin was fixed and the machine would not work. He then, while the train was in motion, went in between the Winnipeg waggon and the succeeding waggon to endeavour to work the lever on the opposite side of the succeeding car. This he clearly deposes to. He failed to uncouple the cars. As he walked along between the cars his foot caught in the points, he was knocked down by the succeeding car and carried about twenty-five feet over the switches, when all the cars came to a standstill. He craweed out from under the cars; Tremblay then came to his aid and found him badly injured. The only negligence on the part of the appellants relied on by the respondent in his declaration were, *first*, their negligence in permitting this shunting to be done in the absence of light, and *secondly*, their negligence in providing a defective coupling machine. But the pleadings developed; much new matter was introduced, and new issues raised upon it.

The appellants in their answer, in addition to traversing the material averments in the declaration, pleaded: (1) that the accident was solely due to the respondent's own negligence, and that they were not guilty of any fault or negligence whatever; (2) that the coupler attached to this car was a patent coupler of approved design, and was in good order; (3) that there was no necessity for the respondent to have gone in between the cars for the purpose of uncoupling them (4); that even if it were necessary for him so to do, he should have given notice of this intention, and was bound to wait till the cars had stopped before attempting to enter between them while moving and that this was a grossly negligent act on his part, forbidden by the orders of the company; (5) that if he had any difficulty in working the coupler he should have signalled to the engine-driver, as he had a right to do, to stop the cars, and should have given the signal to start again only after he had got clear of the cars; (6) that the appellants were not responsible for the want of light; and (7) that its absence was not the cause of the accident.

The respondent replied to this answer by traversing its material averments, and pleading: (1) that it was necessary for him to go in between the cars to get the pin out and make the knuckle work, and that in so doing he had acted in the circumstances as all the other employees of the company act, and according to the practice followed not only on the appellants' line of railway, but on all other railways; and (2) that in doing what he did he conformed to the rules of the company, and the directions of his superior employees, namely, the yard master, John Vachon, and the foreman, Ernest Tremblay.

'On these pleadings the case went to trial. The learned judge who tried the case left seven questions to the jury. The five following, with the answers to them, are alone of importance on this appeal. They run thus:—

"3. Is the said accident due solely to the fault and negligence of the plaintiff, and if so, in what did such fault and negligence consist?—No.

"4. Is the said accident due solely to the fault and negligence of the defendants, their servants and employees, and if so, in what did such fault and negligence consist?—No.

"5. Is the said accident due to the common fault and negligence of the plaintiff and of the defendants, their servants or employees and if so, in what did the respective fault and negligence of each consist?—Yes. The plaintiff was imprudent in going between the cars to uncouple them. The defendant was very much to blame for not instructing the brakesmen, as no rules were shown to the jury that had a direct bearing on a shunter's work in a yard, making up trains. Frechette, after working all day, was called out to take Tweedell's place, who was hurt running to catch the engine in the dark. Tweedell fell and injured himself. Further, the defendants should not allow the shunters to make running shunts during a dark night when there was no light, only a signal lamp

of about one candle power, which was principally used for signalling. Further, the coupling apparatus was proven to be out of order, and Frechette, acting on orders from Tremblay to uncouple the car, tried to lift the pin on the other car. If there was a double lever attachment, it would not be necessary to do so. We find the defendants very negligent for not stopping the work when the lights went out.

"6. Has the plaintiff suffered damage by reason of this accident, and if so, for what amount ?—$ 15,000.

"7. If you replied affirmatively to question No. 5 what amount do you deduct from the damages suffered by the plaintiff ?—$ 3,000."

The appellants rely strongly on the answer to the 5th question as proving that the jury were misdirected and misled by the learned Judge in his charge, in as much as they appear to have based their verdict to a large extent upon what they supposed to be improper methods of managing the business of the railway adopted by the appellants. Even if this were so it was irrelevant, as these methods did not materially, or at all, contribute to the plaintiff's injury, and upon this ground, with others, the appellants contend that they are entitled at the least to have the verdict set aside and a new trial granted.

But their main attack was directed against the answer of the jury to the third question. They contend that the evidence clearly establishes that the respondents' own negligence was the sole effective cause of the injury which he received; that having regard to that evidence, no reasonable man could find as the jury have, in fact, found in answer to this question; and that as it is a crucial question the verdict should be set aside and judgment be entered for them.

There is no doubt that the law of Quebec differs from the law of England on the question of contributory negligence properly so called. If one takes, for example, such a plea of contributory negligence as might be framed in conformity with the judgment by Wightman J. in *Tuff* v. *Warman* (1), to this effect:

> "That the plaintiff himself so far contributed to the misfortune by his own negligence that but for such negligence on his part the misfortune would not have happened, and the defendants could not by the exercise of ordinary care and caution upon their part have avoided the consequences of the plaintiff's negligence."

Now that plea, if proved, would be a perfectly good defence in England—*Radley* v. *London and North Western Ry. Co.* (2). It would be no defence in Quebec. The Jury in Quebec, notwithstanding the proof of it, would be entitled to inflict a kind of penalty upon the plaintiff on account of his own negligence, proportioned, presumably, in their opinion to his culpability, deduct that sum from what they would have awarded to him had he been blameless, and give him a verdict for the balance: *Nichols Chemical Co. of Canada* v. *Lefebvre* (3). That is, in fact, what the jury have done in the present case.

But though this difference between the laws of the two countries on this subject does exist, it is equally certain that in Quebec, as in England, a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of that injury. In his judgment in *George Mathews Co.* v. *Bouchard* (4) Taschereau, J. said:

> "There is no evidence whatever that the negligence of the company, assuming negligence to be proved, caused the accident in question, and an affirmance of the condemnation against it would unquestionably be at variance with our own jurisprudence."

The other members of the Court took a different view as to the existence of evidence of the defendant's negligence, but did not dispute this principle.

The ground of this distinction between the two cases is this: the latter is not, in the true sense of the term, a case of contributory negligence at all. That term can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this it is an irrelevant matter, an *incuria*, no doubt, but to use Lord Cairns' words not an *incuria dans locum injuriae*. See Lord Bowen's judgment in *Thomas* v. *Quartermain* (5) and Lord Cairns' judgment in *Metropolitan Ry. Co.* v. *Jackson* (6).

(Here passages from the judgment of Lord Cairns were quoted). That was a very strong case. The carriage of the company in which Jackson, the plaintiff, was travelling got overcrowded at Gower Street; three people were standing in it. At Portland

(1) [1858] 5 C. B. (N. S.) 573.
(2) 1, App. Cas. 754.
(3) 42 Can S C R 402.
(4) 28 Can S C R 580.
(5) [1887] 18 Q.B.D. 685.
(6) [1878] 3 App. Cas., 193.

Road some people, from a crowded platform, opened the door of this carriage, and others tried to force their way into it. The plaintiff stood up to prevent them, the train suddenly moved on; the plaintiff to save himself from falling, put his hand upon the lintel, of the door, when a porter hastily slammed the door as the train was entering a tunnel, thereby catching the plaintiff's thumb in the door and crushing it. Yet, for the reasons stated by Lord Cairns, it was decided that the Judge at the trial should have directed a verdict for the defendant company.

In reference to the right of a defendant, albeit guilty of negligence not amounting to *incuria dans locum injuriae*, to have a verdict directed for him where the plaintiff's negligence is the sole effective cause of the injury in respect of which he sues, the same great judge laid down the guiding principle of the English law applicable to it in a well-known passage of his judgment in the case of *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (7) where he says:

"If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Metropolitan Ry. Co.* v. *Jackson* (6) as an *incuria*, but not an *incuria dans locum injuriae*. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction."

The principle thus laid down has been many times applied. It was applied in the case of *Davey* v. *London and South Western Railway Co.* (8), and quite recently in the cases of *Macleod* v. *Edinburgh and District Tramways Co.* (9) and *Grand Trunk Railway* v. *McAlpine* (10). In each of these cases the act upon which the risk of injury attended, and from which the injury sustained resulted, was done by the person who suffered the injury. The question, therefore, which was raised and was most discussed in the case of *Smith* v. *Baker* (11), namely, whether a man voluntarily incurred a risk attending his employment, where the act or negligence by which he was injured was the act or negligence of some person other than himself, did not arise in these cases.

In cases such as *Smith* v. *Baker* (11) it must be shewn (1) that the plaintiff clearly knew and appreciated the nature and character of the risk which he ran, and (2) that he voluntarily incurred it. Until both are established, the maxim *Volenti non fit injuria* cannot apply. If, however, a person, with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act, it must be assumed that he voluntarily incurred the attendant risk and danger and the maxim *Volenti non fit injuria* directly applies. Lord Halsbury pointed out this difference with great clearness. He said

("As I have intimated before, I do not deny that a particular consent may be inferred by a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complainant plaintiff himself, and where, therefore, the application of the maxim, '*Volenti non fit injuria*,' is completely justified.")

The first question to be decided, then, resolves itself into this: Does the evidence show that the respondent's own negligence was the sole effective cause of the injury which he sustained, that is, does it show that he, knowing the risk and danger of going in between cars in motion in order to uncouple them by means of this Tower coupler, voluntarily encountered that risk and danger, thereby sustaining the injuries he complains of? If he did so, then it must be held that there was no evidence before the jury upon which they could reasonably find as they have found in answer to question No. 3. The presence or absence of evidence sufficient in any given case, to support the finding of a jury as reasonable men is a matter upon which different minds may well come to opposite conclusions. The division of judicial opinion in the present case is proof of this. And every appellate tribunal, conscious of the great advantage enjoyed by a jury in having seen and heard the witnesses, and in having had the whole trial conducted

(7) [1878] 3 App. Cas. 1155.
(8) [1883] 12 Q.B.D. 70.
(9) [1913] S. C. 624.
(10) [1913] A. C. 838.
(11) [1891] A. C. 325.

under their observation, must feel reluctant to disturb the decision of such a tribunal. This applies in a special degree to this Board, which has to deal with the administration of justice in distant and dissimilar parts of the Empire, and has always desired to strengthen the well-deserved confidence of the local public, in their native tribunals; but if, despite this ever present desire, the Board, after careful examination of the evidence, comes to the conclusion that the verdict of the jury cannot be sustained, no course is open to it but to set that verdict aside. Any other course would amount to a judicial wrong, the punishment of a litigant for something for which he has not been proved to be answerable.

Now, since the respondent again and again admitted that he knew that in going in between freight cars while in motion to uncouple them, he endangered both his life and limbs, it could not be contended that he did not know and appreciate the risk which he ran. He was acquainted with the place, knew where the switches were and knew they were open, since he himself had opened them. If the darkness increased the risk, he must have been aware of that fact also. Accordingly the respondent's Counsel was driven to contend that, though his client knew well the nature and character of the risk he would run if he should act as he has done, he did not encounter that risk voluntarily, but, on the contrary, encountered it under the compulsion of a legal contractual obligation.

Basing himself upon the supposed likeness of the case of *Sword* v. *Cameron* (12), discussed at length by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (13), he argued, borrowing Lord Cranworth's language, that a negligent and defective system of carrying on the operation of shunting was allowed to grow upon the appellant Railway, according to which brakesmen were only required to operate uncoupling levers from outside the waggons so long as the coupling machines worked satisfactorily, but were not only permitted but were bound by the terms of their hiring to get in between cars when in motion for the purpose of uncoupling them whenever the pin happened to stick or the coupler did not work satisfactorily—that is that the brakesmen, including the respondent, were employed to discharge their duties as such according to this defective and negligent practice which was so permitted to prevail.

This, he admitted, was the way most favourable to him in which the contention could be put. It will be considered presently how far the principle of *Sword* v. *Cameron* (12) is applicable to the present case. Before proceeding further, however, it would be convenient to deal with the respondent's point as to the alleged defectiveness of the Tower coupler. (After a consideration of the evidence as to the Tower coupler the judgment proceeded) :—

The respondent himself admitted that in the best of couplers the pin may be held so tight sometimes that it will stick if there be not "slack" between the cars. He explained how this "slack" might be produced. Tremblay, his witness, proved that the Tower was the "*avant dernier*" patent, the Sharon the "*derinier*" patent, and that some of the former work was as satisfactory as the latter.

In addition three or four witnesses were examined on behalf of the appellants on this point, but not on the existence of this practice. They proved that this tower coupler was a patent automatic coupler, the very best of its kind; that its ordinary life was about ten to fifteen years; that about 75 per cent. of the Canadian Pacific freight cars were equipped with it; that it was used on many other of the great Canadian railways; that the Railway Commission, whose rules, regulation, and requirements all Canadian railway companies are bound to obey and comply with, approved of it; that the Sharon patented coupler was fifty pounds heavier than the Tower had the same inside mechanism but had the additional advantage of an attachment operating underneath; that the cars of the company were increased in size so that they were able to carry a load of from fifty to sixty tons, instead of twenty to thirty as theretofore; that the company equipped these larger cars with the heavier coupler because of its greater strength and its additional attachment; and that no cars are built in Canada with the levers attached to couplers running from side to side of the car.

This evidence was practically uncontradicted. Counsel for the respondent admitted,

(12) 1 S.S.C. (2nd Ser.) 493.
(13) 3 Macq. 266.

as indeed, according to a well established principle of law he was bound to admit, that the company were under no obligation whatever to their employees to equip their cars with the very latest improved coupler immediately after it was put upon the market.

Their Lordships are clearly of opinion that the evidence does not establish that the Tower coupler is a defective machine, or that the Company failed in any way in their duty to their Brakesmen to provide them with machines reasonably fit and proper for the work which those brakesmen had to do. The learned judge who presided at the trial was apparently of the same opinion.

It remains to deal with the evidence bearing on the main question in the case. Of the five witnesses examined on behalf of the respondent on this part of the case, two were former employees of the company, and three were existing members of the company's staff. The respondent himself gave evidence (After discussing the evidence their Lordships held that the rules prohibiting men between cars in motion was perfectly well known and they then proceeded.)

The necessity of observing it was impressed upon brakesmen, and they were fully aware of the dangers attending the transgression of it. The respondent must be bound by evidence given on his behalf. Now the argument advanced by his Counsel places him in this difficulty. If the respondent contracted to serve according to the defective system alleged to have been pursued, with or without light, he has no more right to recover for injuries arising from dangers inherent in that system than would a sailor, to take Lord Halsbury's illustration, be entitled to recover damages because he fell from the rigging when, in obedience to orders, he went aloft, or a jockey who was retained to ride in a steeplechase be entitled to recover damages because in the race he was thrown and injured, while if the defective system merely applied to acts done in the daylight or with clear and adequate artificial light, the respondent, knowing the dangers, as he admittedly did, was all the more rash and reckless in going in between the trucks at night. The case of *Sword* v. *Cameron* (12) was a very peculiar one and in their Lordships' view, bears no resemblance whatever to the present. There is no proof whatever in this case that this practice of going in between moving cars was ever tolerated or approved of by the Company, or the infraction of the rule against it systematically winked at by the Company or its officers, and still less proof that the respondent was hired to act under any circumstances in violation of the rule.

It was proved that the brakesmen, though directed to observe the rule, violated it occasionally at their own risk. A company such as this are not required to have every rule for the guidance of their staff printed or reduced to writing. If their employees are aware of the existence and terms of the rule, they are bound by it whether it be written or not. Negligence is a breach of duty, and their Lordships are quite unable to discover what is the particular duty owed by the appellant company to the respondent which the company has violated. They supplied their brakesmen with machines reasonably effective for the purposes required. They caused their staff to be informed that certain rules should be observed. The fact that their employees violated these rules cannot enlarge the duties which the company owed their staff, or impose new duties towards that staff upon them. The respondent has suffered very serious injuries, and is entitled to one's deepest sympathy; but on the whole case their Lordships are clearly of opinion that he is the unfortunate victim of his own rashness and recklessness and that consequently he has no legal claim against the appellant company since they have done him no legal wrong. With moral claims, if any, this Board has no concern. They further think that the answer to question No. 3 is not such as a jury could, on the evidence, have reasonably found. This appeal should therefore be allowed; the judgment appealed from overruled; the verdict found by the jury set aside; and a verdict entered for the appellants, and they will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

T.A.R. *Appeal allowed.*

Solicitors for Appellants—Blake and Redden.

Solicitors for Respondents—Lawrence Jones and Co.

****A.I.R. 1915 Privy Council.**

(FROM NEW ZEALNAD)

23th July 1915.

VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, AND LORD SUMNER.

The King—Appellant.

v.

Catherine Lena Broad—Respondent.

On Appeal from the Court of Appeal of New Zealand.

** (*a*) *Highway—New Zealand—Level crossing—Trespass—Conflicting priority of passage between persons using a highway may be regulated by giving a Railway Company "the right of way" during a period but the duty of using reasonable care remains—The ownership of the highway not vesting in the railway company and the company not being in "occupation of the premises" for carrying on a dangerous business, a person using the level crossing is not a trespasser.*

Broad, a motor-cyclist mot with death at a railway level crossing and the jury gave a verdict of negligence on the part of the railway authority.

By the Public Works Act, 1908 (of New Zealand), S. 19, sub. S. 2, "where a road or street crosses a railway on a level, the public right of way at such crossing shall cease whenever any engine or carriage on the railway is approaching and within a distance of half a mile from such crossing; and shall at all other times extend only to the right of crossing the line of railway with all convenient speed, but not to stopping or continuing thereon.

By by-law No. 38 made under the Government Railways Act, 1908 (of New Zealand) S. 10 (*e*), "no person shall drive or attempt to drive, any vehicle or animal on any part of a public road, where the same crosses over or upon a railway on the same level, otherwise than at a walking pace, and every person shall, before crossing the lines of rail, comply with the directions upon the notice board 'stop, look out for the engine,"—

Held:—(1) Regarding S. 191, sub. S. 2, that its provisions suspended, during the period therein referred to, the absolute right of the public to pass along a highway over a level crossing; but the right of those who did so pass, to have reasonable care exercised by the railway authority in using the line remained unaffected thereby.

The position of the cyclist and engine driver was in point of law the same and as persons using the highway in common, each of them should use reasonable care.

A person using the highway at a level crossing is in no sense a trespasser, the soil or surface vesting in the borough under S. 153 of the Municipal Corporation Act, 1908 and the railway having under S. 43 of the Government Railways Act, 1908 nothing more than the obligation to metal and maintain the surface of the crossing. Nor is the railway authority in "occupation of the premises" for carrying on a dangerous business.

Gantret v. *Egerton and In Indermaur* v. *Dames* distinguished.

Held further (2) that By-law No. 38 set out above was invalid (*a*) because of its ambiguity and failure to give adequate information as to the duties of those who are to obey it.

Nash v. *Finlay* referred to.

(*b*) *Interpretation of statutes—"By-law-Ambiguity By-law No. 38 of the Government Railways Act 1908 is invalid, on account of its Ambiguity.* **Ultra vires**—*By-law No. 38 of Government Railway Act 1908 (New Zealand) is* **ultra vires** *as offending against the object of the rule making power given under S. 10(e) IX of the Government Railways Act, 1908.*

By-law No.38 is *ultra vires* as the rule making power of the Minister of Railways under S. 10(*e*) IX of the Government Railways Act, 1908, is conferred only "for the safety, convenience, and due management of the railway traffic" and cannot extend to oppressive interference of the rights of those subject to them.

Kruse v. *Johnson* followed.

Clavell Salter and *Northcote*—for Appellant.

Rayner Goddard—for Respondent.

Lord Sumner.—This appeal raises two questions, first, whether there was evidence to support the jury's verdict of negligence on the part of the railway authority, and secondly, whether on the undisputed facts a verdict that the deceased met his death wholly or partly by his own default and not otherwise, was not inevitable.

Apart from the effect of the Public Works Act, 1908, S. 191, sub-Ss. 2 and 3, the position is this. The jury having visited the *locus in quo*, found, in terms which admit of no doubt though they are not very precise, that, although the engine driver was not personally in fault, since he gave the whistle signal prescribed by regulation 117, there was negligence on the part of the railway authority, because a more effectual whistle and one better adapted to the particular level crossing ought to have been prescribed for this place. It was within the jury's competence to take this view. Whatever weight attaches to compliance with regular practice as evidence of the reasonableness of particular conduct on a given occasion, it was reduced to a minimum in this case by the fact that this regular practice was itself but compliance with a universal rule applicable to all level crossings at all times, no matter how various the circumstances might be. The power to make regulations, given by the Government Railways Act, 1900, and the Government Railways Department Classification Act, 1901, is a mere power, and there is no provision that compliance with regulations made thereunder shall be deemed to be sufficient care in all circumstances.

Accordingly, the making of general regulations and the particular compliance with them, still left those in charge of the working of the traffic, bound to exercise whatever measure of care might in law be their appropriate duty, upon the occasion in question. In itself the position of the cyclist, Broad, on the one hand, and of the engine driver on the other, was that of persons using a highway in common, who come swiftly and unexpectedly upon one another at a point where, in a greater or less degree, each may expect to meet other persons and must therefore use reasonable care to announce his approach and to keep out of their way. The fact that one ran upon rails while the other used the ordinary road surface, and that one was only crossing the highway transversely instead of proceeding along it, lengthwise, cannot make the position a different one in point of law.

Section 191, sub-S. 2, enacts as follows :—

"Where a road or street crosses a railway on a level, the public right of way at such crossing shall cease whenever any engine or carriage on the railway is approaching and within a distance of half a mile from such crossing; and shall at all other times extend only to the right of crossing the line of railway with all convenient speed, but not to stopping or continuing thereon."

There can be no doubt that this section was framed with the intention of diminishing the rights of the public, and consequently the obligation of the railway authority, when a train is approaching within half a mile, but the right affected is not in terms the right to have some appropriate measure of care observed by those directing the train. The right affected, is the right of way, and the Legislature forebore, no doubt advisedly, to say that in such proximity to a train, persons using the high road must cross at their peril and without any right to have any degree of care exercised towards them, while remaining under some duty to use care themselves in order to avoid injury to the train.

The language of the sub-section is amply satisfied by holding that on the specified approach of a train the public's absolute right to pass is suspended, leaving unaffected the question of other rights, if nevertheless persons do pass. Where a highway is crossed at right angles as of right, priority of passage belongs to the first comer; he has a right to be on the crossing, and, so long as he is crossing with all convenient speed, the second comer cannot disregard or object to his presence, but must wait his turn if he cannot pass clear. Such a suspensory provision may be of considerable importance to the working of a railway; otherwise, for example, a flock of sheep might be driven on to the crossing as of right, when a train, though in sight and near at hand, could still pull up, and then the train would have to wait till the flock had crossed, with all convenient speed, no doubt but far too slowly for the passenger's patience. There are many instances in which delay might be caused to trains at level crossings, which such a section as this tends to prevent, without inflicting real hardships on the public or imperilling its safety. The inconvenience is no more than is involved in waiting at level-crossing gates, when they are closed to road traffic on the approach of a train. The latter part of the section, which expresses the common law rule, is similar in its object—namely, the clearing of the road, so as to prevent the delay of a train. To use a colloqualism common in America, the train has "the right of way."

Whatever may have been the objects which the framers of this section had in mind, it ought not to be interpreted so as to bear hardly on public rights unless its language expresses such a diminution. The argument of counsel for the appellant contends for an extreme interpretation of the first part though the second is merely declaratory of the existing law. Without actually calling the deceased a trespasser, they claim the same immunities towards him as if he had tortiously entered upon private property of the railway authority instead of being a lawful user of a public highway. They argue that at most the obligation of the railway authority was not to lay a trap for him, and deny that there was any trap, since he saw and was familiar with the crossing, and could have seen the train if he had taken enough pains to do so. Their Lordships have been unable to discover upon what legal foundation this construction rests. The surface of the level crossings is not vested in the railway authority. By S. 153 of the Municipal Corporations Act, 1908, the soil of the highway is, as such, vested in the municipal corporation of the borough, and that the crossing of the highway by a railway on the level does not divest the property in the soil at the crossing is shown by the contrast between sub-S. 1 & 2 of S. 191, nor does S. 43 of the Government Railways Act, 1908,

affect anything but the obligation to metal and maintain the surface of the crossing. Considerations which attach to trespass *quare clausum fregit* are inapplicable here.

The argument expressly assumed that the high road had been dedicated to the public before the railway was made. The case was put as one of occupation of premises where, to the deceased's knowledge, the railway authority carried on a dangerous business, and his position and rights, if any, were likened to those of a person who, without leave or at most with bare leave, enters upon such premises and gets hurt thereon. Again, their Lordships think that occupation by the railway authority, which is the foundation of this argument, is not made out. The railway line is laid across the high road under such legal right that its presence on the surface of the highway is not, as it would otherwise be, a public nuisance, and so that no authority but the Legislature can require its removal. True also by S. 43 of the same Act, the maintenance of the road at the level crossing has been for reasons of administrative convenience imposed on the minister instead of on the local authority having charge of the road. All this is far from such occupation as is the foundation of the principles applied both in *Gautret* v. *Egerton* (1) and in *Indermaur* v. *Dames* (2).

Where premises are in private and exclusive occupation and the party injured has entered under circumstances which show that he knew that he was entering, not as of right but either wrongfully or upon terms, it is intelligible that the law should be strict as to the duty of the occupier and the risk of the visitor if he is injured by some source of danger which is patent and manifest. It is intelligible that the law should be stricter still to a person who comes not only without right, but without consent and wrongfully. In such case the party injured knows where he stands. In the present case the most that can be said is that the level crossing is for most part of the day and night in the occupation of neither party, and long stretches of time, when it is simply a somewhat inconvenient section of a high road, are with little, if any, warning diversified by flashes of statutory occupation as transient as they are sudden.

(1) L. R. 2, C. P. 371.
(2) [1867] L. R. 2 C. P. 311.

To such a case, when the passer-by may be quite unable to tell whether his *status* is, on the appellant's construction of the sub-section that of public right or private wrong or precarious toleration it seems to their Lordships that it would be unreasonable to apply rules which belong to totally different cases. The argument would apply the limited duty of care incidental to exclusive occupation to the peculiar position created by a sub-section which does not name or imply occupation of any kind. On the contrary, the sub-section appears to be concerned with conflicting priorities of passage between persons actually using a public highway, and not with questions of mutual care between persons using it in equal right though in highly dissimilar circumstances. It may be that the railway authority has a rateable occupation of the railway track, but their Lordships are unable to regard this as a relevant matter. The fact is that members of the public have just as good a right, and in principle the same species of right, to the use of the roadway at the level-crossing as the railway authority has except in so far as a modification is introduced by S. 191 on the approach of a train. This modification is at all times a passing one; in many places it operates only at long intervals and for the briefest time.

The sub-section contains no provision requiring the railway authority to inform the way-faring public of the precise proximity or even of the presence of the train. It appears to apply whether or not the passer-by does or can know of it. The shape of the ground, the curve of the line, the position of trees or houses, the occurrence of fog, snow, or darkness, all or any of these things may effectually screen the train's approach from the most wary; yet it seems that they must discern or divine its approach for themselves, and decide as best they can whether it approaches in order to cross or only with the intention of stopping short and shunting back again. Upon these things, their rights, it appears, depend; if the train is somewhere within the distance of half a mile, driven with the intention of approaching and crossing the road, then the crossing is in the exclusive occupation of the railway authority and the public come perilously near to trespass. They must draw the line for themselves between a wrongful and hazardous crossing and a crossing as of full right by their judgment of the distance of a possibly invisible train and of the

practice of engine drivers at a spot they may never have seen before. These are cogent reasons for thinking that the sub-section was framed *alio intuitu*. Their Lordships think that so rigorous a ruling is more than should be extracted by bare interpretation from a sub-section which does not appear to be concerned at all with the conduct of persons who meet *de facto* upon a public highway and they agree with the judgment of the majority of the Supreme Court of New Zealand, that S. 191, sub-section 2, is no answer to the finding of the jury that the railway authority was guilty of negligence causing the death of Broad.

The second question turns upon the validity and effect of Railway By-law No. 38. Apart from this by-law, the evidence clearly raised an issue as to contributory negligence, on which the jury might find one way or the other. It is true that Broad approached a blind corner at the level crossing at a speed of some fifteen miles an hour along a road where, according to evidence which the jury must be taken to have accepted in finding negligence against the railway authority the height of the hedge on the near side prevented the rider of a motor-cycle from seeing an approaching train till he was too close to the crossing to pull up for it. On the other hand, there was evidence that would justify the jury in finding that Broad had reason to believe that the only train which could obstruct his passage had passed. True, the station master said that the train started six minutes late and said, "On Wednesday she is always six minutes late," the day of the accident being a Wednesday but it was for the jury to judge of his truthfulness and to estimate exactly what he meant. They clearly did not believe his evidence about the visibility of an approaching train from any point on the road. They may equally have disbelieved his story of the punctual unpunctuality of this train once a week or, as the Supreme Court thought, have taken it to be "a mere general assertion, and not to be evidence of an established and recognized practice." In these circumstances, on the facts proved and apart from the by-law it was for the jury to say whether there was contributory negligence on Broad's part or not, and if they thought that he reasonably believed, as a resident daily using the crossing, that the train had already passed, their verdict that he was not "guilty of negligence which led to the collision" must stand, since, as is not now disputed, they were fully and correctly directed on the point by the learned Chief Justice, who tried the case.

Accordingly, this matter turns on the effect of the by-law. It may be noticed that in the pleading, only that part of the by-law was relied on which affected Broad's speed at the crossing; the contention that, under the by-law, he ought to have stopped at the crossing, does not appear till the motion for judgment was made at the end of the plaintiff's case.

The by-law in question was made in exercise of the power given by S. 10 (*e*) (ix) of the Government Railways Act, 1908, which enables the Minister of Railways to make by-laws in respect of railways or of any specified railway or any part thereof, "regulating the public or private traffic of persons, vehicles, or goods on roads across any railway on the level thereof." Further, by S. 11 (*d*) it is provided that "any by-law may apply to railways generally or to any particular railway or part of a railway."

The by-law is in the following terms:—

"No person shall drive or attempt to drive any vehicle or animal on any part of a public road, where the same crosses over or upon a railway on the same level, otherwise than at a walking pace, and every person shall, before crossing the lines of rail, comply with the directions upon the notice-boards, 'Stop! look out for the engine.'"

This is by-law No. 38; the next, No. 39, deals with private roads crossing a railway on the level and in this connection merely requires that

"every person before attempting to enter or to drive any vehicle or animal thereon shall first ascertain that no approaching train is within half a mile."

Finally, by-law No. 62 punishes any breach of any of these by-laws by a penalty not exceeding £10 for each such breach, though, if the offender is not a member of the public, but employed about the railway, the maximum penalty in his case is £1 only. Upon the facts of the case it can hardly be doubted that, if Broad had come to a standstill at the level crossing and had looked up the line, while still clear of the rails, he must have seen the approaching train and would have gone scatheless. If it was his legal duty to have "stopped" in this sense, and if, by voluntarily going on without stopping, he met his death, he would be no less the author of his own injury than if his breach of duty had been breach of a common-law duty to do whatever was reasonably careful and not breach of a prescribed duty to do a

particular thing. What then does this by-law enjoin and what is its validity and force in law ?

In its terms the by-law is of general application ; it is not, as it might have been, specially framed to suit this spot. The photographs, which were proved in evidence, showed that the notice board at the crossing in question, and, as their Lordships were informed, at level crossing in New Zealand generally, was of the following description. On the offside of the road to those approaching the crossing in each direction a tall pole is erected. It has on its top a board bearing the word " Stop," in large letters, and some feet below, about the middle of the post, a smaller board bearing, in smaller letters, " Look out for the engine." This, or one of these, is the notice-board with the " directions " of which the passer-by is required to comply in terms of the by-law.

Since this by-law is of universal application, and since, as it appears, level crossings are the rule in New Zealand. it is quite plain that if it requires all passers-by to stop—that is, come to a standstill—and in that posture to look out for the engine at every level crossing and then go on, using, of course, the same proper care as would have been incumbent without any by-law ; it must in a multitude of cases require persons who lawfully use the highway to go through an idle and irritating ritual on pain of an accumulation of convictions and a burden of penalties, which only the good sense and clemency of justices can save from being crushing. The whole Supreme Court (for on this part of the case Denniston J. expressed no dissent), with a plenitude of local knowledge which has much assisted their Lordships, seem to have recognized fully the grave public inconvenience which such a requirement must occasion. Many level crossings, it seems, are so constructed that coming to a stand and then crossing at a walking place creates a danger otherwise avoidable, for if the approaching train be invisible and the road on the other side ascends from the line of rails, there is every chance for a train to appear at close quarters while a motor car or a waggon is being got into motion again and is slowly proceeding uphill clear of the metals. If, on the other hand, the view is clear for miles and either no train is in sight or none within a distance which be traversed in less than several minutes, to what purpose is this waste of time and energy ? If the passenger knows that no train is due for hours, or that no train can approach, since he has just seen a train pass on a single line in the other direction, which he knows cannot reach a siding for several minutes, what is the point of requiring him to halt on the edge of the rails ? If the conduct of the railway servants has reasonably led him to believe that the line is clear, again why must he arrest his progress ? Why is the immutable formality of stopping imposed in the case of a public road, when in the case of a private road it is enough to attend to the practical point and " first ascertain that no approaching train is within half a mile ?"

If this act of stopping is made of universal obligation it might, at any rate, have been expected that language would have been employed of quite unambiguous meaning. The requirement is not to stop, but to comply with the directions upon a notice-board, which, moreover, the by-laws do not require any one to erect or maintain. According to the experience of the Supreme Court the public in New Zealand does not stop at every level crossing, and indeed, rarely stops at all, probably only when it is reasonably needful. This must not be attributed to a universal contumacy, which, indeed, could have no legal effect, or to a general clemency on the part of prosecuting authorities which would probably be a dereliction of their duty, but to a general opinion, right or wrong, that the directions are, " complied with," if the engine is " looked out for," where there is not reasonable ground for believing that there is no engine to be seen, however long it be looked for. Whether, as a matter of interpretation, this be right or wrong, it is at least ground for saying that in the minds of those most concerned. this by-law does not bear the interpretation contended for by counsel for the appellant, and that is proof that the by-law fails by reason of its ambiguity to give adequate information as to the duties of those who are to obey it : *Nash* v. *Finlay* (3).

Again, it is clear from the terms in which the power to make by-laws is conferred that the object of the by-laws, and therefore the limit of the power, is the safety, convenience, and due management of the railway traffic. Where that is not and cannot be affected the

(3) [1901] 85 L. T. 682.

Minister of Railways has no concern with traffic on the roads. To what purpose then are members of the public required to come to a stand, except when trains are or presently may be approaching so that if the line be crossed before they have passed a collision may occur or the train be delayed ?

Their Lordships, of course, cannot revise this by-law merely because they possibly would not have made it, if they had been invested with what is the function of the Minister of Railways alone. The rule is well established that if by-laws

"involved such oppresive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules."

Per Lord Russell of Killowen, C. J., in *Kruse* v. *Johnson* (4). Furthermore, in the present case, on the evidence given and the view which the jury took of it, the conduct of the servants of the railway authority itself led Broad to believe that no train was or could be approaching, and he was prevented from knowing the truth by the want of adequate signals in view of the configuration of the ground. Can it be said that a by-law, which made him liable to conviction for acting in accordance with that belief, and thereby disregarding a useless and cumbersome ceremony, was an exercise of a power of regulating public traffic on the road for the protection of the railway ? The answer to such questions must be "No."

On all these grounds their Lordships agree with the judgment appealed from, and think that the by-law cannot be sustained.

The view thus arrived at makes it unnecessary to deal either with the effect of Ss. 25 and 43 of the Government Railways Act, 1908, or with S. 10 of the Government Railways Amendment Act, 1913. The terms of S. 25 limit its effect to the creation of a liability to be fined, and the minister's obligation as to metalling the road, was, for the purposes of this case, only relied on as an alternative head of negligence on the part of the railway authority.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

T. A. R. *Appeal dismissed.*

Solicitors for Appellant—Mackrell, Maton, Godlee and Qunicey.

(4) [1898] 2 Q. B. 91.

Solicitors for Respondent—Peacock and Goddard.

***A.I.R. 1915 Privy Council.**

(FROM GUERNSEY.)

3rd March 1915.

LORD DUNEDIN, SIR GEORGE FARWELL, SIR ARTHUR CHANNELL.

Gibbons.

v.

Lenfestey and *another.*

On Appeal from the Royal Court of Guernsey.

* (*a*) *Practice—Case recorded—Suit dismissed on the ground that pleadings did not disclose a cause of action. Appeal record ought to contain pleadings.*

It is not a very convenient position that when an action has been dismissed on pleadings alone, the actual pleadings should not be before their Lordships though they were practically recited in the judgment. [P. 166 C. 1.]

(*b*) *Easements—The Natural right of drainage—By the Law of Guernsey the only origin of easements is by grant and they are provable only by a contract registered—They are distinct from the Natural Right of drainage of superior proprietor.*

The appellant and respondents were co-terminous proprietors of land bounded on one side by the high road. The appellant's close of land was at a lower level from the high road but higher than those of the respondents. By a verbal agreement in 1872, drainage of water was provided for by a regular channel which was rebuilt in 1905 by the appellant, substantially serving the same purpose. The respondents voluntarily closed the hole in the wall of the drain with the result that the waters gushed back and flooded the premises of the appellant who sued for an injunction against the respondents blocking the hole and damages for the injury suffered by flooding. The lower Courts dismissed the suit on the ground that the pleadings disclosed no cause of action.

Held, on appeal, the suit was maintainable as the true cause of action is not the verbal agreement of 1872, which by the law of Guernsey is not binding, being a contract not registered, but the natural right of a superior proprietor to call on the inferior proprietor to, receive the water flowing naturally from a higher to a lower level. Though merely a question of nomenclature, such a right is a natural right inherent in property and not an ordinary servitude or easement which under the Law of Guernsey differing from other systems can be constituted only by a grant. [P. 167, C. 1.]

* (*c*) *Easement—The natural right of drainage defined—Limitations of such right.*

"Where two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on an inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be

collected into onebody by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property." [P. 167, C. 1]

Such right is not absolute but circumscribed within limits depending on circumstances of each case. For example, the natural right does not extend to introducing water draining another watershed or flowing from another pipe, or to eavesdropping but includes water flowing to the lower proprietor after its fall from the roof of a building on the higher proprietor's own grounds. [P. 167, C. 2.]

R. H. R. Reeve--for Appellant.

J. H. Stamp and *H. C. Ninnim* (*of the Guernsey Bar*)—for Respondents.

Lord Dunedin.—The consolidated appeals are against two judgments of the Royal Court of Guernsey, which dismissed an action for an injunction and an action of damages at the instance of the appellant, Gibbons, against the respondents, Lenfestey and another. The judgment in both actions is the same and dismisses the action as irrelevant. It is not a very convenient position that when an action has been dismissed on pleading alone the actual pleadings are not before their Lordships. They are, however, practically recited—whether textually or not—in the judgment, and there is sufficient to shew that it is not in accordance with justice that the case should have been disposed of without any enquiry into the facts. There were several amendments made, but the pleadings as they finally stand are as follows :—

The appellant and respondents are co-terminous proprietors, the appellant's land being bounded on one side by the high road of Grandes Rocques. The appellant avers that his close of land is situated at a lower level than the high road, but at a higher level than the close of the respondents—

"*Lesquelles premisses* (*the respondents'*) *ont etc., tenues de temps immemorial de recevoir les eaux de pluie et de source des dites premisses du dit Gibbons y compris celles qui venant des premisses superieures a celles du dit Gibbons et de la dite Grande Route s'ecoulaient pardessus les dites premisses du dit Gibbons.*"

He then says that in 1872 a verbal agreement was made between all the proprietors concerned by which a regular channel was made by means of drains, gutters, and pipes which took the water from the lands of the respondents, including the water coming from the high road across the lands of the respondents and other proprietors down to the Bay of Port Soif. The course of the waters thereafter was by a drain on the appellant's land which passed along the old dyke, which was the boundary between the properties, and then coming through the dyke entered a pipe and gutter in the lands of the respondents. He then states that in 1905 he pulled down the old dyke and built a greenhouse wall in approximatel, the same line as the old dyke, but two feet distant from his boundary, in which wall he made a hole at a spot--subsequently altering this at the request of the respondents to another spot so as to be exactly opposite the place where the waters had entered into the pipe and gutter on the respondents' land in the past, and that the water then ran over the strip of land intervening and into the pipe and gutter as in times past till 1910, when the respondents at their own hand blocked up the hole in the wall, with the result that the waters regurgitated and the appellant's premises were flooded ; and he craved injunction against the respondents blocking the hole and damages for the damage suffered by flooding.

The action was disposed of without any enquiry into the alleged facts by the Court sustaining the following exceptions stated by the respondents :—

'(1) *Que la dite cause ne precise pas suffisamment quels ci-devant proprietaires ont fait l'accord verbal mentionne dans la dite cause nisile dit accord verbal etait temporaire ou permanent ni les conditions que en faisaient partie.*

'(2) *Qu'attendu que le dit acteur admet dans la presente cause qu'il a change la nature de ses premisses en batissant et faisant d'autres changements, il n'est pas allegue qu'il avait le droit de ce faire en vertue du dit accord verbal et d'ainsi changer et aggraver la servitude qui existait s'il y en existait une.*

'(3) *Qu'un accord verbal fait entre des ci-devant proprietaires ne peut etre obligatoire envers les presents proprietaires qui n'y etaient pas parties attendu que tout accord ou fait d'heritage doit etre par ecrit et enregistre au Greffe.*"

To dispose of the case on these grounds involves a thorough misconception of the true ground of action. By the law of Guernsey a contract which is to have a binding effect as regards land in the hands of a successor in the land must be registered, and it seems to have been therefore thought that

inasmuch as the agreement was only verbal all cause of action was gone. But the true cause of action is not the agreement of 1872; it is the natural right of a superior proprietor to call on the inferior proprietor to receive the water which naturally flows from the higher to the lower level. The agreement of 1872 is nothing as regards binding force; it is merely narrative of how the natural flow of the water came to be as it was.

The law of Guernsey, differing in this respect from some other systems, does not allow of the constitution of ordinary servitudes or easements except by grant. But the right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude. Their Lordships do not doubt that the law of Guernsey in this matter is the same as that of every other country whose jurisprudence is traceable to Roman sources. Indeed, even the countries ruled by the common law have accepted the Roman rules. It is true that the Roman designated this right as servitude, but they explained the distinction by dividing servitude into three classes natural, legal, and conventional and it is to the first class that this belongs. The law may be stated thus: Where two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water, which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property.

It follows from this that the case of the appellant, assuming his averments to be true (which in a matter of relevancy must be assumed), in no way depends on the agreement of 1872. What happened in 1872 need not be pleaded as an agreement; it need only be mentioned historically as the reason of the *status quo*. It is sufficient for the appellant, *prima facie*, to shew that his is the superior close and that the natural water has been cast on the respondents' close in a certain place, and that the respondents at their own hand have interfered with the *status quo*.

The right, however, of the superior proprietor is not quite absolute. The limits cannot be defined by definition, but each case must depend on its own circumstances. It would not, for instance, be within his right to introduce water which was foreign to the land—for example, by procuring a pipe supply, or draining another watershed—and then insist that all the water so brought on the land should be received by the inferior proprietor to his detriment. At the same time exception No. 2, which has been sustained, betrays a wrong view of the law, and, indeed, as expressed, is self-destructive. It speaks as if "changer" and "aggraver" were convertible terms. which they are not. Nor does the mere fact of building forfeit the right. No doubt a proprietor may not build on the extreme verge of his property, and then throw water off his roof on to the neighbour's land: that would require the constitution of a servitude which the Romans called *stillicidium*, and English law calls "eaves-drop." But if the water from the roof of a building falls on the proprietor's own grounds, it does not cease to be natural water, but must be received by the lower proprietor as the water was received before the building was there.

Their Lordships do not say more, because they do not wish to prejudice any defence which the respondents may have on the merits—a defence which has not yet been formulated, at least so far as discoverable from the judgment before their Lordships.

Their Lordships will humbly advise His Majesty that the judgments appealed from should be reversed and the case remitted with a declaration that the exceptions pleaded by the respondents fall to be disallowed as exceptions prejudicial to the action; that the respondents should be allowed to plead on the merits, and thereafter, after evidence is let in the event of the statements of parties not being at one, that judgment should be given in the case as shall be just. The respondents will pay the costs of this appeal. The costs in the Courts below will abide the result of the actions.

T.A.R. *Case remanded.*

Solicitors for Appellant—Benham, Barrett and Synnott.

Solicitors for Respondents—Ranger, Burton and Frost.

****A.I.R. 1915 Privy Council.**

(FROM ONTARIO)

21st December 1915.

VISCOUNT HALDANE, LORD PARKER, AND SUMNER.

Central Trust and Safe Deposit Co.—Appellants.

v.

Snider and Carleton—Respondents.

On Appeal from the Supreme Court of Ontario.

(a) Contract Act, S. 16—Niece residing with uncle transferring to latter, her moiety of property, other moiety of which was already acquired by him—Consideration for transfer by niece being covenant by the uncle, to pay half the rents of the property to the niece and to devise half the property by will to her heirs—Transaction was probably voidable in a Court of equity, in view of relationship between parties.

M. C. and her brother were co-heirs as regards certain property left by their father. Upon their father's death, they went to live with their uncle, T. S. T. S. purchased the moiety of the property belonging to the brother and proceeded to erect thereon a warehouse at a cost of some 10,000 dollars.

Subsequently M. C. by deed conveyed to T. S. all her estate, legal or equitable, in the property in question, to hold the same unto and to the use of T. S in fee simple. The consideration expressed in the deed was the nominal consideration of one dollar. The real consideration was that expressed in a letter written to her before the conveyance, by the legal adviser of T.S. According to this letter M. C. was to be paid during her life one-half of the rents of the property and after her death one moiety of the property itself was to be conveyed to her heirs. This was to be secured partly by the management of the property being left, as theretofore in the hands of her maternal uncle, and partly by a will which T. S. was to make in her favour.

Held:—It was probable that the conveyance by M. C. to T. S. was, having regard to the relationship existing between the parties, originally voidable in a Court of equity. [P. 169, C. 2.]

******(b) *Contract Act, S. 16—Transferor of property contending that transferee holds it in trust for transferor and that there is a resulting trust in his favour cannot, consistently, seek to set aside the conveyance on equitable grounds—Practice—Inconsistent pleas.*

Where property is conveyed by one person to another and the former subsequently contends that the transferee holds the property in trust for him (transferor) and that there is a resulting trust in his favour owing to failure of consideration, the conveyance cannot be sought to be set aside on equitable grounds, as neither of the above contentions is consistent with such a claim.

***** (c) *Trusts—Evidence—Property conveyed—Entire interest of transferor whether legal or equitable, intended to be conveyed—No intention to create trust can be gathered.*

Where a property is conveyed by one person to another and the real consideration for the conveyance is expressed in a letter written by the legal adviser of the transferee to the transferor, before the conveyance, and the transferor subsequently contends that the transferee holds the property in trust for the transferor, the intention to create a trust is to be gathered from the conveyance and the letter above referred to. Where such intention has been to convey the whole interest of the transferor, whether legal or equitable, there can be said to be no intention to create a trust in favour of the transferor. [P. 170, C. 1.]

****** (d) *Trust—Evidence—Contract to devise a beneficial interest is not evidence of a trust* in presenti.

A contract to devise a beneficial interest assumes an estate in the person who contracts, sufficient to enable the contract to be performed and it would be contrary to equitable principles to construe a promise to settle as a present declaration of trust. [P. 170, C. 1.]

****** (e) *Trusts—Resulting trust—Whole interest of grantor, legal and equitable intended to be transferred—No resulting trust comes into existence unless there is no consideration or consideration wholly fails.*

When grantor intends to part with the whole of his legal and beneficial interest in favour of another, there can be no resulting trust unless in the view of a Court of equity, there be no consideration to support the transaction, or the consideration if any, entirely fails. [P. 170, C. 1.]

****** (f) *Trusts—Resulting trust—Property conveyed in consideration of covenant—Breach of covenant is not failure of consideration so as to give rise to resulting trust.*

If property be conveyed in consideration of a covenant to pay money or to settle land the breach of the covenant, does not bring about a failure of consideration. The consideration is a covenant and the failure to observe the covenant result in a right of action at law, on the covenant or for its breach and not in any equitable right based on failure of consideration. Hence the breach of the covenant does not bring about a resulting trust. [P. 170 C. 1.]

****** (g) *Trusts—Covenant for value to settle land—Covenantor is trustee if and so long as covenant is specifically enforceable.*

Just as it is said that after a contract for the sale of land, the Vendor is a trustee for the purchaser, it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made, but in each case, it is tacitly assumed that the contract in a Court of equity be enforced specifically. If for some reason, equity would not enforce specific performance or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour, specific performance, might originally have been granted, the Vendor, or covenantor, either never was or has ceased to be a trustee in any sense at all. *Howard* v. *Miller* (1915) A.C. 318 referred to. [P. 170, C. 2.]

****** (h) *Specific Performance—Property conveyed to testator in consideration of his covenant to devise it by will to transferor's heirs—Transferee failing to do so—Privy Council assumed covenant to be specifically enforceable against volunteers under will left by transferor.*

Property was conveyed to a testator, partly in consideration of a covenant by him to devise the lands to the transferor's heirs. The testator left a will in which he failed to devise the lands as covenanted by him.

The Privy Council assumed the above contract to be one in its nature capable of specific performance as against volunteers under the will. *Synge v. Synge* [1894], 63 L. J Q. B. 202 Ref.

[P. 171, C. 1]

**(i) *Specific Performance —Property conveyed in consideration of transferee's covenant to devise property to transferor's heirs—Transferee granting legacy to transferor on the footing of the latter relinquishing his interest in the property—Transferor cannot claim specific performance of testator's covenant, by volunteers under the will (assuming covenant to be specifically enforceable against them) unless he disclaims the legacy.*

A person conveyed to another his property in consideration of the transferee's covenant to devise the land on the transferor's heirs. The transferee left by his will a legacy to the transferor on the footing that the latter had relinquished or would relinquish his interest in the property itself and the transferor knew that it was so left, and did nothing to bring home to the testator the fact that he would not accept it on that footing.

Held, that it would be inequitable to allow him while insisting on his legal right to the legacy to appeal to a Court of equity to complete his title to the property. A person who asks equitable relief must himself be willing to do what is equitable. Hence the covenant by the transferee (assuming it to be of such a nature as to be specifically enforceable against volunteers under the transferee's will), could be specifically performed only if the transferor was willing to disclaim the legacy.

Lawrence, and *Eliott* (*of the Canadian*) *Bar* for Appellants.

Armour (*of the Canadian Bar*),—for Respondent Mabel Carleton.

Lord Parker.—The questions for decision in this case concern the title to certain hereditaments in Toronto, known as 78 Bay Street, and arise under the following circumstances :

The late Martin Edward Snider died in the year 1888, intestate. He was at the time of his death the owner of the property in question, which then consisted of about twenty-three feet of frontage on the west side of Bay Street, with a small half-brick residence erected thereon. He left two children, Thomas E. Snider and the defendant, Mabel Carleton, and the property devolved upon them as his co-heirs. After their father's death they went to live with their uncle, Thomas A. Snider, hereinafter referred to as the testator. On 4th September 1899, the testator purchased and took a conveyance of the moiety of the property belonging to Thomas E. Snider. The validity of this transaction is not now in dispute. The testator, having thus become entitled to a moiety of the property, proceeded to erect thereon a warehouse, at a cost of some 10,000 dollars.

On 15th May, 1900, the defendant, Mabel Carleton, by deed conveyed to the testator all her estate and interest, legal or equitable, in the property in question, to hold the same unto and to the use of the testator in fee-simple. The consideration expressed in the deed was the nominal consideration of one dollar, of which she acknowledged the receipt. The real consideration was admittedly that expressed in a letter dated 9th May 1900, and written to her by Mr. Irwin, the testator's legal adviser. According to this letter she was to be paid during her life one-half of the rents of the property less any disbursements, and after her death one moiety of the property itself was to be conveyed to her heirs. This was to be secured partly by the management of the property being left as theretofore in the hands of her maternal uncle, Frank Hillock, and partly by a will which the testator was to make in her favour.

It is, in their Lordships' opinion, probable that the last-mentioned transaction was, having regard to the relationship existing between the parties, originally voidable in a Court of equity. Whether, having, regard to what subsequently happened, it still remains voidable, is a different matter, and one which need not be considered, for no claim has been made to avoid it. On the contrary, the defendant, Mabel Carleton, claims on the footing that, by virtue of the conveyance of 15th May, 1900, and in the events which have happened, the testator at his death held the property conveyed in trust for her. Her counterclaim asks for a declaration that this conveyance, though absolute in form, was intended only as a conveyance in trust for her, and the first reason in her case on the present appeal is that, the conveyance having been made in consideration of a promise which was never carried out, there is a resulting trust in her favour. Neither the suggestion of an intention to create a trust nor the suggestion of there being a resulting trust is consistent with a claim to have the conveyance set aside on equitable grounds. It is worthwhile, however, before proceeding further with the history of the case, to consider both these suggestions.

In their Lordships' opinion the intention of the parties must be gathered from the conveyance and Mr. Irwin's letter. The intention, as manifested by the conveyance, is clear enough. All the interest of the defendant, Mabel Carleton, whether legal or equitable, is intended to pass. The letter contains nothing inconsistent with, and a good deal to confirm this. The testator was evidently intended to be put in a position to grant a lease or leases of the property on such terms as he might think desirable, which could not be properly done if the defendant, Mabel Carleton, remained equitable owner of a moiety of the prope ty. Further, the testator's promise to devise a moiety of the property in her favour is inconsistent with her being intended to remain in equity the owner of such moiety, whether the testator did or did not make such a devise. A contract to devise a beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed, and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust. With great deference their Lordships think that the trial Judge, in holding that the letter created a trust, did not give sufficient weight to these considerations. In their opinion it is impossible to impute to the parties any intention of creating a trust *in praesenti*.

The suggestion that there was a resulting trust does not appear to have been dealt with in the Courts below. It is, in their Lordships' opinion, equally untenable. When once the conclusion is arrived at that a grantor intends to part with his whole legal and beneficial interest in favour of another, there can be no resulting trust unless, in the view of a Court of equity, there be no consideration to support the transaction, or the consideration, if any, entirely fails. It is not alleged that there was no such consideration in the present case. It is suggested that the consideration failed. But how can there be a total failure of a consideration consisting, in part at any rate, of a promise to do something in future? If property be conveyed in consideration of a covenant to pay money, the breach of the covenant to pay does not bring about a failure of consideration. The consideration is a covenant and failure to observe the covenant results in a right of action at law on the covenant, or for its breach, and not in any equitable right based on failure of consideration.

In their Lordships' opinion Chief Justice Meredith put the matter on a surer ground. There being no question of setting the transaction aside, the only point to be determined is whether, by virtue of the testator's promise to settle the property given in the letter of 9th May, 1900, for valuable consideration, the defendant, Mabel Carleton, became entitled in equity to any and what interest. The learned Chief Justice refers to the case of *Freemoult* v. *Dedire* (1) as having decided that a covenant to settle lands makes the covenantor but a trustee for the parties who would be interested if the covenant were performed, and to a passage in *Lewin on Trusts* (12th ed.), pp. 160, 161, where it is stated that if a person agrees for valuable consideration to settle a specific estate, he becomes a trustee of it for the intended objects, and all the consequences of a trust will follow. *Freemoult* v. *Dedire* (1) was undoubtedly a sound decision, and there is little fault to be found in the statement in *Lewin in Trusts* as to the general equitable principle. But it must be remembered that this principle is but the logical consequence of the power of a Court of equity to grant, and its practice in granting, specific performance of a contract to convey or settle real estate. It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would, in a Court of equity, be enforced specifically.

If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard* v. *Miller* (2) in connection with the law as to the registration of titles in the province of British Columbia, and came to the conclusion that, though the purchaser of real estate might before conveyance have

(1) 1 P. Wms. 429.
(2) [1915] A. C. 318=[1914] 84 L. J. P. C. 49.

an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a Court of equity in specifically performing the contract, and could only be defined by reference to the relief which the Court would give by way of specific performance. If, therefore, the defendant, Mabel Carleton, has any interest in the property, it can only be because an action would lie for specific performance of the testator's contract to settle the property in her favour. Their Lordships will assume that the contract is one in its nature capable of specific performance as against volunteers under the testator's will—as indeed would appear from the case of *Synge* v. *Synge* (3) and that the defendant, Mabel Carleton, is in the present action seeking to have it specifically performed. On this footing two questions arise: *First*, was the contract varied by substituting for the promise to settle the property a promise to leave the defendant, Mabel Carleton, the legacy of 20,000 dollars which the testator in fact gave her by his will? *Secondly*, if there was no such contract to vary, can the defendant, Mabel Carleton, enforce specific performance without abandoning her interest in this legacy? In considering these questions it is necessary to deal in some detail with what happened after the original promise was made.

It appears that the testator, shortly after the conveyance of 15th May 1900, granted a ten-year lease of the property at an annual rent of 977 dollars, and one half of the rent, less outgoings, was duly paid to the defendant, Mabel Carleton. In the year 1904 the warehouse built by the testator was burned down, and the testator thereafter erected on the property a larger warehouse at a cost of 27,000 dollars. This sum was provided partly out of moneys received for insurance, partly by a mortgage of the property for 20,000 dollars, and partly out of the testator's private moneys. On 26th June 1905, the testator granted a lease of the property for ten years at an annual rent of 2,632·72 dollars. In the year 1909 the testator, through Frank Hillock, proposed to the defendant, Mabel Carleton, to modify the arrangement contained in the letter of 9th May 1900, as follows, that is to say, the defendant, Mabel Carleton, was to be paid 600 dollars a year during his life, and he was by his will to give her an annuity of 1,200 dollars, with a legacy of 20,000 dollars to her children after her death, she on her part giving up all interest in the property in question.

The answer of the defendant, Mabel Carleton, to these proposals is contained in her letter to Mr. Frank Hillock of 20th May 1909. She refers to the arrangement as to receiving half the rents of the property, and complains that she has not even had the 600 dollars now proposed to be paid to her. She insists on this arrangement being adhered to. She says, however, "As to Uncle T.A.'s will, that is all right"; and in their Lordships' opinion this can only mean that she is willing to accept the new proposals so far as they relate to the provision of the 1,200 dollars annuity and the legacy of 20,000 dollars to her children after her death, instead of the interest in the property itself, which was to be secured to her according to the original arrangement by her uncle's will. The letter, therefore, is at most a proposal, and not the acceptance of an offer so as to constitute a contract modifying the original arrangement.

There the correspondence ends, but it appears that the testator thereafter paid her 600 dollars a year, which amounted approximately to one-half the rents of the property, and also made a will bequeathing to her an annuity of 1,200 dollars, and to her children after her death the sum of 20,000 dollars. The defendant, Mabel Carleton, discussed these provisions with him, evidently on the footing that they were to be in substitution for her interest in the property after his death. She suggested that there was no reason why the legacy should not be left to her absolutely instead of to her children. There was no reason why anybody but herself should benefit by her father's property. By his last will the testator left her an immediate legacy of 20,000 dollars, but did not leave the property itself, as provided by the letter of 9th May 1900.

Under these circumstances their Lordships conclude that the 20,000 dollars was left to her on the footing that she had relinquished or would relinquish her interest in the property itself, and that she knew that it was so left, and did nothing to bring home to the testator the fact that she would not accept it on this footing. It would be clearly inequitable to allow a

(3) [1894] 63 L. J. Q. B. 202=[1894] 1 Q. B. 466.

legatee, while insisting on her legal right to the legacy, to appeal to a Court of equity to complete her title to the property itself.

A person who asks equitable relief must himself be willing to do what is equitable. It follows that, even if the agreement of 9th May 1900 has not been varied by mutual consent, it can only be specifically performed if the defendant, Mabel Carleton, is willing to disclaim the legacy. The appellants being willing that the defendant, Mabel Carleton, should take either a moiety of the property itself, subject to the existing mortgage, or the legacy, whichever she may prefer, it is unnecessary to decide whether there was ever any binding agreement for the variation of the original contract.

Under the circumstances their Lordships are of opinion that the appeal succeeds, and that the right order will be to declare that the defendant, Mabel Carleton, cannot take both the interest in the property, to which the Courts below have declared her to be entitled, and the 20,000 dollars legacy, and to limit a period of three months within which she is to exercise her election.

Their Lordships will humbly advise His Majesty to this effect, and they think that the respondent, Mabel Carleton, should pay the appellants' costs here and in the Court of Appeal. With regard to the costs here and in the Court of Appeal of the other respondents, they should be paid out of the estate of Thomas A. Snider.

T.A.R. *Appeal allowed.*

Solicitors for Appellants and for Respondent Snider—Blake and Redden.

Solicitors for Respondent Mabel Carleton—Harrison and Powell, and Tulk.

A.I.R. 1915 Privy Council.

(FROM S. AFRICA)

26th July 1915.

VISCOUNT HALDANE, LORDS DUNEDIN, SHAH, PARKER, AND SUMNER.

Copthall Stores, Lim.—Appellants.

v.

Willoughby's Consolidated Co., Lim.—Respondents.

On Appeal from the Supreme Court of South Africa.

*** Privy Council—Remand—Defendant raising a new defence before the Privy Council—Pleadings not in form to raise the defence—Important questions of law raised—Case was remanded with directions that pleadings should be amended and that the Court should answer in particular certain questions framed for the purpose—Civil P. C. O. 6, R. 17.*

Plaintiffs were owners of certain lands in Southern Rhodesia, with clear registered title. The action was for declaration of title and for ejectment of the defendants from the lands. The defendants based their defence on a certain agreement made between their predecessors-in-title and those of the plaintiffs. The defence as lodged amounted to what was substantially a counter claim for a declaration that the defendants were entitled to (1) the exclusive rights of trading over the whole properties belonging to plaintiffs, detailed in a Schedule A annexed and (2) for purposes of said trade to take and occupy in perpetuity such store sites as were necessary.

The plaintiffs won their case in the lower Courts and the defendents appealed to the Privy Council. Before the Privy Council, the defendants made a complete change of front. Their Counsel abandoned all claim to the counter- declaration above described and contended only for maintenance in possession of the sites already occupied by themselves and their tenants in defence to eviction. The contention was that the defendants had occupied certain sites under the agreement above-mentioned and spent money in buildings upon these sites and that under the law of Rhodesia the agreement followed by possession constituted a real right of the nature of servitude. It was further argued that the plaintiffs had notice of the agreement and the defendant's occupation thereunder and that therefore under the law, the plaintiffs were bound by the agreement even though it was admittedly not registered against the land.

The pleadings as they stood were not in a form to raise this defence properly. Various necessary particulars were absent from the pleadings.

Held,—that the argument put forward raised questions of law of great importance which would be apt to be applied to cases of other holdings of a similar character, held by persons who were not parties to this case; and in particular it raised a very serious question of law as to the necessity of registration of such rights as to which it was apparent from the opinions in *Judd* v. *Fourie*, 2 Buchanan 41, that there had not been unanimity among the Judges in South Africa.

Therefore, their Lordships were unwilling simply to dismiss the appeal without giving the appellants an opportunity of raising the true case. The case was to be remanded and the pleadings should be amended. But the appellants must pay the entire costs up to date. [P. 173, C. 2.]

Held,—further that the general questions were so important that the opinion of the whole members of the Court of Appeal should be taken and their alteration especially directed to the questions which their Lordships framed for the purpose. [P. 174, C. 1.]

***Maugham*, and *Fairfax Luxmoore*—for Appellants.**

***Upjohn*, and *H. G. Robertson*—for the respondents, were stopped by their Lordships.**

Lord Dunedin—The plaintiffs are owners of certain lands in Southern Rhodesia with clear registered title. The action is for—(1), a declaration that the defendants are not entitled to occupy by themselves or their tenants any portion of the plaintiffs' lands; (2), ejectment from whatever portions of the plaintiffs' lands which are at present in the occupation of the defendants or their tenants; and (3), further relief, which need not be mentioned.

The defendants originally based their defence on agreements of 1895 and 1910, but the case, so far as based on the agreement of 1910, is now abandoned. The agreement of 1895 was made between a company called Dawson's Stores, the predecessors-in-title of the defendants, and the Matabele Co., the predecessors-in-title of the plaintiffs.

The defence as lodged amounted to what was substantially a counterclaim for a declaration that in virtue of the agreement of 1895, which it was alleged was duly transferred to the defendants and binding on the plaintiffs, the defendants are entitled to (1) the exclusive right of trading over the whole properties belonging to the plaintiffs detailed in a Schedule A annexed, and (2) for purposes of the said trade to take and occupy in perpetuity such store sites as were necessary. It followed that, if sustained, head (2) was a complete answer to the claim for ejectment. The defence in both its heads was maintained by the Judge of first instance, but on appeal to the Supreme Court it was repelled and judgment pronounced as claimed by the plaintiffs. Their Lordships have no doubt as to the soundness of the result at which the Judges of the Court of Appeal arrived on the case as pleaded before them.

Before their Lordships, however, the appellants made a complete change of front. Their counsel frankly abandoned all claim to what has above been described as a counter declaration, and contended only for maintenance in possession of the sites already occupied by themselves and their tenants in defence to eviction. The pleadings as they stand are not in a form,to raise this defence properly. The argument which the learned counsel for the defence put forward was this: He said that in virtue of the agreement of 1895 the Matabele Co. had handed over to Dawson's Stores certain store sites; that thereafter the defendant company, to whom the rights of Dawson's Stores had been transferred, occupied these sites and other sites, which in presence of the agreement they had selected, and that they had expended large sums of money in buildings upon these sites, and let them to tenants. He argued that according to the law of Rhodesia the agreement followed by possession constituted a real right of the nature of servitude. He further said that the plaintiffs, when they acquired the property of the Matabele Co., had notice of the existence of the agreement, and of the fact that the defendants were possessing these stores in virtue of it; and he argued that the result in law was that the plaintiff company was bound by the agreement, even though the agreement was admittedly not registered against the land.

In support of this proposition he relied particularly on the judgment in *Judd* v. *Fourie* (1). To found such an argument it is obvious that the pleadings ought to have specified the particular portions of land occupied, given particulars of the date of occupation, and set forth the expenditure of money upon them. Not only is all this not done, but from the form of the pleadings and the arguments in the Court below their Lordships have not had the assistance of the opinions of the learned Judges in the Court below on the case which it is now wished to raise. It is clear that the argument now put forward raises questions of law of great importance which would be apt to be applied to the cases of other holdings of a similar character, held by persons who are not parties to this case; and in particular it raises a very serious question of law as to the necessity of the registration of such rights, as to which it is apparent from the opinions in *Judd* v. *Fourie* (1) that there has not been unanimity among the learned Judges in South Africa.

Their Lordships are, therefore, unwilling simply to dismiss the appeal without giving the appellants an opportunity of raising the true case. But the whole procedure, in which the appellants have been held to be wrong, is thrown away. The appellants must, therefore, pay the entire costs up to date, or the appeal will fall to be dismissed. If the costs as taxed are paid, their Lordships will humbly advise His Majesty to recall the judgments appealed from *hoc statu*, and remit the case with a declaration

(1) [1881] 2. Buchanan 41

that the defendants be allowed to amend their pleadings, and the plaintiffs to put in answers to such amendments. The learned Judges will fix a proper time within which this must be done under sanction of the former judgment being repeated. If this is done, there will fall to be made an alteration as to the date from which the rents and profits belong to the respondents, as the respondents' counsel admitted that the present date, 1st January 1911, could not be supported. They will also fix whether, upon the amended pleadings and answers, any further enquiry is necessary, and thereafter dispose of the case in such a manner as shall seem to them to be just. It was agreed that the date from which the mesne profits were directed to—run namely, 1st January 1911—was incorrect. When the action is finally disposed of, this date must be corrected, either in the Supreme Court, or, if the appellants elect to proceed no further with the action, then they should be at liberty to apply to His Majesty in Council to put the matter right.

Their Lordships look upon the general questions as so important that they desire that the opinion of the whole members of the Court of Appeal be taken, and their attention especially directed to the following questions :

(1) If an agreement by which the owner of land in Southern Rhodesia gives another person a right to trade over such land, and in pursuance of such trading to take and occupy suitable sites for stores, is followed by the taking and occupation of such sites and by the expenditure of money thereon, is there constituted as between grantor and grantee a servitude which will enable the grantee to maintain possession of the sites as against the grantor ?

(2) If the answer to question (1) is in the affirmative, is such servitude *ipsa natura* intransmissible, and, therefore, brought to an end by the death or extinction of the natural or legal person in whose favour it was constituted ; or is the transmissibility a quality to be judged of according to the construction of the particular agreement and the whole circumstances of the case ?

(3) How far is the transmissibility, if any, affected by registration or want of registration ?

(4) If the servitude is valid, then, if it is not registered as against the servient tenement, is a purchaser of the servient tenement for valuable consideration, who has notice of the claim to the servitude at the time of purchase, bound to recognise it ; and in particular is the opinion of Buchanan J. or of Sheppard J. in the case of *Judd* v. *Fourie* to be preferred ?

(5) What is the application of the law laid down in the answers to the foregoing queries to (*a*) the agreement of 1895 in this case, (*b*) the notice as to the right which the plaintiffs are shewn to have had ?

T.A.R. *Case Remanded.*

Solicitors for Appellants—Armitage, Chapple and Macnaghten.

Solicitors for Respondents—Ashurst, Morris, Crisp & Co.

****A.I.R. 1915 Privy Council.**

(FROM BR. COLUMBIA)

3rd June 1915.

THE LORD CHANCELLOR (VISCOUNT HALDANE), AND LORDS DUNEDIN AND ATKINSON.

Odlum and *others*—Appellants.

v.

City of Vancouver and *others*—Respondents.

On Appeal from the Supreme Court of British Columbia.

(*a*) *Land Acquisition—Interest on price of land acquired ordinarily runs from date of possession—Under Ss. 6 and 7 of the False Creek Reclamation Act (1911, of Br. Columbia)—It is from the date of award.*

In ordinary cases interest on the price of land acquired runs from the date of taking possession. But under Ss. 6 and 7 of the False Creek Reclamation Act (1911) of British Columbia, interest can run only from the date of award and not from date of notice as fixed by arbitrator. [P. 176, C. 1.]

**(*b*) *Land Acquisition—Valuation—Potential value which is too remote cannot be taken into account—Value of access to sea may be taken into account.*

The appellants were the owners of certain lands in city of Vancouver, which were bounded at the back by an arm of the sea called False Creek. These lands were acquired under the False Creek Reclamation Act (Brit. Col. Stat. 1911, c. 56), and the arbitrator who was to fix the value, allowed a value over and above the value of the land taken, for the chance which the owner would have had of getting leave from the Crown to extend some *opus manufactum*, such as a pier head over the foreshore.

Held.—While all opportunity of employment for certain purpose in regard to the position of the land to be acquired is to be taken into account. there must come a point where the opportunity becomes so remote as to be negligible. [P. 176, C. 2.]

The arbitrator would have been right if he had only added something to the value of the land itself for the privilege which the owners had of giving over the foreshore and obtaining access to the sea. (The owners had no right in the solum of the foreshore.) *Buccleuch (Duke)* v. *Metropolitan Board of Works*, (1872) 41 L. J. Ex. 137 Followed. [P. 176, C. 2.]

But the arbitrator erred in allowing a value for the chance of getting from the Crown, leave to extend some *opus manufactum* such as a pier head over the foreshore. A proprietor who abutted on the foreshore might apply to the Crown—which was the proprietor of the foreshore—for such a grant. But it is different if the foreshore does not belong to the Crown. In the present case, the whole of the bed and foreshore of False Creek had been conveyed to the Corporation by the Crown which was therefore deprived of the right of the *solum*. The appellants were not *in titulo* to apply to the Government for any permission. To enable them to do so, they would first be bound to acquire from the Corporation so much of the foreshore and bed of False Creek as was to bear the *opus manufactum*. There was no evidence that the Corporation would ever have consented to sell. Hence the arbitrator palpably erred in allowing values which did not attach to the lands taken. [P. 176 C. 2, P. 177, C. 1 and 2.]

The present potential value may be a factor, but the potential values may be too remote at this date to enhance the value of the land which at present was practically unproductive. *Cedar Rapids Manufacturing Co.* v. *Lacoste*, (1914) 83 L.J.P.C. 162 Followed. [P. 177. C. 2.]

P. O. Lawrence and *T. Mathew*—for Appellants.

E. P. Davis (*of the Canadian Bar*) and *M. Macnaghten*—for Respondents.

Lord **Dunedin**.—This is an appeal against a judgment of the Court of Appeal of British Columbia, by which that Court by a majority of four to one reversed a judgment of Mr. Justice Morrison, and set aside an award pronounced by Frederic Buscombe as sole arbitrator in an arbitration between the parties to the case.

The appellants are the owners of certain lots of ground in the City of Vancouver, which front Westminster Avenue and are bounded at the back by an arm of the sea called False Creek. In 1911 an Act was passed in British Columbia entitled the "False Creek Reclamation Act" (Brit. Col. Stat. 1911, c. 56), which empowered the Corporation of the City of Vancouver to reclaim the False Creek by filling it up, and in connection with this undertaking allowed them to acquire compulsorily (*inter alia*) the various lots belonging to the appellants. It is unnecessary to set forth the provisions of the statute, as it empowered the Corporation to serve notice to treat and to acquire the whole rights of the appellants in the lots specified upon payment of the value of all rights so acquired, with arbitration in default of agreement as to the amount to be paid—all in ordinary form. The parties by agreement appointed Frederic Buscombe as sole arbitrator. He inspected the properties heard witnesses, and delivered an award, in which he set forth the various elements which he had taken into consideration and awarded certain sums in respect of each of the properties taken. The appellants applied to the Court of British Columbia for an order to enforce the award or an order of Court. This was met by a motion on behalf of the respondents to set aside the award. These counter-motions came to depend before Mr. Justice Morrison. That learned Judge refused to set aside the award, though remitting it to the arbitrator to deal with some minor matters which need not be mentioned. Appeal was taken by the first respondents to the Court of Appeal, who, by a majority as before stated, set aside the award. The question before this Board is whether that judgment was right.

The grounds on which the award was set aside were four in number—being all matters which appear on the face of the award, and were alleged as follows: (1) The arbitrator allowed a value over and above the value of the land taken, for the chance which the owner would have had of getting leave from the Crown to extend some *opus manufactum*, such as a pier head over the foreshore. (2) In respect of lots 5 and 6 he valued upon the assumption that they might have got an additional piece of ground behind to make up for what had been taken from them in front in a street-widening operation, whereas, in point of fact, they did not get this additional piece. (3) The arbitrator allowed interest on the sums awarded from the date of the notice to treat. (4) The arbitrator awarded himself fees in excess of the scale allowed by the statute.

Their Lordships will deal with these points in reverse order.

(4) It is clear that the fees are in excess. This, however, could easily be dealt with by remit.

(3) In ordinary cases interest on the price of land taken runs from the date of taking possession. But in this case there seems no room for argument as to when possession was or might have been taken. Sections 6 and 7 of the False Creek Reclamation Act are as follows :

Section 6 :

"In arriving at the value of any lands, rights, or interests expropriated or to be expropriated, the arbitrator shall take the value of the lands, rights, or interests at the date of the service of the notice as hereinbefore provided."

Section 7 :—

"Upon payment or legal tender of the amount so awarded or agreed upon to the person, body corporate, or party entitled to receive it, or upon payment into the Supreme Court of British Columbia of the amount of such compensation under the award or agreement, the lands, rights, or interests so expropriated shall vest in the Corporation, and there shall vest in the Corporation power to forthwith take possession of the lands or interests the subject of the award or agreement ; . . ."

It is clear that interest in this case can therefore only run from date of award, and not from date of notice as fixed by the arbitrator. This also, however, could easily be set right by remit.

(2) Previous to the events of the arbitration a street widening had been effected, for which ground had been taken on the street side from lots 1, 2, 3, and 5 and 6. All these lots are bounded behind by high-water mark. As part of the arrangement for compensation the corporation gave to lots 1, 2, and 3 a piece of the foreshore—which, as will be afterwards set forth, they had acquired from the Crown—sufficient to make the total depth of the lots 120 feet. This was not done as part of the arrangement with the proprietors of lots 5 and 6. It seems therefore clear that the arbitrator had no right to award a value based upon the supposition that 5 and 6 might have had a depth of 120 feet, when, as a matter of fact, they had not such depth. Had he merely said that the value of 5 and 6 per frontage foot was the same as that of the other deeper lots, his view could not have been touched. But he has explained the ground on which he went, and that ground is on the face of it erroneous. This point, however, would only affect the award as regards lots 5 and 6.

(1) This is the only important matter. Their Lordships do not propose to repeat, as to the general principles of valuation, what was recently said by them in the case of *Cedar Rapids Manufacturing Co.* v. *Lacoste* (1), the gist of which is quoted by Mr. Justice McPhillips in the present case. It is evident that, while all opportunity of employment for a certain purpose in regard to the position of land to be acquired is to be taken into account, there must come a point where the opportunity becomes so remote as to be negligible.

It is here that their Lordships are constrained to come to the opinion that the arbitrator went wrong. The lots in question were bounded by the high-water mark. The owners of the lots had no right in the *solum* of the foreshore. They had the right of going over the foreshore, whether covered by water or not, and so obtaining access to the sea. If the arbitrator had only added something to the value of the land itself for that privilege, nothing could have been said—that was the principle on which allowance was made in the case of *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (2). But the arbitrator has done more than that. For after dealing with the right of access to the sea, he goes on thus :

'While the riparian right carries with it no definite legal right to build upon, or extend the property abutting upon the water, to or upon the land under the water, the actual right of access to the water has in common practice carried with it the privilege of applying to the Crown for a grant to extend the property affected out to deep water, or to an established pier-head line, and this right or privilege, is, I believe, rarely, if ever, withheld where the rights of others are not interfered with.'

Now that a proprietor who abutted on the foreshore might apply to the Crown—proprietor of the foreshore—for such a grant may be conceded. But it is quite different if the foreshore does not belong to the Crown, and in this case the foreshore did not belong to the Crown, for by a grant of 1901 the whole of the bed and foreshore of False Creek had been conveyed to the corporation. This grant contained certain restrictions, and was supplemented by an ampler grant in 1911. The effect of these grants was to deprive the Crown of the right of the *solum*. The allowance by the Crown to construct *opera manufacta* is rendered necessary, apart from the common law, by the provisions of the Navigable Water Protection Act. In respect of these provi-

(1) [1914] A. C. 569=83 L.J.P. C. 162.
(2) [1872] 41 L. J. Ex. 137=L. R. 5 H. L. 418.

sions the Department of Public Works has issued regulations dealing with applications for permission to erect such works.

One of the regulations is as follows :—

"The applicants must furnish proof that they own or have a sufficient interest in the land or land covered with water upon which the works are to be constructed. It is not sufficient to hold the riparian interests alone, if the work extends beyond the limits of the shore, but a sufficient portion of the harbour, river or lake must also be held by the applicants. The statute has reference to the erection of structures on lands owned by the applicants, and is designed to provide for due protection to navigation. It cannot be used as a means of acquiring title to lands upon which the structure is to be erected."

It seems therefore abundantly clear that the appellants here were not *in titulo* to apply to the Government for any permission. To enable them to do so, they would first be bound to acquire from the corporation so much of the foreshore and bed of False Creek as was to bear the *opus manufactum*.

Now there is not a tittle of evidence that the corporation would ever have consented to sell. It is obvious that the arbitrator really mistook the true position; for he says in another passage;

"For while the city occupied the position of being able to block or prevent these owners from obtaining these foreshore grants or leases it manifestly was not their intention so to do prior to the agreement with the Canadian Northern Railway, as the weight of evidence plainly shows."

Now, while he is quite right in considering the situation as it was prior to the agreement with the railway company—or, in other words, the Reclamation Act under which the land is taken from the claimants —yet he is radically wrong when he speaks of the city being able to "block the owners from obtaining a foreshore grant." The Crown could not give a foreshore grant not because the city "blocked" it, but because the foreshore no longer belonged to the Crown to give, and the right to ask for an *opus manufactum* did not exist except in some one who had the foreshore. That meant conveyance from the city to the claimants, and there is not a jot of evidence to shew that there was a chance of any such conveyance. In other words, their Lordships agree with Mr. Justice McPhillips, who says :

"The arbitrator has palpably erred in allowing values which did not attach to the lands" (taken);

and with Mr. Justice Irving, who says :

"I do not question that the present potential value may be a factor, but the potential values may be too remote at this date to enhance the value of the land, which at present is practically unproductive."

These observations are, in their Lordships' opinion, strictly in accordance with the principles laid down in *Cedar Rapids Manufacturing Co.* v. *Lacoste* (1) already cited.

Their Lordships are therefore of opinion that the award as it is cannot stand. There remains the question of whether it should be set aside or remitted for reconsideration. This seems to their Lordships a question of discretion for the Judges in the whole circumstances of the case, and unless that discretion has been obviously misused they do not feel inclined to interfere with it.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

T.A.R. *Appeal dismissed;*

Solicitors for Appellants.—Charles Russell & Co.

Solicitors for Respondents.—Linklater, Addison and Brown.

A.I.R. 1915 Privy Council.

(FROM CALCUTTA)

29th January 1915.

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

(*Shaikh Haji*) *Mutasaddi Mian* and *another*—Defendants—Appellants.

v.

Mahomed Idris and *others*—Plaintiffs—Respondents.

Bengal Land Revenue Act (VII of 1876), Secs. 4 and 14—Separate kist accounts for sharers in a Mahal—Sale for arrears of Revenue—Whole Mahal put up for sale for arrears of March kist—No arrears for March kist but arrears for June kist—Sale is ultra vires.

On a sale of a share of a Mahal for arrears of revenue the bids did not reach the amount of arrears and thereupon the Collector declared that the whole Mahal would be sold under Sec. 14 of the Land Revenue Act if within 10 days the co-sharers did not make a purchase thereunder. The Collector closed up the accounts of the Mahal up to the 29th March 1904 and on the 19th September 1904 sold the whole Mahal for an arrear of Rs. 3 and odd found by him to be due for March kist. It was found that by merging the separate accounts of the sharers in one account, there would be no

arrear for March kist but there would be an arrear of Rs 2-0-6 for the June kist. In a suit to set aside the sale.

Held, that there being no arrear for March kist a sale held expressly for such an arrear was *ultra vires*, though on the date of the sale, the sale might legitimately have been held for the June kist.

[P. 179 C. 2.]

W. Garth—for Appellants.

Respondents—Ex-parte.

The following was the Judgment of the High Court :—

This appeal arises out of a suit for the annulment of a sale for arrears of revenue, which took place on the 19th of September 1904. The main grounds upon which the plaintiffs come to Court are two. First, that the Collector had no jurisdiction to hold the sale as no arrears were legally due, and second, that the sale was brought about by the fraud of defendant No. 3 who was the accredited agent of some of the plaintiffs for the payment of revenue, and being as such bound to give information of the estate having fallen into arrears, did not do so, but, on the contrary, colluded with defendants Nos. 1 and 2 whose servant also he was, and purchased the estate for himself, his relation defendant No. 4 and defendants Nos. 1 and 2, entitling the plaintiffs to a re-conveyance of their share on payment of the proportionate value.

The learned Subordinate Judge had decided the suit against the plaintiffs on both these points, and they have appealed mainly on the grounds indicated above.

The main facts of the case are that the estate called Mahal Fakhruddinpur, bearing tauzi No. 1146 of the Saran Collectorate and consisting of two mauzas—Pakri Fatehulla and Fakhruddinpur, bore a Government revenue of Rs. 186–14–2¼. The Mauzawar Register kept by the Collector under sec. 4 of the Land Registration Act, Ex. 19, p. 117, shows that the revenue assessed upon Mauza Pakri Fatehulla was Rs. 79–2–5½, and that upon Fakhruddinpur Rs. 107–11–8¾. The learned Subordinate Judge said "this so-called Mahalwar Register which bears the signature of the Superintendent of Survey is not binding on the Collector, as the jama-sadar of two villages cannot be apportioned except under the Butwara Law." This seems to be a misconception of the Subordinate Judge. The keeping of these Mauzawar Registers, called Mahalwar Registers in Bihar, is enjoined by sec. 4 of the Land Registration Act, VII of 1876 (B. C.) and even before that enactment there were the Quinquennial Registers under Regulation 48 of 1793 and Estate Registers under Regulation 8 of 1800. The attested copy filed was taken from the Collectorate, and the mere fact that it bears the signature of the Superintendent of Survey, on a corner does not make it a document kept by that officer. This document does not show any apportionment of revenue within a mauza but states the revenue assessed on each mauza, so that the reference to the Butwara Law is quite irrelevant. Now, several separate accounts were opened in respect of this estate; for in respect of Mauza Pakri Fatehulla, comprising the whole 16 annas, and two in respect of Fakhruddinpur, comprising 6 annas, leaving 10 annas as the ijmali or residuary share bearing the original tauzi No. 1146, the separate account shares being numbered as T. 1146-1, 1146-2, 1146-3, 1146-4, 1146-5 and 1146-6, the first four relating to Pakri Fatehulla and the rest to Fakhruddinpur. The first separate account (1146-1) was in respect of 9 annas 4 pies Pakri for a revenue of Rs. 46–3–1, which is exactly proportionate on the basis of the revenue for the 16 annas being Rs. 79–14–5½. The second separate account (1146-2) was opened in 1872 in respect of a 2 annas share of Pakri Fatehulla, and the revenue fixed was Rs. 10–11–6. The third account (1146-3) was opened in 1882 for 4 annas 8 pies for a revenue of Rs. 22–4–3 the 16 annas making a total of Rs. 79–2–10, a little more than the actual amount of Rs. 79–2–5½, small fractions being taken as units for the convenience of realization and payment. In 1884, account No. 4 bearing T. 1146-4 was opened out of account No. 2 for 6 pies, 13 krants and odd, and the revenue assessed was Rs. 2–11–11. Account No. 5 was opened in 1892 for 2 annas of Fakhruddinpur with a revenue of Rs. 13–7–6, and another of 4 annas Fakhruddinpur with revenue of Rs. 26-15, both amounts being in exact proportion to a revenue of Rs. 107–11–8¾ for 16 annas. Thus 10 annas of Fakhruddinpur was left as the residuary share, and its revenue should be Rs. 107–11–8¾ minus Rs. 40–6–6, the total of jamas for Nos. 5 and 6, that is, Rs. 67–5–2¾. It would appear that when account No. 4 was opened out of account No. 2, the original revenue for the original No. 2 was not reduced but left as before, and the jama of the ijmali share was reduced by Rs. 2–11–11

which was assigned to account No. 4. In this way from June 1884 to March 1904, for a period of 19¼ years the jama of account No. 2 was from year to year kept up on the erroneous basis of Rs. 10–11–6, *i.e.*, Rs. 2–11–11 more than it should have been and the result was that account No. 2 was erroneously charged with Rs. 2–11–11 × 19¾=Rs. 54–3–5 in excess. The arrear shown on the March kist of 1904 is Rs. 52–4–4 and if the accounts of the Collector had been correctly kept, the account No. 2 would not only have been not in arrears in March 1904, but have an excess payment of Rs. 1–15–1 to its credit. It is contended that even the figure of Rs. 10–11–6 is not correct, and it should have been Rs. 9–14–4. Upon this amount being taken as the correct jama for the original No. 2, the excess payment would be much more on the 28th of March 1904, so that on either calculation there was no arrear due from account No. 2 on the 28th of March 1904; and the proceedings for the sale of account No. 2 for the March kist of 1904 are entirely void and, consequently the sale of the entire mahal under sec. 14 is also void. See Kishen Das *v.* Simpson (L. R. 25 I. A. 1). The learned Subordinate Judge says that 'If the plaintiff's pleader had shown by means of chalans that the owners of khata No. 2 have all along paid their share of Rs. 8 rent since the opening of khata No. 4 and that the arrear is due to their not paying Rs. 2 odd, then that would have shown to some extent the reason of this contention. Here also the learned Judge is under a clear misconception. For as soon as we have it that since 1884 khata No. 2 has been charged with Rs. 10–11–6 and that the 29th March of 1904 the arrear due on that basis was Rs. 52–4–4, the natural conclusion must be that the owners have paid the balance. There is another view of the case also in which the sale can be held to be *ultra vires*. Taking it for granted that the Collector's books were all correctly kept and that the plaintiff's were not entitled to rely upon the legally payable portion of revenue for account No. 2, the arrear upon the 29th of March 1904, was Rs. 5–4 for account No. 2.

Account No. 2 was put up for sale for that amount on the 6th June 1904 and the bids not reaching the said amount of arrear the Collector declared that the whole mahal would be sold if the co-sharers did not make purchase under sec. 14 within 10 days, , up to the 17th June 1904. Now, the ne kist fell due on the 7th June 1904, and e owners made payments for that kist. hen the co sharers did not take advantage the offer of the Collector under sec. 14 up the 17th June, he had to sell the whole tate for such arrears as would be due pon the whole estate at that time. What e did, however, was that he closed the ccounts up to 29th March 1904, and aking into account all excess payments nade by other co-sharers up to March 29th, ound an arrear of Rs. 3 odd upon the whole estate as due for the March kist, 1904, and sold the whole estate on the 19th September 1904, for this arrear of Rs. 3 odd as due up to the 29th March 1904. It is admitted that upon the basis of the Collector's books, this would be the arrear up to the 29th March and Rs. 2–0–6 the arrear up to the June kist upon the whole estate, and the Respondent contends that as there were arrears on the March kist as well as on the June kist, the mahal was liable to sale and the question of *ultra vires* goes out, and the appellants cannot succeed on the errors and irregularities pleaded, as they were not specifically pleaded in the appeal before the Commissioner. It is admitted that the Collector was bound to close all the separate accounts before he could sell the entire estate under sec. 14. The Collector became entitled to sell the whole estate on the 17th June 1904. On that date all the separate accounts must be considered as merged in one account for the whole estate, and if on that date all demands up to that date and all payments up to that date including the June kist were taken one against the other there would be no arrear on the March kist, but there would be an arrear of Rs. 2–0–6 for the June kist. There being no arrear for the March kist, a sale held expressly for such an arrear would be *ultra vires*, although the sale might legitimately have been held for the June kist, which it was not. Therefore, on either view of the case, *i.e.*, whether we take the Collector's books as incorrect and base our calculations on the correct revenue assignable to the several accounts or whether we take the Collector's books as correct and consider how the Collector should have closed the separate accounts, there was no arrear for the March kist of 1904, and the sale must be held to be *ultra vires* and void. Having held that the

sale was void on the first branch of the case, it is not necessary to go into the question of fraud and re-conveyance. The learned Subordinate Judge was of opinion that defendant No. 3 was the servant of defendants Nos. 1 and 2, and that he was the agent of some of the plaintiffs for the payment of revenue. but that his treachery to the maliks of Fakhruddinpur could not be of any avail to plaintiffs Nos. 1—9 who are maliks of Pakri Fatehulla with which defendant No. 3 had no concern. That is not, however, the right view to take of the case. If Wakif Hossein was the agent of some of the plaintiffs. and the servant or agent of defendants Nos. 1 and 2, and also interested as a co-sharer in the right of his father and uncle in one of the mauzas comprising the estate, and if he brought about the sale in breach of his duty to the Pakri maliks whose agent he was, and if the defendants Nos. 1 and 2 took advantage of his treachery, no Court of justice would be inclined to allow defendants Nos. 1 and 2 to retain the benefits of the sale. As we have said, however, we do not think it necessary to go into these questions, as our decision on the first branch of the case is quite sufficient to dispose of the appeal. The result, therefore, is that the appeal is decreed with costs of both the Courts. The sale is declared inoperative. The plaintiffs will recover possession of their shares with mesne profits, the amount of which will be ascertained in execution. The purchaser defendants will be entitled to a refund of the purchase money with interest at the legal rate.

Lord Shaw.—Their Lordships see no occasion to interfere with the judgment of the High Court in this case. They agree with that judgment and will humbly advise His Majesty that the appeal be dismissed. The respondents not having appeared, no question of costs arises

P.R.S. *Appeal dismissed.*

Solicitors for the Appellants—T. L. Wilson & Co.

B. N. D. I. R. B. A. LL. B.
Late High Court,
BANGALORE (Karnataka)

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